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TABLE OF CONTENTS

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I. INTRODUCTION

Morgan and Sierra[1] met on a dating website in 1997 while Morgan was struggling through a post-undergraduate quarter-life crisis.[2] The transatlantic romance progressed as Morgan, in Michigan, and Sierra, in England, spent hours chatting online together each night, which eventually led to visits overseas.[3] In 1999, the relationship intensified when Sierra moved

1. Names have been changed to protect their identities.
2. MJB, *The Events Leading Up to My Exile de Facto*, MY LIFE IN EXILE DE FACTO (Aug. 24, 2008, 5:15 PM), http://exiledefacto.blogspot.com/2008/08/events-leading-up-to-my-exile-de-facto.html.
3. *Id.*

to Michigan to be with Morgan after obtaining an 18-month work visa.[4] When the visa expired, however, Sierra was forced to move back to England as immigration procedures became stricter following the terrorist attacks on September 11, 2001.[5] For the next seven years, Sierra constantly shuttled back and forth around the world, remaining in the United States on temporary visas and returning to England when the expired visas took a while to renew, which they almost always did.[6] Compounding the financial difficulties of living on two different continents, some of Sierra's visas forbade her to work in the United States, and the couple was forced to live on Morgan's salary alone.[7]

Morgan and Sierra sought out different immigration attorneys and tried in vain to end their forced separation.[8] For a couple as committed to each other as Morgan and Sierra were, the next logical step would be to marry and apply for a family reunification visa for Sierra so she could legally remain with Morgan in the United States.[9] Unfortunately, this practical solution was not only unavailable but was legislatively banned because both Morgan and Sierra are women.[10] After exhausting all their viable options, Morgan and Sierra were forced to uproot their lives (Sierra for the second time) and expatriate to Canada, a country that both recognizes same-sex marriage and allows a citizen to sponsor their same-sex partner for family-based immigration ("same-sex immigration"), so they could finally, legally start their new life together as a married couple.[11]

How does the United States legislatively refuse the foreign spouse of a same-sex bi-national couple the right to citizenship? Although immigration rights for bi-national same-sex spouses are not restricted by the Immigration and Nationality Act (INA), which controls federal immigration laws, the INA is restrained by the Defense of Marriage Act of 1996 (DOMA).[12] Section 3 of DOMA defines "marriage" on a federal level as "a legal

4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *See id.*
10. *Id.*
11. *Id.*
12. Defense of Marriage Act, Pub. L. No. 104-99, § 7, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006) [hereinafter DOMA] (applying the Act's definition of marriage to "any Act of Congress").

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."[13] Since 1996, DOMA has forbidden the federal government from recognizing the validity of same-sex marriages, thus refusing same-sex couples the federal benefits that are automatically conferred to opposite-sex married couples, such as health insurance eligibility, tax deductions, and immigration rights.[14] The United States' denial of federal marriage benefits to same-sex couples is even harsher for bi-national couples; not only is their sacred union unrecognized by the country they live in, they are also refused the right to remain together indefinitely in the United States.[15] Because same-sex marriage is not federally recognized, a bi-national same-sex couple is unable to apply for the foreign spouse's citizenship through a family reunification visa, placing the spouse at high risk of removal from the United States—a procedure referred to as "DOMA deportation."[16] Fearful of this removal, some bi-national same-sex couples have chosen to escape the additional difficulties the United States imposes upon their relationship by fleeing to countries that offer same-sex immigration.[17]

This comment will focus on bi-national same-sex couples who are forced to expatriate from the United States to Canada because of DOMA's detrimental effects on their relationship. More specifically, Part I focuses on DOMA's constitutionality, effects on bi-national same-sex couples, and current legal challenges. Part II provides a historical analysis of the United States' attitude towards same-sex unions before describing current legislation regarding same-sex couples. Part III describes Canada's recognition of same-sex marriage and support of immigration equality, comparing and contrasting the Canadian approach with the United States' approach. Part IV explains the current legal and financial issues that bi-national same-sex couples face in the United States, and analyzes the consequences suffered by those who expatriate to Canada. Part V

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13. *Id*.

14. *"DOMA" Means Federal Discrimination Against Married Same-Sex Couples: GLAD challenges DOMA § 3*, GAY & LESBIAN ADVOCATES & DEFENDERS, http://www.glad.org/doma/lawsuit (last visited Feb. 18, 2012) (listing examples of federal marriage benefits denied to same-sex couples).

15. *See* Blythe Wygonik, *Refocus on the Family: Exploring the Complications in Granting the Family Immigration Benefit to Gay and Lesbian United States Citizens*, 45 SANTA CLARA L. REV. 493, 494 (2005) (explaining how legislation can separate same-sex couples and force them to emigrate to stay together).

16. *Stop the DOMA Deportations*, THE ADVOCATE, http://www.advocate.com/News/Daily_News/2011/03/01/An_Evolving_Immigration_Landscape (Mar. 1, 2011) (discussing the removal proceedings of an El Salvador citizen in a same-sex marriage with an American citizen).

17. *See* Wygonik, *supra* note 15 (noting same-sex couples "may be forced to emigrate to foreign nations to ensure their liberties.").

will evaluate the problems with presently pending solutions to the United States' refusal to allow same-sex immigration. Lastly, Part VI will propose a different solution that will allow bi-national same-sex couples to physically unite in spite of DOMA's continuing reign.

II. "MARRIED AND GAY? JUST STAY AWAY!" THE UNITED STATES' APPROACH TOWARDS SAME-SEX IMMIGRATION

Despite the United States' worldwide reputation as a liberal and progressive country, some claim it is the only industrialized English-speaking nation that does not recognize same-sex marriages on a federal level or allow same-sex immigration.[18] As of July 2012, ten countries have officially recognized same-sex marriage: the Netherlands (since 2001), Belgium (2003), Spain (2005), Canada (2005), South Africa (2006), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), and Argentina (2010).[19] Of these countries, only Argentina does not allow a citizen to sponsor a same-sex spouse for immigration purposes.[20] There are ten countries, however, that do not federally recognize same-sex marriage, but do allow same-sex immigration: Australia, Brazil, Denmark, Finland, France, Germany, Israel, New Zealand, Switzerland, and the United Kingdom—making a total of nineteen countries that offer immigration equality.[21]

According to estimates from the 2000 national census, around 36,000 bi-national same-sex couples reside in the United States and are affected by the legislative ban on same-sex immigration.[22] Because the census only identifies individuals currently living in the United States, this

18. Matthew S. Pinix, *The Unconstitutionality of DOMA + INA: How Immigration Law Provides A Forum For Attacking DOMA*, 18 GEO. MASON U. C.R. L.J. 455, 456–57, (2008).

19. *See A Decade on, Progress on Same-Sex Marriages*, HUMAN RIGHTS WATCH (Mar. 14, 2011), http://www.hrw.org/news/2011/03/14/decade-progress-same-sex-marriages. While Mexico as a whole does not grant same-sex marriage, Mexico City's Federal District has legalized it, and same-sex marriages performed there are recognized in all thirty-one Mexican states.

20. *See Uniting American Families Act*, HUMAN RIGHTS CAMPAIGN (May 2, 2011), http://www.hrc.org/resources/entry/uniting-american-families-act.

21. *Id*.

22. GARY J. GATES, *Bi-National Same-Sex Unmarried Partners in Census 2000: A Demographic Portrait*, THE WILLIAMS INSTITUTE 1 (2005), *available at* http://escholarship.org/uc/item/6kk5x4pn (data from the 2010 census is still unavailable).

number does not include same-sex bi-national couples who are separated by immigration legislation.[23] As of July 2012, 38 states possessed either a statutory or constitutional prohibition on same-sex marriage.[24] Only nine states—Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, Maryland, Maine, and Washington—and the District of Columbia currently recognize same-sex marriages and issue licenses to married same-sex couples.[25] Oregon and California no longer issue licenses, but are ordered to recognize the thousands of same-sex marriages that took place while licenses in those states were valid.[26] Only New York, Maryland, and the District of Columbia legally recognize same-sex marriages that take place in other states.[27]

A. The United States' History of Excluding LGBT Immigration

Given the United States' hostile attitude towards the Lesbian, Gay, Bisexual, and Transgender (LGBT) community, it is not surprising to learn that the federal government legislatively restricted LGBT individuals from immigrating into the United States until as recently as 1990, when the Immigration Act amended the INA to repeal the LGBT ban.[28] The

23. SCOTT LONG, JESSICA STERN & ADAM FRANCOEUR, HUMAN RIGHTS WATCH & IMMIGRATION EQUAL., FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 7 (2006) [hereinafter "FAMILY, UNVALUED"].

24. National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, http://www.ncsl.org/issuesresearch/human services/same-sex-marriage-overview.aspx (last modified June 2012) [hereinafter *Defining Marriage*]. On February 7, 2012, the Ninth Circuit overturned Proposition 8, which amended California's constitution to restrict marriage to only between a man and a woman. *See* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012). This decision is currently pending appeal. *See* Robert Barnes, *California Proposition 8 Same-sex-marriage Ban Ruled Unconstitutional*, WASHINGTON POST, Feb. 7, 2012, http://www.washingtonpost.com/ politics/ calif-same-sex-marriage-ban-ruled-unconstitutional/2012/02/07/gIQAMNwkwQ_story.html. On February 13, 2012, Washington became the seventh state to legalize same-sex marriage, but its effect is stayed pending appeal. *See* Reuters, *Washington: Gay Marriage Legalized*, N.Y. TIMES, Feb. 14, 2012, at A17. On March 1, 2012, Maryland became the eighth state to legalize same-sex marriage, but this will not take effect until January 2013, pending appeal. *See Maryland Governor Signs Bill Legalizing Gay Marriage*, USA TODAY, http:// www.usatoday.com/news/nation/story/2012-03-01/maryland-gay-marriage-law/53319758/1 (last modified Mar. 1, 2012).

25. *Defining Marriage*, *supra* note 24; Edith Honan, *Maryland, Maine, Washington Approve Gay Marriage*, REUTERS, http://www.reuters.com/article/2012/11/07/us-usa-campaign-gaymarriage-idUSBRE8A60MG20121107 (Nov. 7, 2012) ("Voters in Maryland, Maine, and Washington state approved same-sex marriage . . . marking the first time marriage rights have been extended to same-sex couples by popular vote.").

26. *Timeline—Same Sex Marriage*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/ Default.aspx?TabId=4243 (last visited Feb. 18, 2012).

27. *Defining Marriage*, *supra* note 24.

28. *See* Immigration Act of 1990, S. 358, Pub. L. No. 101–649, 104 Stat. 4978 (lacking language that restricts LGBT individuals from immigrating to the United States).

LGBT ban lasted almost forty years, beginning in 1952 when Congress amended the INA to exclude anyone suffering from a "psychopathic personality" from the United States.[29] Congress labeled LGBT persons as "psychopathic" based on a recommendation from the United States Public Health Service, which declared, "the exclusion of aliens afflicted with psychopathic personality or a mental defect . . . is sufficiently broad to provide for the exclusion of homosexuals and sex perverts."[30] Thirteen years later, in 1965, Congress amended the INA to explicitly ban LGBT individuals from immigrating to the United States, claiming they were "afflicted with psychopathic personality, or with sexual deviation."[31] Throughout the duration of the INA's LGBT ban, both Congress and federal courts upheld the exclusion of LGBTs from the United States by labeling homosexuality as "'constitutional psychopathic inferiority,' 'psychopathic personality,' and 'sexual deviancy'" and calling LGBT individuals "'public charge[s]' [and] 'mentally defective.'"[32]

B. The United States' Current Immigration Policies Towards Same-Sex Couples

In 1973, the American Psychiatric Association officially declared that homosexuality was not a psychiatric disorder, thus removing the basis for both the legislative and judicial bans on LGBT immigration.[33]

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29. Immigration and Nationality Act of 1952, Pub. L. No. 82–414, § 212(a)(4), 66 Stat. 163, 182.

30. *See* JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 90–91 (2001) (quoting S. Rep. No. 1515, 81st Cong., 2d Sess. 345 (1950)).

31. Immigration and Nationality Act of 1965, Pub. L. No. 89–236, § 15(b), 79 Stat. 911, 919.

32. Scott C. Titshaw, *The Meaning Of Marriage: Immigration Rules And Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 586, (2010) (quoting Boutilier v. INS, 387 U.S. 118, 118–23 (1967) (excluding homosexuals from immigration under "psychopathic personality" category)); Matter of S-, 8 I& N Dec. 409, 412–14 (B.I.A. 1959) (classifying a homosexual under the terms "psychopathic personality" and "mentally defective"); MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 21–23 (2009) (discussing exclusion of gay men and lesbians under "public charge" grounds).

33. John J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives*, 30 AMERICAN PSYCHOLOGIST, 620, 633 (1975) (supporting "the action taken on December 15, 1973, by the American Psychiatric Association, removing homosexuality from that Association's official list of mental disorders").

Congress, however, continued to maintain the INA's LGBT ban for almost another twenty years, before officially repealing it in the Immigration Act of 1990, an action influenced by the American Psychiatric Association's seventeen-year-old finding.[34] After Congress's repeal of the INA's LGBT ban, LGBT individuals were finally allowed to immigrate to the United States—that is, unless they sought to do so by way of their marriage.

1. The United States' Ban on Same-Sex Immigration

The INA itself does not address the issue of same-sex marriage. For a marriage to be valid for immigration purposes, section 216(d)(1)(A)(i)(I) of the INA requires that "a qualifying marriage [be] entered into in accordance with the laws of the place where the marriage [takes] place."[35] The INA thus recognizes, for immigration purposes, all marriages that are valid in the jurisdictions in which they are performed. Why, then, does the United States continually refuse to acknowledge same-sex marriages for immigration purposes, even if these marriages were legitimately performed in the countries and states where they took place?

a. Adams v. Howerton *(1962)*

Shortly before Congress repealed its LGBT ban, the Ninth Circuit determined the INA would not allow an LGBT spouse to immigrate to the United States on the basis of a same-sex marriage in Adams v. Howerton.[36] Adams was a United States citizen who married Sullivan, his Australian partner, in Colorado while the state offered same-sex marriage licenses in 1975.[37] Using this marriage as a basis for citizenship, Adams petitioned the Immigration and Naturalization Service (INS) to have Sullivan recognized as an "immediate relative," and thus eligible for US citizenship.[38] The INS denied Adams's petition in a rejection letter, proclaiming, "You have failed to establish that a bona fide marital

34. Wygonik, *supra* note 15, at 501 (citing MURDOCH & PRICE, *supra* note 30, at 276).

35. Immigration and Nationality Act of 1952, Pub. L. No. 82–414 § 216(d)(1)(A)(i)(I), 66 Stat. 163 (codified as amended at 8 U.S.C. § 1186a(d)(1)(A)(i)(I) (2006)).

36. *See* Adams v. Howerton, 673 F.2d 1036, 1040–41 (9th Cir. 1982) (interpreting legislative history to find Congress did not intend to include homosexual marriages under section 201(b) of the INA).

37. *Id*. at 1038; Adam Francoeur, The Enemy Within: Constructions Of U.S. Immigration Law and Policy and The Homoterrorist Threat, 3 STAN. J. C.R. & C.L. 345, 346 (2007) (quoting Letter from Immigration and Naturalization Service to Richard Adams (Nov. 24, 1975) *in* STEVEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 139 (2d ed. 1997)).

38. *Id.*

relationship can exist between two faggots."[39] In response, the Ninth Circuit established a two-prong test to determine the validity of a marriage: (1) whether the marriage is recognized by state law; and (2) whether the marriage is recognized under the INA.[40] At the time *Adams* was decided, no state had recognized same-sex marriages and the INA had not yet repealed its ban on LGBT immigration.[41] The court concluded the INA does not recognize same-sex marriage because (1) Congress intended the term "spouse" to be restricted to a member of the opposite sex, and (2) this limitation was constitutional because the Supreme Court was merely upholding Congress's plenary power to limit access to immigration benefits, as immigration is a federal issue.[42]

Although *Adams* has not been overturned, the case offers weak precedent for rejecting same-sex marriage for immigration purposes. In light of the changing definition of "marriage," the amended INA, and recent state recognition of same-sex marriage, *Adams* should not control issues of same-sex marriage recognition.[43] In determining Congress's intent regarding the definition of "marriage" in the 1965 version of the INA, the Adams court looked to the 1971 edition of Webster's Third New International Dictionary, which provided opposite-sex definitions for "spouse" and "marriage."[44] The current online version of Webster's Dictionary, however, has done away with the exclusive opposite-sex definitions. For example, marriage is now also defined as "the state of being united to a person of the same sex in a relationship like that of a traditional marriage."[45] Furthermore, since Adams was decided in 1982, the INA has repealed its LGBT ban and some states have even started to issue same-sex marriage licenses.[46] Because the INA recognizes marriages that are valid in the jurisdictions which they are performed, hundreds of same-sex marriages satisfy the state-recognized prong of the Adams test and facially satisfy the INA-recognized prong. However, these same-sex marriages will not pass the INA test because of an external federal restriction on marriage—DOMA.

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39. Francoeur, *supra* note 37.
40. *Adams*, 673 F.2d at 1038.
41. Wygonik, *supra* note 15, at 520.
42. *Adams*, 673 F.2d at 1038.
43. Titshaw, *supra* note 32, at 595–96; *see Defining Marriage*, *supra* note 24.
44. *Adams*, 673 F.2d at 1038.
45. Merriam-Webster Dictionary, "Marriage," http://www.merriam-webster.com/dictionary/marriage (last visited Feb. 18, 2012).
46. Wygonik, *supra* note 15, at 520–21; Defining Marriage, *supra* note 24.

b. Defense of Marriage Act of 1996

Even if Adams is overturned, the INA has a much stronger restriction imposed upon it, preventing it from recognizing same-sex marriages for the purposes of immigration. Over a decade after Adams commanded the Ninth Circuit to cease recognizing same-sex marriages under the INA, DOMA prohibited the federal government from recognizing same-sex marriages for any purpose.[47] Thus, the United States government is forbidden by DOMA to confer any federal marriage benefits to same-sex couples, even though those same benefits are automatically granted to opposite-sex couples that are married. In addition, DOMA proclaims that any state, territory, possession of the United States, or Indian tribe is not required to legally recognize or uphold any "public act, record or judicial proceeding" of a same-sex relationship originating in any other jurisdiction, consequently limiting the scope and effects of any benefit a particular state may grant to same-sex couples.[48]

i. DOMA Violates the Fourteenth Amendment's Equal Protection Clause

DOMA's provisions are not only controversial, they are unconstitutional. By creating a federal distinction between opposite-sex and same-sex couples that results in considerably unequal federal treatment, DOMA violates the Fourteenth Amendment's Equal Protection Clause, which declares, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[49] Section 3 of DOMA not only restricts the definitions of "marriage" and "spouse" to opposite-sex couples, it applies these definitions to every aspect of federal law by declaring, "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."[50] Thus, the application of any "ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States"

47. *See* DOMA, Pub. L. No. 104–99, § 7, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006)) (applying the Act's definition of marriage to "any Act of Congress").
48. *Id.* § 1738C.
49. U.S. CONST. amend. XIV, § 1.
50. DOMA, § 7.

that takes marriage into account is restricted solely to heterosexual married couples. As of 2003, the General Accounting Office has identified marriage as a factor present in 1,138 federal statutory provisions, including Social Security, healthcare, immigration, and tax benefits.[51] Consequently, DOMA denies same-sex couples over one thousand federal marriage benefits, protections, rights, and responsibilities that are automatically conferred to their heterosexual counterparts solely upon the basis of their sexual orientation.[52]

ii. Gill v. Office of Personnel Management

On May 31, 2012, the First Circuit proclaimed section 3 of DOMA unconstitutional when it affirmed Gill v. Office of Personnel Management in Massachusetts v. U.S. Department of Health and Human Services.[53] In Gill, same-sex couples who had legally married in Massachusetts sued the federal Office of Personnel Management, claiming DOMA's refusal to grant them the federal marriage benefits enjoyed by similarly-situated opposite-sex couples was unconstitutional because it violated the "equal protection principles embodied in the Due Process Clause of the Fifth Amendment."[54]

Because the federal distinction between same-sex and opposite-sex couples creates a government classification of LGBT individuals, the Equal Protection Clause requires constitutional scrutiny of DOMA because the statute "affects some groups of citizens differently than others."[55] The same-sex couples argued the court should employ the highest standard of constitutional analysis, "strict scrutiny," which only applies when a law (1) violates a fundamental right or (2) targets a suspect class.[56] Instead, the district court decided it did not have to apply strict scrutiny at all because it determined DOMA does not even survive the lower, "highly deferential" standard of constitutional scrutiny, the "rational basis test."[57]

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51. Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 236 (D. Mass. 2010) (citing U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004)).
52. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 379 (D. Mass. 2010).
53. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 1 (1st Cir. 2012) [hereinafter *DHHS*].
54. Gill, 699 F. Supp. 2d at 376–77.
55. *Id.* at 386 (quoting Engquist v. Or. Dep't of Agric., 553 U.S. 591, 592 (2008)).
56. *Id*. at 386–87.
57. *Id*. at 387.

Although rational basis review requires a law be "narrow enough in scope and grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]," the court's deference to Congress is so high that merely "hypothesiz[ing] about potential motivations of the legislature" suffices to pass the rational basis test.[58] There is arguably a higher standard for a law to fail rational basis review than to pass it: if the court perceives even a hint of a legitimate reason behind the law, it passes; but in order to fail rational basis review, the governmental classification must be so far removed from the state interest that it makes the distinction irrational or arbitrary.[59] Thus, if arguments for the distinction on the federal level "[make] no sense in light of how the [government] treat[s] other groups similarly situated in relevant respects," the law fails rational basis review.[60]

On appeal, the First Circuit declined to categorize sexual orientation as a suspect class.[61] The court also refused to find DOMA failed rational basis review, as the district court did in Gill.[62] Instead, the appellate court applied a more rigorous version of rational basis review that originated in U.S. Department of Agriculture v. Moreno.[63] Under this form of scrutiny, the court assesses the justifications for a classification more carefully where there have been "historic patterns of disadvantage suffered by the group adversely affected by the statute."[64]

Finding that LGBT individuals have been historically oppressed, the court closely analyzed Congress's justifications in enacting DOMA by looking to the House Committee Report.[65] Congress's stated governmental interests were to: (1) defend and nurture the institution of traditional, heterosexual marriage; (2) defend traditional notions of morality; (3) protect state sovereignty and democratic self-governance; and (4) preserve scant government resources.[66]

First, the court found "a lack of demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage" because banning federal benefits to same-sex couples does not increase

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58. *Id*. (quoting Heller v. Doe, 509 U.S. 312, 319–20 (1993)).
59. *See id*. at 387–88 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447 (1985)).
60. *Id*. at 388 (quoting Board of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366 n.4 (2001)).
61. DHHS, 682 F.3d at 9.
62. *Id*. at 4.
63. *Id*. at 5 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)).
64. *Id*. at 11.
65. *Id*. at 6, 8.
66. *Id*. at 8–9.

benefits given to opposite-sex couples nor reinforce the institution of opposite-sex marriages.[67] Moreover, although the court agreed that "[t]raditions are the glue that holds society together," it also noted that "Supreme Court decisions in the last fifty years call for closer scrutiny of government action touching upon minority group interests and of federal action in areas of traditional state concern."[68] Second, the court declared legislation cannot be justified by mere moral disapproval alone.[69] Third, the First Circuit found DOMA's federal definition of marriage not only intruded upon states' regulation of marriage, but also burdened states by shifting to them the costs of public benefits that the federal government denies to same-sex couples.[70] Fourth, the court noted that when a distinction is created for a historically-disadvantaged group for no other reason than to preserve government resources, the distinction fails because such a group has been less able to protect itself from the political process of the majority:[71]

> To conclude, many Americans believe that marriage is the union of a man and a woman, and most Americans live in states where that is the law today. One virtue of federalism is that it permits this diversity of governance based on local choice, but this applies as well to the states that have chosen to legalize same-sex marriage. Under current Supreme Court authority, Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest.[72]

iii. Windsor v. United States

On October 18, 2012, the Second Circuit followed suit and struck down section 3 of DOMA as unconstitutional in *Windsor v. United States*.[73] New York residents Edith Windsor and Thea Spyer were in a same-sex partnership for forty years, which culminated in a marriage in Canada.[74] Although New York recognized their marriage, the federal government did not.[75] Thus, when Spyer passed away, Windsor was forced to pay over $363,000.00 in federal estate taxes to claim the inheritance

67. *Id*. at 9.
68. *Id*. at 11.
69. *Id*. at 10 (referencing Lawrence v. Texas, 539 U.S. 558, 577–78 (2003)).
70. DHHS, 682 F.3d at 9.
71. *Id*. at 14–15.
72. *Id*. at 16.
73. *See* Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).
74. *Id*. at 397.
75. *Id*. at 396.

that Spyer had bequeathed to her.[76] If their marriage had been heterosexual, the government would not have charged Windsor a dime. Windsor sued, seeking a tax refund and alleging section 3 of DOMA violated the Equal Protection Clause.[77]

The Second Circuit took a bold approach in declaring section 3 of DOMA unconstitutional. Whereas the First Circuit refused to categorize sexual orientation as a suspect class, the Second Circuit determined homosexuals constituted a quasi-suspect class.[78] The Second Circuit found homosexuals as a group satisfied the necessary elements of a quasi-suspect class because homosexuals (a) were "historically 'subjected to discrimination;'" (b) possess "a defining characteristic that 'frequently bears [a] relation to ability to perform or contribute to society;'" (c) exhibit "obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and (d) are "a minority or politically powerless."[79]

First, the Second Circuit decided homosexuals did not have to suffer discrimination "for longer than history has been recorded," proclaiming "[n]inety years of discrimination is entirely sufficient to document a 'history of discrimination.'"[80] Second, respondents in *Windsor* conceded that homosexuals possess a characteristic relating to their ability to perform or contribute to society, arguing that "same-sex couples have a diminished ability to discharge family roles in procreation and the raising of children."[81] Third, the Second Circuit stated a "distinguishing characteristic" does not require an "obvious badge" or be "*outwardly* 'obvious, immutable, or distinguishing,'" equating illegitimacy with homosexuality.[82] Illegitimacy, another class subject to heightened scrutiny, is not outwardly distinguishable, yet an illegitimate status prevents a person from recovering Social Security benefits from a deceased biological parent.[83] Similarly, homosexuality may not be obvious at first glance, yet it still prevents a same-sex spouse like Windsor from receiving a marital tax benefit.[84] Lastly, the Second Circuit notes that while homosexuals' political positions have improved in recent years, homosexuals are still unable to "adequately protect themselves from the discriminatory wishes of the majoritarian public."[85]

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76. *Id*. at 397.
77. *Id*. at 396.
78. *Compare* DHHS, 682 F.3d at 9 *with* Windsor v. United States, No. 12-2335-cv and 12-2435, 2012 WL 4937310, at *4 (2d Cir. Oct. 18, 2012).
79. *Windsor*, WL 4937310, at *6.
80. *Id*. at *6–*7.
81. *Id*. at *7.
82. *Id*. at *8.
83. *Id*.
84. *Id*.
85. *Id*. at *9.

Because section 3 of DOMA applies to a quasi-suspect class, the Second Circuit employed the appropriate method of constitutional analysis to DOMA: intermediate scrutiny.[86] This form of constitutional review holds offending regulations to a standard of constitutional analysis that is higher than rational basis review, yet lower than strict scrutiny.[87] For a statute to pass intermediate scrutiny, its "classification must be 'substantially related to an important government interest.'"[88] The interest is "substantially related" if it is "exceedingly persuasive."[89]

Respondents stated DOMA serves four governmental interests: (1) maintaining a consistent federal definition of marriage; (2) protecting government resources; (3) preserving the traditional understanding of marriage; and (4) encouraging responsible procreation.[90] The Second Circuit held none of these interests were substantial enough to withstand intermediate scrutiny.[91]

First, the Second Circuit rejected the governmental interest in creating a uniform federal definition of marriage because the federal government has "historically deferred to state domestic relations laws, irrespective of their variations."[92] Second, the Supreme Court established that "[t]he saving of welfare costs cannot justify an otherwise invidious classification."[93] Furthermore, the Second Circuit also found DOMA does not have a substantial interest in preserving federal resources because it affects over one thousand laws, many which do not relate to fiscal matters.[94] Third, the Second Circuit held the government interest in upholding a tradition does not even withstand rational basis review, let alone establish a substantial relation.[95] Even if preserving the traditional understanding of marriage is an important interest, however, the Second Circuit declared the correct means to do so is via state regulation, not a federal statute such as DOMA.[96] Finally, the Second Circuit failed to find a rational, let

86. *Id*. at *10.
87. Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.").
88. *Windsor*, WL 4937310, at *10 (quoting *Clark*, 486 U.S. at 461).
89. *Id*. (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).
90. *Id*. at *10–*13.
91. *Id*.
92. *Id*. at *10.
93. *Id*. at *11 (quoting Graham v. Richardson, 403 U.S. 365, 375 (1971)).
94. *Id*.
95. *Id*. at *12.
96. *Id*.

alone a substantial, relation between DOMA and promoting procreation because nothing in DOMA's purpose or effect provides an incentive for opposite-sex couples to engage in responsible procreation or child-rearing.[97] The Second Circuit thus became the second federal appellate court to strike down section 3 of DOMA as unconstitutional and the first to apply intermediate scrutiny to government discrimination against homosexuals.[98]

2. Options for Bi-National Same-Sex Couples to Stay in United States

Because foreign spouses of bi-national same-sex couples are banned from immigrating to the United States on family reunification visas, they must consider the few other immigration options available to them: obtain refugee or asylee status or apply for an employment-based immigrant visa.[99] Spouses unable to meet the rigid requirements for refugee/asylee status or employment-based immigrant visas must turn to non-immigrant visas (student, work, or tourist visas) in order to stay in the United States on a temporary basis.[100]

a. Immigration Options

i. Asylees and Refugees

Obtaining refugee or asylee status is difficult because applicants must show they are unable or unwilling to return to their home country because of past persecution or reasonable fear of future persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion.[101] The difference between refugee and asylee status depends on where the applicant receives the classification: refugee

97. *Id*. at *12–*13.

98. *See Federal Appeals Court Declares "Defense of Marriage Act" Unconstitutional*, AMERICAN CIVIL LIBERTIES UNION ("ACLU"), http://www.aclu.org/lgbt-rights/federal-appeals-court-declares-defense-marriage-act-unconstitutional (Oct. 18, 2012) [hereinafter "ACLU"].

99. *See Green* Card (Permanent Residence), U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/greencard (last modified May 13, 2011) (listing three categories to obtain a green card—through family, job, or refugee or asylee status).

100. See FAMILY, UNVALUED, *supra* note 23, at 37–44 (discussing different non-immigrant visa options for foreign spouses in bi-national same-sex relationships).

101. *See* Refugees & Asylum, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www uscis.gov/portal/site/uscis (follow "Refugees & Asylum" hyperlink listed below "Humanitarian" hyperlink) (last modified Sept. 1, 2011).

status is granted before the immigrant arrives in the United States; asylee status is requested afterwards.[102]

Refugee admissions are capped annually. For example, in 2011, the United States limited the total number of refugees to 80,000.[103] Another obstacle to refugee admissions is the numerical ceiling imposed upon refugees coming from each section of the world. The United States places different caps on refugees coming from Africa (15,000), East Asia (19,000), Europe and Central Asia (2,000), Latin America/Caribbean (5,500), and the Near East/South Asia (35,500).[104] In addition, refugees that the United States classifies under three different priority levels have a greater chance of admission than other refugees.[105]

Some refugees have "compelling persecution needs" or "no other durable solution" and are referred by the United Nations High Commissioner for Refugees (UNHCR) or identified by a United States Embassy or non-government organization ("NGO").[106] These refugees are known as Priority One refugees. Priority Two refugees are "groups of special concern" who are classified by the Department of State with input from the United States Citizenship and Immigration Services (USCIS), UNHCR, and NGOs.[107] Currently, Priority Two refugees come from "the former Soviet Union, Cuba, Iraq, Burma, Bhutan, and Eritrea."[108] Priority Three refugees are immediate relatives of refugees who are already settled in the United States.[109] These relatives must be refugees themselves, and can only be the spouse, parent, or minor child (under age 21) of the settled refugee.[110] Presently, an applicant whose refugee status is based on sexual orientation alone is not prioritized.[111] Politicians have urged Secretary of State Hillary Clinton to include LGBT refugees under the Priority Two classification,

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102. Jeanne Batalova, Refugees and Asylees in the United States, MIGRATION INFO. SOURCE (July 13, 2009), http://www.migrationinformation.org/usfocus/display.cfm?ID=734.

103. *See* U.S. DEP'T OF STATE, U.S. DEP'T OF HOMELAND SEC. & U.S. DEP'T OF HEALTH & HUMAN SERVS., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2011: REPORT TO THE CONGRESS 6 (2010).

104. *Id*.

105. *See* Am. Immigration Council, Refugees: A Factsheet, IMMIGRATION POLICY CTR. (Oct. 21, 2010), http://www.immigrationpolicy.org/just-facts/refugees-fact-sheet.

106. *Id*.

107. *Id*.

108. *Id*.

109. *Id*.

110. *Id*.

111. *See id*.

to no avail.[112] Thus, an LGBT refugee from Europe faces a much lower chance for admission than any refugee who is simply from Iraq. The LGBT refugee must consequently look for other avenues for admission, such as applying for asylum.

Homosexuality became a universally accepted basis for asylum in 1994, when former Attorney General Janet Reno established Matter of Toboso-Alfonso, a case where the Board of Immigration Appeals (BIA) determined an asylum applicant's persecution was founded upon homosexual identity instead of homosexual conduct. The case established a precedent for future homosexuality-based asylum claims.[113]

Although there is no cap on asylum claims, applicants must overcome several obstacles to obtain asylum status. First, applicants must submit their asylum claim within one year of their arrival in the United States, or their claim will expire.[114] After the claim is received, the applicant must undergo a discretionary government interview with a USCIS Asylum Officer, where the officer determines whether the asylum claim is credible and if the applicant is eligible for asylum.[115] If an applicant's asylum claim is rejected, the USCIS Asylum Officer may place him in removal proceedings, and the applicant must appear before an immigration judge to see if any other forms of relief apply.[116] Although the asylum process seems simple, asylum grants are inconsistent and unpredictable, as they are dependent upon the individual discretion of USCIS officials and the fluctuating socioeconomic conditions of the applicant's home country. Though about 50% of total asylum applications were granted in 2010, immigration judges' approval rates varied by 54%.[117] Moreover, in that year, immigration courts rejected 88.0% of 3,050 asylum claims from Guatemalans, while rejecting only 37.1% of 3,338 Albanian claims.[118]

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112. Letter from Kirsten E. Gillibrand, U.S. Senator for N.Y., et al. to Hilary Clinton, Sec'y of State (Feb. 4, 2010) (on file with author), *available at* http://tammybaldwin.house.gov/Media/PDFs/LGBT%20refugee%20letter%202.4.2010.pdf.

113. *See Asylum*, IMMIGRATION EQUAL., http://www.immigrationequality.org/issues/asylum/ (last visited Feb. 18, 2012).

114. Obtaining Asylum in the United States, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis (follow "Asylum" hyperlink listed below "Refugees & Asylum" hyperlink listed below "Humanitarian" hyperlink") (last modified Mar. 10, 2011).

115. *Id.*

116. *Id.*

117. Asylum Denial Rates Reach All Time Low: FY 2010 Results, a Twenty-Five Year Perspective, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV. (Sept. 2, 2010), http://trac.syr.edu/immigration/reports/240/.

118. Asylum Denial Rates by Nationality Before and After the Attorney General's Directive, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV. (2010), http://trac.syr.edu/immigration/reports/240/include/nationality_alpha.html.

The differences between refugees and asylees extend to the federal benefits available to them upon arrival in the United States.[119] Refugees are given a Social Security Card, employment authorization, and are eligible for Office of Refugee Resettlement (ORR) benefits (medical, financial, employment, and language assistance), family reunification, and travel documents immediately after arriving in the United States.[120] Refugees can apply for a green card one year after their arrival date.[121] Although asylees are also entitled to these benefits, they are not eligible to receive them until after they are granted asylum. However, applicants may apply for employment authorization if 150 days have passed since they submitted their completed asylum applications and no decision has been reached on their claim.[122] Thus, asylum is a last-resort immigration option due to its arduous application process and the deprivations it imposes upon applicants while they await the government's decision on their asylum claims.

ii. Employment-Based Immigrant Visa

The last immigration option available for foreign spouses is to obtain an employment-based ("EB") immigrant visa.[123] There are four different ways an applicant can qualify for a green card: through 1) a job offer, 2) self petition, 3) investment, and 4) special categories of jobs.[124] In order to gain a green card through a job offer, the applicant is required to have a permanent employment opportunity in the United States.[125] The employer must also be willing to sponsor the applicant. Sponsorship is very

119. *Compare* Refugees, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis (follow "Refugees & Asylum" hyperlink listed below "Humanitarian" hyperlink; then follow "Refugees" hyperlink) (last modified Aug. 4, 2011) (discussing benefits available to refugees of the United States) *with* Asylum, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/ site/uscis (follow "Refugees & Asylum" hyperlink listed below "Humanitarian" hyperlink; then follow "Asylum" hyperlink) (last modified Sept. 7, 2011) (discussing available benefits to asylees of the United States).

120. *Refugees*, *supra* note 119 (discussing benefits available to refugees upon their arrival in the United States).

121. *Id*. (explaining green card procedure for refugees).

122. *Asylum*, *supra* note 119 (describing employment authorization procedure for asylum applicants).

123. FAMILY, UNVALUED, *supra* note 23, at 36.

124. Green Card Through a Job, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis (follow "Green Card Through a Job" hyperlink listed below "Green Card (Permanent Residence)" hyperlink) (last modified Dec. 10, 2009).

125. *Id*.

difficult because the employer must prove to the government that there are insufficient qualified U.S.-citizen workers to fill the position at the current wage, and therefore, hiring a foreign worker will not negatively affect similarly situated U.S. workers' wages and working conditions.[126] To further complicate matters, there is a numerical cap on all EB immigrant visas—approximately only 140,000 EB visas are available each year for applicants and their spouses.[127] This cap includes the five levels of preferences for EB visas,[128] which will be discussed below. Of these levels, EB-2 (without a national interest waiver) and EB-3 require a job offer, EB-1 and EB-2 (with a national interest waiver) allow for self-petition, EB-4 is comprised of the "special categories of jobs," and EB-5 is the investment visa.[129]

For the first preference, EB-1, the applicant must have an "extraordinary ability" in the sciences, arts, education, business, or athletics, with nationally or internationally recognized achievements acknowledged by "extensive documentation" in his respective field or through a one-time extraordinary achievement, such as an Olympic medal, Pulitzer Prize, or Oscar.[130] EB-1 visas are also granted to outstanding professors and researchers, multinational executives and managers, and applicants with extraordinary abilities.[131] EB-2 visas are reserved for professionals with advanced degrees, or applicants with "exceptional abilities" in the arts, sciences, or business.[132] Unlike EB-1 applicants, those seeking an EB-2 visa must provide a labor certification unless they qualify for a "national interest waiver."[133] Applicants who qualify for EB-3 visas are either skilled workers who possess a minimum of two years' training or work experience, professionals who possess a baccalaureate degree, or unskilled workers who possess fewer than two years' training or work experience that is

126. *See* Permanent Workers, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis (follow "Permanent Workers" hyperlink listed below "Working in the US" hyperlink) (last modified Aug. 10, 2010).

127. *Id.*

128. *Id.*

129. *Id.*

130. Employment-Based Immigration: First Preference EB-1, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis (follow "Permanent Workers" hyperlink listed below "Working in the United States" hyperlink; then follow "Employment-Based Immigration: First Preference EB-1" hyperlink) (last visited July 21, 2012).

131. *Id.*

132. Employment-Based Immigration: Second Preference EB-2, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis (follow "Permanent Workers" hyperlink listed below "Working in the United States" hyperlink; then follow "Employment-Based Immigration: Second Preference EB-2" hyperlink) (last modified Aug. 2, 2011).

133. *Id.*

not of a temporal or seasonal nature.[134] EB-4 visas are only available to "special immigrants"—religious workers, broadcasters, Iraqi/Afghan translators, Iraqis who have assisted the United States, international organization employees, physicians, armed forces members, Panama Canal Zone employees, retired NATO-6 employees, and spouses and children of deceased NATO-6 employees.[135] Lastly, EB-5 visas are issued to applicants who invest in a commercial enterprise with a minimum qualifying investment of one million dollars in a commercial enterprise.[136]

As evidenced by the stringent requirements set forth above, it is easy to see how a foreign spouse in a bi-national same-sex couple may be unable to qualify for an immigrant visa through either refugee/asylee status or extraordinary ability. What other option does a person have to immigrate to the United States? None. There are no other options available which will allow a person to stay in the United States on a permanent basis. Faced with this dilemma, many foreign spouses turn to the next-best option: temporary visas.

b. Non-Immigration Options

Because prior persecution and reasonable fear are difficult to prove, if they are even applicable, many foreign same-sex spouses are not eligible for either refugee or asylee status and must instead apply for one of three temporary visas: a student visa, visitor visa, or business visa.[137] Although temporary visas are easier to obtain, they place visa holders and their spouses in a stressful cycle of uncertain residency status, known as "visa

134. Employment-Based Immigration: Third Preference EB-3, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis (follow "Permanent Workers" hyperlink listed below "Working in the United States" hyperlink; then follow "Employment-Based Immigration: Third Preference EB-3" hyperlink) (last visited Feb. 18, 2012).

135. Employment-Based Immigration: Fourth Preference EB-4, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis (follow "Permanent Workers" hyperlink listed below "Working in the United States" hyperlink; then follow "Employment-Based Immigration: Fourth Preference EB-4" hyperlink) (last modified Nov. 22, 2010).

136. EB-5 Immigrant Investor, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis (follow "Permanent Workers" hyperlink listed below "Working in the United States" hyperlink; then follow "Employment-Based Immigration: Fifth Preference EB-5 hyperlink) (last modified July 3, 2010).

137. *See* FAMILY, UNVALUED, *supra* note 23, at 37.

juggling."[138] Because processing times for visa renewals may vary from a few months to a few years, foreign spouses run the risk of overstaying their visa, which consequently places them in "undocumented," or "illegal," status.[139]

Moreover, obtaining a green card after possessing a temporary visa is very difficult, as student and visitor visas are granted on the condition that the visa holder will return to his home country.[140] For instance, in order to qualify for a student visa, an applicant must demonstrate that he: a) has a residence abroad and no immediate intention to abandon that residence; b) intends to depart the United States after he completes his course of study; and c) possesses the necessary funds to pursue his proposed course of study.[141] In order to "maintain status," applicants must continuously be enrolled in a course of study and are severely restricted from obtaining employment while possessing a student visa.[142]

These requirements present multiple obstacles for bi-national same-sex couples. Because degree programs are generally only four years long,

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138. *Id.* at 50 (describing "visa-juggling" as a situation where "in order to stay in the U.S. for as long as possible legally, the foreign-born partner switches from one non-immigrant visa to another (usually) non-immigrant visa as ability allows").

139. Visa Overstay and Illegal Presence in the US, TEMPLE UNIV., INT'L STUDENT AND SCHOLAR SERVS., http://www.temple.edu/isss/immigration/overstay.html (last visited July 22, 2012) (explaining the corresponding penalties of specific nonimmigrant status violations under the INA).

140. *See* Student Visas: Qualifying for a Student Visa, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/types/types_1268.html (last visited Feb. 18, 2012) [hereinafter Qualifying for a Student Visa] (requiring student visa applicants to have "no immediate intention of abandoning" a residence abroad and to possess the intent to "depart from the United States upon completion of the course of study"); *see also* Visitor Visas—Business and Pleasure: Qualifying for a Visitor Visa, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/types/types_1262.html#3 (last visited Feb. 18, 2012) [hereinafter Qualifying for a Visitor Visa] (ordering visitor visa applicants to overcome the presumption of immigration intent by demonstrating "[t]hat they plan to remain for a specific, limited period" and "other binding ties that will insure their return abroad at the end of the visit").

141. Qualifying for a Student Visa, *supra* note 140 (emphasis added).

142. *See* Student and Exchange Visitor Information System, SEVIS Fact Sheet: Maintaining Your Immigration Status While a Student or Exchange Visitor, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/doclib/sevis/pdf/sevis_english_fs.pdf (last modified July 27, 2004) (listing examples of status violations, including "[u]nauthorized employment during your stay" and for students on an F-1 (Academic Student) visa, "[f]ailure to maintain a full course load without prior authorization"); *see also* Students and Employment, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis (follow "Students and Exchange Visitors" hyperlink listed below "Working in the United States" hyperlink; then follow "Students and Employment" hyperlink) (last modified July 22, 2011) (restricting students on an F-1 visa from engaging in off-campus work their first academic year, and restricting later off-campus employment options to three categories: Curricular Practical Training; Optional Practical Training; and Science, Technology, Engineering, and Mathematics Optional Practical Training; also prohibiting students on an M-1 (Vocational Student) visa from engaging in practical training until after they complete their studies).

many foreign partners are forced to obtain multiple degrees in order to remain with their citizen partner in the United States.[143] The financial consequences of obtaining multiple degrees can be drastic. Because the foreign partner is unable to substantially contribute to the household income due to employment restrictions on student visas, the burden of providing for the couple falls solely on the citizen partner's shoulders.[144] Additionally, out-of-state tuition for courses, even at community colleges, can be astronomical when accumulated over a period of years.[145] To make matters worse, because the foreign partner is not a citizen or legal permanent resident, he or she is ineligible for federal or state financial aid to offset the cost of tuition.[146]

Visitor visas are harder to obtain than student visas, because the law automatically presumes every applicant possesses immigration intent.[147] The applicant holds the burden to overcome this presumption by demonstrating the applicant a) plans to travel to the United States solely for business, pleasure, or medical treatment; b) plans to remain for a specific, limited period, c) has sufficient funds to cover the expenses of remaining in the United States, or knows someone in the United States with sufficient funds to do so; d) possesses compelling social and economic ties abroad, and e) has a residence outside the United States and additional binding ties that will insure the applicant's return abroad at the end of the visit.[148]

A temporary business visa requires all the same qualifications of a visitor visa, except the primary purpose of the applicant's trip to the United

143. Miranda Leitsinger, For Some Gay Couples, Fight Goes on to Marry—and Stay in the United States, LIFE ON MSNBC.COM, http://www.msnbc.msn.com/id/43848013/ns/us_newslife/t/some-gay-couples-fight-goes-marry-stay-us/#.TsB0osPNltM (last modified July 22, 2011) (interviewing a foreign-born partner who has "found a way to be with his partner . . . going to school. He is now on his second master's degree, jokingly noting that the money he spends is akin to some couples who would pay thousands of dollars on a wedding.").

144. *See* FAMILY, UNVALUED, *supra* note 23, at 101 ("The partner cannot earn a full salary on a student visa. Yet international students often pay far more tuition than American students, are ineligible for federal and state financial aid, must maintain minimum savings equal to a year or more's tuition, and are stringently restricted in the hours of work-study they are allowed in a given week.").

145. *See id*.

146. *Id*.

147. *Qualifying for a Visitor Visa*, *supra* note 140 ("The presumption in law is that every visitor visa applicant is an intending immigrant.").

148. *Id*.

States must be for a legitimate business purpose.[149] However, this situation is far from perfect. Because visitor visa holders are not permitted to be employed in the United States, the financial burden on the citizen partner is significant.[150]

The financial costs and stringent requirements associated with temporary visas make them less than ideal for bi-national same-sex couples wishing to remain in the United States together. However, they are the last resort for LGBT individuals whose foreign partners cannot comply with the rigid demands of immigration visas. Thus, visa-juggling bi-national same-sex couples knowingly choose to live together on borrowed time, constantly anticipating the day the United States government will discover their scheme and wrench them apart.

C. Risks of Violating the United States' Immigration Laws: The Illegal Immigration Reform and Immigrant Responsibility Act of 1996

The same year the United States government enacted DOMA, it implemented another barrier preventing bi-national same-sex couples from residing together in the United States—the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).[151] IIRAIRA amended the INA to criminalize unlawful presence in the United States, thus placing individuals who have overstayed their visa at risk of deportation.[152] If a foreign partner has overstayed his or her visa by more than six months but less than one year, he or she is barred from returning to the United States for three years.[153] If a foreign partner has overstayed his or her visa by more than one year, he or she is barred from returning to the United States for a decade.[154] IIRAIRA places an additional burden on student visa applicants by restricting them to private educational

149. *Compare id. with* B-1 Temporary Business Visitor, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis (follow "Temporary Visitors for Business" hyperlink listed below "Working in the United States" hyperlink; then follow "B-1 Temporary Business Visitor" hyperlink) (last modified Mar. 31, 2011).

150. Visitor Visas—Business and Pleasure: Additional Information, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/types/types_1262.html#3 (last visited Feb. 18, 2012) ("Visitors are not permitted to accept employment during their stay in the U.S.").

151. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546 [hereinafter IIRAIRA]; DOMA, Pub. L. No. 104–99, § 4, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006)).

152. *See* IIRAIRA, Pub. L. No. 104–208, § 301(b)(1), 110 Stat. 3009–546 (codified as amended at 8 U.S.C. § 1182(a)) (amending sections 212(a)(9)(B) and (C) of the INA).

153. *Id.*

154. *Id.*

institutions and forbidding them to transfer to public institutions.[155] This increases the financial burden on the citizen partner, because private institutions generally require a higher rate of tuition.

IIRAIRA also places the citizen partner at risk of criminal prosecution, amending the INA to make it a felony to harbor an unlawful alien.[156] For purposes of IIRAIRA and the INA, "harbor" means to "conduct tending substantially to facilitate an alien's [ability to] 'remain[] in the United States illegally,' provided, of course, the person charged has knowledge of the alien's unlawful status."[157] If convicted, the citizen partner can be fined under Title 18 of the United States Code and/or imprisoned for up to five years.[158] For couples who cannot stand to live in constant fear and insecurity, the only option is to leave the United States and move to a country that welcomes same-sex relationships, such as Canada.

III. "MARRIED AND GAY? NO PROBLEM, EH!" CANADA'S APPROACH TOWARDS SAME-SEX IMMIGRATION

Canada's stance on same-sex marriage and LGBT immigration mirrored the United States' until the turn of the twenty-first century, when Canada's progressive policies began to emerge. Canada welcomed the new millennium by allowing its LGBT citizens to permanently unite with their same-sex foreign partners in 2002, when it amended Canadian immigration laws to recognize "common-law partners" as a classification for family reunification.[159] Subsequently, Canada expanded its support for LGBT residents by legally acknowledging the sacred union of marriage

155. Henry J. Chang, The Illegal Immigration Reform and Responsibility Act of 1996, CHANG & BOOS' CAN.—U.S. IMMIGR. L. CENTER, http://www.americanlaw.com/1996law.html (last visited Feb. 18, 2012) ("Section 625 [of IIRAIRA] amends INA § 214 to bar F-1 status for an alien who seeks to attend a public elementary school or a public adult education program . . . unless: 1) the aggregate period of F-1 status does not exceed a year; and 2) the alien reimburses the school for the costs of providing education. An alien who obtains an F-1 visa to attend a private school and then transfers to a public school . . . is deemed to have violated F-1 status.").

156. IIRAIRA, Pub. L. No. 104–208, § 203(b), 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1324(a)) (amending section 274(a) of the INA).

157. United States v. Lopez, 521 F.2d 437, 440–41 (2d Cir. 1975), cert. denied, 423 U.S. 995 (1975).

158. Immigration and Nationality Act of 1952, Pub. L. No. 82–414, § 274(a)(1)(B), 66 Stat. 163 (codified as amended at 8 U.S.C. § 1324(a)(1)(B) (2006)).

159. *See* Immigration and Refugee Protection Act, R.S.C. 2001, c. 27, s. 12 (Can.) [hereinafter IRPA].

among its same-sex couples in 2005, thus becoming the fourth country in the world to formally recognize same-sex marriage.[160]

A. Canada's History of Excluding LGBT Immigration

Canada's rejection of LGBT immigrants was formally documented in its Immigration Act of 1952, which excluded "prostitutes, homosexuals or persons living on the avails of prostitution or homosexualism, pimps, or persons coming to Canada for these or any other immoral purposes."[161] Canada took the issue head-on—unlike the United States, which only indirectly banned LGBT immigrants in its original INA of 1952.[162] The United States did not explicitly include an LGBT ban in their immigration laws until the INA Amendments of 1965.[163] While the United States based their LGBT ban on the theory that LGBT individuals suffered from a "psychopathic personality or mental defect," Canada's argument for banning LGBT immigrants was founded upon morality grounds, equating homosexuals with prostitutes.

B. Canada's Current Immigration Policies Towards Same-Sex Couples

Canada had a head start on the United States in repealing its ban on LGBT immigration, which it did in the Immigration Act of 1976.[164] Canada's LGBT ban only lasted twenty-five years (1952–1977), making it eleven years shorter than the United States' LGBT ban (1952–1990), and repealed thirteen years earlier. Unfortunately, the repeal of the ban on LGBT immigration only permitted LGBT individuals to immigrate to Canada. It did not allow LGBT couples to immigrate together on a family visa, nor did it enable all Canadian citizens to apply for their

160. *See* Civil Marriage Act, S.C. 2005, c. 33 (Can.) [hereinafter CMA]; *see also* Colin R. Singer, New Developments: Same Sex Marriages, Common-Law Partners and Conjugal Partners, IMMIGRATION.CA, http://www.immigration.ca/permres-family-samesex.asp (last visited Feb. 18, 2012) ("[F]ollowing the recent proclamation of the federal Civil Marriages Act . . . Canada thus becomes the fourth member of an exclusive group of countries (Netherlands, Belgium and Spain) that have legalized nation wide same sex marriage.").

161. Immigration Act of 1952, S.C. 1952, c. 42 (Can.).

162. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163, 182 (banning LGBT individuals under a "psychopathic personality" provision).

163. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919.

164. *See* Immigration Act of 1976, S.C. 1976, c. 52, s.1 (Can.) (lacking previous language prohibiting LGBT individuals from immigrating).

foreign same-sex spouse to immigrate to Canada on a family reunification visa.[165]

In 1991, however, the Department of Employment and Immigration implemented a discretionary policy that allowed officials to admit foreign same-sex partners and couples into Canada on the grounds of "compassionate and humanitarian considerations."[166] Many Canadian immigration lawyers and LGBT individuals, however, were not satisfied.[167] A grassroots Canadian lobby and support group, the Lesbian and Gay Immigration Taskforce (LEGIT), argued the discretionary policy was

> the worst possible set of procedures. There are no rules. There are no appeals. There are no rights. There is no assurance of consistency of decision making by the program managers and visa officers in the various embassies and consulates. There is no openness, no transparency, no publicity.[168]

1. Canada's Acceptance of Same-Sex Immigration

Fortunately for LEGIT and the rest of LGBT Canadians, Canada later enacted the Immigration and Refugee Protection Act of 2002 (IRPA), which was enforced through the corresponding Immigration and Refugee Protection Regulations (IRPR), and extended immigration benefits to same-sex partners of Canadian citizens.[169] A mere three years after allowing same-sex partners to permanently unite and remain together in its country, Canada further established its acceptance of the LGBT community by becoming the first nation in the Americas—and the fourth nation in the world—to formally recognize same-sex marriage in 2005 with the implementation of the Civil Marriage Act.[170]

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165. *See* Nicole La Violette, *Coming Out to Canada: The Immigration of Same-Sex Couples Under the Immigration and Refugee Protection Act*, 49 MCGILL L.J. 969, 973 (2004).
166. *Id*. at 976.
167. *See id*. at 977.
168. *Id*. at 978 (quoting LEGIT, Taking the Next Step: A Brief to the Honorouble Sergio Marchi, Minister of Immigration (Nov. 12, 1993) (unpublished brief)).
169. *See* IRPA s. 117; *see also* Immigration and Refugee Protection Regulations, SOR/2002-227, s. 117(1)(a) (Can.) [hereinafter IRPR].
170. *See* CMA c. 33.

a. Immigration and Refugee Protection Act of 2002 and Immigration and Refugee Protection Regulations

In response to attacks upon the consistency and permanency of discretionary grants of citizenship to foreign same-sex partners, Canada enacted IRPA in 2002, which replaced the previous Immigration Act of 1977.[171] IRPA accepts three categories of partners under the "family class" provision—"spouse," "common-law partner," and "conjugal partner"—although "conjugal partner" is only mentioned in IRPR, not IRPA.[172] "Spouse" is not defined under either the IRPA or IRPR, but is assumed to mean a person who is married.[173] IRPR requires a foreign marriage be "valid both under the laws of the jurisdictions where it took place and under Canadian law."[174] Thus, foreign same-sex marriages were invalid as a basis for immigration purposes at the time IRPA was enacted. IRPR, however, still allowed a foreign same-sex partner to be sponsored through the family visa under the "common-law partner" or "conjugal partner" status.[175] Although the distinction between "common-law partner" and "conjugal partner" is slight, as discussed below, it is nevertheless a key determination in the type of immigration benefits a couple may receive from Canada.

IRPR defines "common-law partner" is "an individual who is cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year."[176] Acknowledging the difficulties that bi-national couples have in fulfilling the cohabitation requirement, the drafters of IRPR offered a narrow exception for couples who were unable to cohabitate "due to persecution or any form of penal control."[177] LGBT advocates found two main issues with the common-law partner status: 1) because IRPR did not explicitly specify that same-sex partners qualified as common-law partners, foreign nationals would be confused and misled by the lack of transparency and accessibility, and 2) the cohabitation requirement imposed a stringent restriction on bi-national same-sex couples

171. IRPA s. 12.
172. *Compare id*., *with* IRPR, s. 117 (including "conjugal partner" as a member of the family class, whereas IRPA only lists "spouse" and "common-law partner").
173. *See* IRPA s. 12; *see also* IRPR s. 117 (lacking definition of "spouse" for purposes of IRPA).
174. IRPR s. 117 (defining "marriage").
175. *Id*. ("A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is . . . the sponsor's spouse, common-law partner or conjugal partner.")
176. *Id*. s. 1(1).
177. *Id*. s. 1(2).

that even the previous discretionary policy lacked.[178] Couples unable to meet the cohabitation requirement (about 75%, as estimated by LEGIT)[179] were subjected to the notoriously unpredictable discretionary policy.[180]

Taking these fallacies into account, the Minister of Citizenship and Immigration amended IRPR before it was finalized.[181] The Regulatory Impact Analysis noted the final IRPR explicitly allowed Canadian citizens and permanent residents to sponsor "a common-law partner or a conjugal partner, which may include sponsorship of a partner of the same-sex," and recognized "the reality that in some countries same-sex couples are not able to live together."[182] The IRPR amendments thus created a third category of partners: the "conjugal partner."[183]

A "conjugal partner" is merely a foreign "common-law partner" who does not fulfill the cohabitation requirement.[184] More specifically, a "conjugal partner" is "a foreign national residing outside Canada who is in a conjugal relationship with the sponsor and has been in that relationship for a period of at least one year."[185] That sole distinction, however, strips the conjugal partner of all other family-based immigration options except one: a conjugal partner may only immigrate to Canada if his or her partner is a Canadian citizen or permanent resident.[186] Spouses and common-law partners, on the other hand, are allowed to immigrate to Canada even if their partners are also foreign nationals. They can be listed as familial dependents, or "family members" if the foreign partner is a primary applicant and eligible to immigrate to Canada under other

178. Submissions to the House of Commons Standing Committee on Citizenship and Immigration: Immigration Regulations, EGALE CAN. (Feb. 2002), *available at* http://archive.egale.ca/index.asp?lang=E&menu=1&item=332.

179. La Violette, *supra* note 165, at 983. Deb LeRose from LEGIT estimates that 75% of couples are unable to meet the cohabitation requirement. Standing Committee on Citizenship and Immigration, House of Commons Committees, Parliament of Canada, Committee Evidence, 37th Parl., Meeting No. 45 (Feb. 5, 2002) at 1045, *available at* http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=518817&Language=E&Mode=1&Parl=37&Ses=1.

180. La Violette, *supra* note 165, at 983.

181. *Id*. at 984.

182. Regulatory Impact Analysis Statement, C. Gaz. 2002.II, 177, 258 (Can.).

183. IRPR s. 117(1)(a) (including "conjugal partner" as a member of the family class).

184. *See id.* s. 117(1)–(2) (indicating that both "common-law partner" and "conjugal partner" require a conjugal relationship to last at least one year, but "common-law partner" has an additional cohabitation requirement).

185. *Id*. s. 117(2).

186. La Violette, *supra* note 165, at 994.

provisions.[187] Furthermore, the "conjugal partner" status is more difficult to obtain, as it requires sufficient proof that the couple is absolutely unable to live together; the existence of an immigration barrier would qualify, whereas mere desire to stay with a certain job or field of study would not.[188]

Thus, of the three immigration partner categories available via the IRPA and IRPR, the "common-law partner" status was the most beneficial to same-sex bi-national couples at the time of its creation. The "spouse" status did not apply because the foreign same-sex marriages would have to be recognized by Canada, which at that point only federally recognized heterosexual marriages.[189] The "conjugal partner" status was difficult to obtain, and couples who did not meet either the "common-law partner" or "conjugal partner" qualifications were subjected to the completely discretionary "compassionate and humanitarian considerations" test, which may be have been even harder to pass.[190]

b. Halpern v. Canada

Shortly after the Canadian legislature enacted the IRPA and IRPR, Ontario became the first Canadian province to legally recognize same-sex marriage when Halpern v. Canada was decided.[191] In a suit challenging the constitutionality of Canada's definition of marriage, the Ontario Court of Appeal unanimously declared Canada's common-law definition of marriage, "the lawful and voluntary union of one man and one woman to the exclusion of all others," violated section 15(1) of the *Canadian Charter of Rights and Freedoms*.[192] The Charter declares that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and,

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187. *Id*. at 985.

188. Sponsoring Your Family: Spouses and Dependent Children—Who Can Apply, CITIZENSHIP & IMMIGRATION CAN., http://www.cic.gc.ca/english/immigrate/sponsor/spouse-apply-who.asp (last modified Aug. 3, 2011) (providing examples of relationships that are ineligible to obtain a "conjugal partner" status).

189. *See* CMA c. 33 (recognizing same-sex marriage three years after IRPA and IRPR, in 2005).

190. La Violette, *supra* note 165, at 982–83 (quoting LEGIT, *supra* note 168).

191. Halpern v. Canada (Att'y Gen.) (2003), 65 O.R. 3d 161, para. 156 (Can. Ont. C.A.) [hereinafter *Halpern*].

192. *Id*. at para. 37; Modernization of Benefits and Obligations Act, S.C. 2000, c. 12, s. 1.1 (Can.) (definition in force from Dec. 12, 2002 to July 19, 2005); *Halpern*, at para. 108. The Canadian Charter of Rights and Freedoms is Canada's equivalent to the United States' Constitution. Stephane Dion, President, Privy Council and Minister of Intergovernmental Affairs, The Canadian Charter of Rights and Freedoms at Twenty: The Ongoing Search for Balance Between Individual and Collective Rights, Address at Director's Forum (Apr. 2, 2002), http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=archive&sub=speeches-discours&doc=20020402-eng.htm.

in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[193]

The court applied the three stages of the "section 15(1) inquiry" to determine if Canada's common-law definition of marriage violated section 15(1):

> 1) whether the law (a) draw[s] a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail[s] to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics,
> 2) if so, whether the differential treatment is "based on an enumerated or analogous grounds," and
> 3) whether "the differential treatment discriminate[s], by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration."[194]

The court found a formal distinction did exist between same-sex couples and heterosexual couples, as heterosexual couples possess the right to marry while the same right is denied to same-sex couples.[195] Furthermore, the court determined the distinction met the second factor of the section 15(1) inquiry, as sexual orientation had previously been established as an "analogous ground," and the differential treatment was based upon sexual orientation.[196] Lastly, the court held that differential treatment imposed a burden on human dignity, and that the dignity of individuals in same-sex relationships was violated by their exclusion from the legal institution of marriage.[197] Thus, the court concluded Canada's common-law definition of marriage unjustifiably violated same-sex couples' equality rights under section 15(1) of the Charter.[198] To remedy this situation, the court rendered Canada's common-law definition of marriage invalid, immediately revising it to "the voluntary union for life of two persons to the exclusion of all others."[199]

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193. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, s. 15(1) (U.K.).
194. *Halpern*, 65 O.R. 3d at para. 61.
195. *Id*. at para. 65.
196. *Id*. at para. 73–76.
197. *Id*. at para. 107–08.
198. *Id*. at para. 155.
199. *Id*. at para. 156.

c. The Civil Marriage Act of 2005

After Halpern, eight other provinces struck down same-sex marriage bans in subsequent court cases.[200] By the time the legislature enacted the Civil Marriage Act (CMA) in 2005, only four holdout provinces remained: Alberta, Prince Edward Island, Northwest Territories, and Nunavut.[201] The CMA rectified this departure and legalized same-sex marriage throughout all of Canada, codifying the definition of marriage for the first time in Canadian law.[202] Unlike before, when Canada's common-law definition of marriage only applied to heterosexual unions, the codified definition of marriage was amended to apply universally to couples of all sexual orientations, thereby replacing "one man and one woman" with the gender-neutral "two persons."[203] Canada now legally defines "marriage" as "the lawful union of two persons to the exclusion of all others."[204]

Canada's Parliament made a significant decision to formally recognize same-sex relationships by legalizing civil marriages instead of merely making a token concession by expanding same-sex civil unions to include all the federal benefits of marriage. The landmark Halpern decision strongly influenced the Parliament in both revising the definition of marriage and the legal analysis behind formally recognizing same-sex marriage under section 15(1) of the Charter.[205] They defend this decision in the preamble of the CMA, declaring that:

> [o]nly equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the Canadian Charter of Rights and Freedoms.[206]

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200. Mary C. Hurley, Bill C-38: The Civil Marriage Act, LIBRARY OF PARLIAMENT (revised Sept. 14, 2005), http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c38&Parl=38&Ses=1.

201. Canada Gay "Marriage" Bill to be Signed Into Law Today, LIFESITENEWS.COM, (July 20, 2005, 11:15 AM EST), http://www.lifesitenews.com/news/archive/ldn/1950/72/5072004.

202. Hurley, *supra* note 200.

203. *Id*.

204. CMA c. 33.

205. *Compare* CMA c. 33 (defining marriage as "the lawful union of two persons to the exclusion of all others" and citing section 15 of the Charter as a primary reason for creating the act in the preamble), *with* Halpern, 65 O.R. 3d at para. 154–55 (defining marriage as "the voluntary union for life of two persons to the exclusion of all others" and discussing in depth why excluding same-sex marriage violates section 15 of the Charter).

206. CMA pmbl.

Canada's recognition of same-sex marriage was not only a boon for Canadian same-sex couples, but it was a miracle for Canadian citizens in same-sex bi-national relationships and LGBT couples around the world. Under the CMA, the IRPA and IRPR now acknowledge foreign same-sex marriages as a basis for a family reunification visa, thus opening Canada's doors to uniting separated bi-national same-sex married couples and welcoming foreign same-sex married couples. With an industrialized, English-speaking country with a culture so like its own embracing their relationships, it is no wonder that same-sex couples escaping DOMA's oppression in the United States are using Canada as a refuge. This northward migration, however, is much more complex than merely packing up a life's worth of belongings and transferring nationalities.

2. Canada's Immigration Procedures

There are two routes bi-national same-sex couples can take to immigrate to Canada: 1) family class sponsorship and 2) individual merit.[207] As previously discussed, if one of the partners in a bi-national same-sex relationship is a Canadian citizen or permanent resident, he or she can sponsor the foreign partner for immigration under a "family class" visa if the foreign partner is a spouse, common-law partner, or conjugal partner.[208] However, a Canadian sponsor must be financially secure and able to provide for his or her partner, who may not apply for financial assistance from the government once he or she arrives.[209]

If neither partner is a Canadian citizen nor a permanent resident, one partner may apply to immigrate based on individual merit. The applicant can then include the other partner on the same immigration application

207. Same-Sex Immigration for Gay and Lesbian, BORDER CONNECTIONS, http://www.borderconnections.com/same-sex-immigration.html (last visited Feb. 18, 2012) [hereinafter Same-Sex Immigration].

208. Form IMM 3999 E—Family Class: Sponsorship of a Spouse, Common-Law Partner, Conjugal Partner or Dependent Child Living Outside Canada, IMMIGRATION CAN., http://www.scribd.com/doc/2384505/Canada-Immigration-Forms-3999E (last modified 2008).

209. Sponsoring Your Family, CITIZENSHIP & IMMIGRATION CAN., http://www.cic.gc.ca/english/immigrate/sponsor/index.asp (last modified May 9, 2011) ("If you sponsor a relative to come to Canada as a permanent resident, you are responsible for supporting your relative financially when he or she arrives. As a sponsor, you must make sure your spouse or relative does not need to seek financial assistance from the government.").

only if he or she is a spouse or common-law partner.[210] Canada implements a "points system" for their individual merit selection process, which is split into four categories: a) skilled worker, b) entrepreneur, c) investor, or d) self-employed.[211] The legislature awards points based on each applicant's potential for integration into the Canadian labor force.[212]

The "skilled worker" status requires a high education level (at least a Bachelor's degree), between one to four years of work experience, language skills in either English or French, arranged employment in Canada, and a number of adaptability factors, including a relative in Canada, previous work or study in Canada, or the level of partner's education.[213] The legislature gives preference to applicants between twenty-one and forty-nine years old.[214] To qualify as an "entrepreneur," an applicant needs business management experience and a plan to manage a business in Canada.[215] An "investor" must also have business experience, but in addition, must show that he or she possesses a minimum net worth of $1,600,000 and is required to make a $800,000 investment into the Canadian economy.[216] The "self-employed" category is restricted to applicants in farm management, or the cultural or athletic fields.[217]

What happens, though, if neither partner possesses more than a high school education? What if a partner does possess the necessary business experience, but cannot obtain a secure business plan in Canada, or does not possess the necessary finances to invest? What if a Canadian partner is not financially able to provide for his foreign partner? As the above requirements indicate, immigrating to Canada may be just as difficult as immigrating to the United States. As the co-founder of Love Sees No Borders, an LGBT advocacy group created to aid bi-national same-sex

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210. Same-Sex Immigration, *supra* note 207.

211. Immigrating to Canada, CITIZENSHIP & IMMIGRATION CAN., http://www.cic.gc.ca/english/immigrate/index.asp (last modified Sept. 11, 2012).

212. Audrey Kobayashi & Brian Ray, Placing American Emigration to Canada in Context, MIGRATION INFO. SOURCE (Jan. 2005), http://www.migrationinformation.org/Feature/display.cfm?ID=279.

213. Same-Sex Immigration, *supra* note 207; *see also* Skilled Workers and Professionals—Who Can Apply, CITIZENSHIP & IMMIGRATION CAN., http://www.cic.gc.ca/english/immigrate/skilled/apply-who.asp (last modified Aug. 17, 2012).

214. Same-Sex Immigration, *supra* note 207.

215. *See* Entrepreneurs, CITIZENSHIP & IMMIGRATION CAN., http://www.cic.gc.ca/english/immigrate/business/entrepreneurs/index (last modified June 29, 2011); *see also* Same-Sex Immigration, *supra* note 207.

216. *See Investors*, CITIZENSHIP AND IMMIGRATION CAN., http://www.cic.gc.ca/english/immigrate/business/investors/index.asp (last modified June 28, 2012).

217. *See Self-employed Persons: Who Can Apply*, CITIZENSHIP AND IMMIGRATION CAN., http://www.cic.gc.ca/english/immigrate/business/self-employed/apply-who.asp (last modified Oct. 11, 2011); *see also* Same-Sex Immigration, *supra* note 207.

couples trying to live in the United States,[218] noted, "The sad thing about it for the U.S. is that Canada doesn't allow just anyone to move there. They want skilled people . . . . We're talking people with higher education with professional skills. Engineers. Pharmacists. Nurses."[219]

IV. DOMA DEPORTATION: THE UNITED STATES' "GAY DRAIN" IS CANADA'S "GAY GAIN"

After the Halpern decision was decided in Ontario, over a third of the first nine hundred same-sex marriage licenses issued in Toronto went to United States couples.[220] A combination of factors resulting from DOMA makes life in the United States extremely difficult for same-sex couples. Immigration laws make it almost impossible for bi-national same-sex couples to live together in the United States. DOMA's refusal to acknowledge same-sex marriages makes family reunification visas unavailable for same-sex couples, forcing foreign partners to stay on a series of temporary visas.[221] When those visas expire without the option of renewal, the foreign partner is at risk of removal, a procedure informally known as "DOMA deportation." The foreign partner would not be deported if the same-sex couple had the right to marry.[222] For partners lucky enough to remain together, the cost of living in the United States is much higher for same-sex couples than heterosexual couples.[223]

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218. Leslie and Marta, LOVE SEES NO BORDERS, (Feb. 7, 2008, 12:12 AM), http://imeq.us/our_stories/files/tag-love-sees-noborders.htmlhttp://imeq.us/our_stories/files/tag-love-sees-no-borders.html (last visited Feb. 7, 2012).

219. Rona Marech, Same-Sex Couples Flock to Gay-Friendly Canada, S.F. CHRON., Mar. 9, 2004, at A-1.

220. *See* Kathleen Harris, 'Gay Gain' Strikes Canada: Couples Take Off to Great White North After Court Ruling, WINNIPEG SUN, Nov. 23, 2003, http://www.airliners.net/aviation-forums/non_aviation/read.main/457458/ ("In the four months since an Ontario court ruling essentially legalized gay marriage[,] the City of Toronto has issued almost 900 licences to marry same-sex couples—about 10% of the total number dispensed. From those, 311 were to American couples and 34 were to international pairs.").

221. *See* FAMILY, UNVALUED, *supra* note 23, at 50 ("[T]o stay in the U.S. for as long as possible legally, the foreign-born partner switches from one non-immigrant visa to another (usually) non-immigrant visa as ability allows.").

222. *See generally* Bob Egelko, Obama's Deportation Focus Shifts From Gay Families, S.F. CHRON., Aug. 23, 2011, http://www.sfgate.com/news/article/Obama-s-deportation-focus-shifts-from-gay-families-2333943.php (using "DOMA deportation" to refer to the deportation of a foreign partner in a same-sex bi-national couple who has overstayed his visa).

223. *See* Tara Siegel Bernard & Ron Lieber, The Costs of Being a Gay Couple Run Higher, N.Y. TIMES, Oct. 3, 2009, at A1.

The linguistic and sociological similarities between Canada and the United States, not to mention their physical proximity, make moving to Canada a practical choice for bi-national same-sex couples currently living in the United States.[224] As a Toronto immigration lawyer observed, "As long as the United States is continuing to be oppressive in their lack of sanctity of unions for gays and lesbians, then they're going to continue to lose really good citizens. . . . Your loss, our gain."[225] Indeed, the United States' loss of same-sex couples to Canada has been described as the United States' "gay drain" and Canada's "gay gain."[226] The transition from the United States to Canada, however, is not as easy as moving a few hundred miles north. Same-sex United States expatriates report issues with culture shock, underemployment, and social isolation, in addition to the high cost of physical emigration to Canada.[227]

A. United States' "Gay Drain"

DOMA's refusal to recognize same-sex marriage on a federal level excludes LGBT individuals from even the most basic socioeconomic rights. Because same-sex couples are prevented from enjoying federal marriage benefits, they generally pay more than their heterosexual counterparts when it comes to health insurance, social security, estate and income taxes, child-rearing, pensions, spousal I.R.A.s, tax preparation, and financial planning costs.[228] The United States' increasing standard of living costs for same-sex couples compels many of them to seek out more affordable living conditions elsewhere, leading many same-sex couples to emigrate.[229] Thus, the United States' refusal to acknowledge same-sex marriage is causing a "gay drain" on its population.

The New York Times conducted a study entitled "The Costs of Being a Gay Couple Run Higher."[230] The Times created a fictional family comprised of a middle-class, college-educated, same-sex couple with two children and dual incomes.[231] The publication created fictional tax rates

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224. *See* Comparisons Between Canada and the United States of America, UNITED N. AM., http://www.unitednorthamerica.org/simdiff.htm (last visited Feb. 18, 2012) (comparing similarities in languages spoken at home, ethnicities, religion, etc.).

225. Marech, *supra* note 219.

226. *See* Harris, *supra* note 220 (defining "gay gain" and "gay drain").

227. *See generally* FAMILY, UNVALUED, *supra* note 23; *see also* MJB, Difficulties Making Friends, MY LIFE IN EXILE DE FACTO (Dec. 23, 2008), http://exiledefacto.blogspot.com/ 2008/12/difficulties-making-friends.html.

228. *See* Bernard & Lieber, *supra* note 223.

229. *See* Tara Siegel Bernard, Do Gay Couples Give Up Their U.S. Citizenship?, N.Y. TIMES, Apr. 27, 2010, http://bucks.blogs.nytimes.com/2010/04/27/do-gay-couples-give-up-their-u-s-citizenship/.

230. Bernard & Lieber, *supra* note 223.

231. *Id.*

by averaging the state taxes of New York, California, and Florida— states with the highest estimated same-sex populations.[232] In the best-case scenario, a middle-class couple's "lifetime cost of being gay" was $41,196.[233] This figure increases more than eleven times, however, in the worst-case scenario, where the lifetime cost of being gay is $467,562.[234] If both partners were affluent, the cost of being gay could reach well into the millions.[235] The writers of the Times noted that all these costs (except those associated with having a child) would virtually be eliminated if same-sex marriage were federally recognized.[236]

As expected, there is an enormous cost disparity in health insurance between same-sex and heterosexual couples.[237] In the worst-case scenario, one partner's employer does not offer health coverage and the other partner's coverage does not cover domestic partners, forcing the uncovered partner to purchase health insurance on her own.[238] The estimated cost of this scenario would be $211,993 more than the costs for heterosexual partners who are both covered under one partner's health insurance plan.[239] Even if both partners were covered equally by their respective employers' health plans, a same-sex couple would still pay $28,595 more than similarly situated heterosexual couples.[240] The more common scenario, in which an employer's health plan covers domestic partners, is usually more expensive than individual health coverage because of the tax implications raised by domestic partnerships.[241]

This very matter of marriage-based federal benefits was at stake in Golinski v. Office of Personnel Management.[242] Karen Golinski, a federal employee, attempted to apply for health benefits for her same-sex spouse, Amy Cunninghis.[243] An Employment Dispute Resolution Plan judge ruled

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232. Tara Siegel Bernard & Ron Lieber, The High Price of Being a Gay Couple: A Look at How the Column was Reported, N.Y. TIMES, Oct. 2, 2009, http://documents.nytimes.com/how-a-column-on-expenses-for-gay-couples-wasreported#p=1[hereinafter Bernard & Leiber, A Look at How the Column was Reported].
233. Bernard & Lieber, *supra* note 223 at A1.
234. *See id*.
235. *Id*.
236. *Id*.
237. *Id*.
238. *Id*.
239. *Id*.
240. *Id*.
241. Bernard & Lieber, *A Look at How the Column was Reported*, *supra* note 232.
242. *See* Transcript of Record at 5–7, Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2011) (No. C-10-00257-JSW).
243. In re Golinski, 587 F.3d 901, 902 (9th Cir. 2009).

DOMA did not preclude Cunninghis from qualifying as a "spouse" under the Federal Employee Health Benefit Act (FEHBA) and ordered the Office of Personnel Management (OPM) to include Cunninghis on Golinski's health plan.[244] OPM argued this ruling would mean FEHBA violated DOMA and refused to comply with the order.[245] The judge issued a final order enabling Golinski to enforce his prior order by filing the case in federal court, where the initial health-benefits case transformed into a debate on the constitutionality of DOMA.[246]

The Golinski case marks the first time the Department of Justice (DOJ) has appeared before a court to argue its new stance that DOMA should be required to undergo "heightened scrutiny," placing sexual orientation in the same protected categories as race, religion, and gender.[247] On February 22, 2012, the United States District Court for the Northern District of California ruled section three of DOMA did not survive heightened scrutiny, thus violating Golinski's equal protection rights.[248] The court noted section three may even fail rational basis review, the lowest scrutiny standard, but did not go as far as saying DOMA was created to discriminate against same-sex couples.[249] Golinski thus has the potential to become a landmark case in DOMA's demise, as House Minority Leader Nancy Pelosi noted, "The court made it clear that there is no legitimate federal interest in denying married gay and lesbian couples the legal security, rights, and responsibilities guaranteed to all married couples under state law."[250]

B. Canada's "Gay Gain"

Given the United States government's second-class treatment of same-sex couples, relocating to a nearby country that has abolished these inequalities seems like an obvious solution. Canada has become a global safe haven for bi-national same-sex couples seeking to remain together and legitimize their union. Switching citizenships is not as simple as learning to love hockey or maple syrup, however. Canada's immigration "points" system overwhelmingly favors "highly educated and relatively affluent 'economic' applicants" who are "skilled, under age 40, and

244. *Id*.
245. *Id*.
246. *Id*. at 963–64.
247. *See* Brief for Defendants in Opposition to Motions to Dismiss at 3–23, Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2011) (No. C-10-00257-JSW).
248. *See* Chris Geidner, Breaking: DOMA's Federal Definition of Marriage Unconstitutional, Judge Rules in Golinski Case, METRO WEEKLY (Feb. 22, 2012, 5:35 PM), http://www.metroweekly.com/ poliglot/2012/02/domas-federal-definition-of-ma.html.
249. *Id*.
250. *Id*.

English-speaking."[251] Thus, the United States is losing its young LGBT professionals to its northern neighbor, making the United States' gay drain Canada's gay gain. Even those same-sex couples fortunate enough to make it through Canada's highly selective immigration process, however, face additional obstacles in their new home.

1. Professionals Relocating to Canada

Though Canadian immigration officials do not presently keep records of the number of same-sex couples applying for immigration, the Canadian Consulate in Los Angeles has received a significantly higher number of inquiries in the last few years.[252] Canada's immigration procedure, however, implements a "points" system that clearly places a greater emphasis on younger, highly educated applicants who possess the necessary work experience and economic resources to easily transition into the Canadian workforce and culture. Points are awarded to applicants through six categories: (1) Education (up to 25 points); (2) Official Language (English and French) Proficiency (up to 24 points); (3) Work Experience (up to 21 points); (4) Age (up to 10 points); (5) Pre-Arranged Employment in Canada (up to 10 points); and (6) Adaptability (up to 10 points).[253] An applicant needs over four years of work experience in a designated field in order to receive the maximum of twenty-one points in the third category.[254] For the age requirement, an applicant between twenty-one and forty-nine years old receives ten points, but an applicant outside this age range loses two points for every year he is under twenty-one or over forty-nine years of age.[255] Currently, applicants must score a minimum of sixty-seven out of a possible one hundred points in order to merely qualify for immigration into Canada.[256] In addition to these requirements, applicants must prove they can financially support both themselves and their family members once they arrive in Canada without applying for public assistance.[257] Thus, applicants must be relatively well-

251. Kobayashi & Ray, *supra* note 212.
252. Marech, *supra* note 219.
253. Christopher Worswick, Immigrants' Declining Earnings: Reasons and Remedies, C.D. HOWE INST. BACKGROUNDER, Apr. 2004, at 3.
254. *See id*. at 7–8.
255. *Id*. at 7.
256. Kobayashi & Ray, *supra* note 212.
257. Sponsoring Your Family, *supra* note 209 ("As a sponsor, you must make sure your spouse or relative does not need to seek financial assistance from the government.").

off, young, and well-educated in order to even be considered for Canadian citizenship. Even then, citizenship is not guaranteed.

2. Costs of Relocating to Canada

Completing the immigration application procedure is just the first step in a same-sex couple's journey to Canada. Not only are there the financial costs associated with moving from one country to another, there are also significant economic, occupational, and social difficulties that arise once a couple settles in Canada. Though Canada may share the same language as the United States, its culture is different. Same-sex couples without any ties to Canada often experience difficulties with adjusting to their new country, with many couples hesitating to call it "home."

a. Financial Costs

Even if a same-sex couple's financial situation qualifies them to immigrate to Canada, the myriad of costs incurred by an international move is substantial. Besides the normal costs associated with a move (buying and selling homes, transporting and storing possessions), couples moving to another country must pay for medical exams, immigration attorneys, insurance premiums, withdrawal penalties for retirement accounts, and the travel expenses incurred during the search for new homes and jobs. For Morgan and Sierra, these costs totaled around $34,000 over a period of four years, which depleted their savings and placed them further in debt.[258]

Although Morgan and Sierra are both employed, it will take them much longer to work their way out of debt because Canadian immigrants earn lower wages than native-born Canadians, even though immigrants are more highly educated.[259] According to data from the 2006 Canadian Census, only 15.8% of native-born Canadians possessed a Bachelor's degree or higher, whereas 25.4% of Canadian immigrants held degrees.[260] Native-born Canadians, however, still earned an average total income of $64,239, which is 25% more than Canadian immigrants, who earned an average total income of $48,488.[261] Worse, because Canadian immigrants generally do not have the social and business contacts necessary to connect them

258. MJB, The Costs of Marriage Inequality and Leaving the US, MY LIFE IN EXILE DE FACTO (Sept. 13, 2008, 9:31 AM), http://exiledefacto.blogspot.com/2008/09/costs-of-marriage-ineqality-and-leaving.html.

259. *See* Martin Prosperity Inst., Recent Immigrants are the Most Educated and Yet Underemployed in the Canadian Labour Force, UNIV. OF TORONTO'S ROTMAN SCH. OF MGMT., Mar. 12, 2009, at 1.

260. *Id.*

261. *Id.*

to employment opportunities, they are unable to access the "hidden job market" available to Canadian natives.[262] Thus, immigrants who come to Canada without pre-arranged employment find themselves in a hopeless situation.

Morgan and Sierra's situation is not uncommon. Though Canada's immigration procedure prefers highly educated applicants, their economic requirements are measured at the time of the application. Thus, many immigrants who have not found high-paying employment, or any employment at all, may find themselves in the low-income group within the first year of their arrival. By the early 2000s, immigrants admitted into Canada under the "skilled worker" category were more likely to enter the low-income bracket (sometimes even becoming "chronic low-income") than those who immigrated via the "family class" category.[263]

b. Occupational Costs

Even if same-sex couples are fortunate enough to obtain employment in Canada, they are not yet out of the low-income danger zone. Because of the way Canada evaluates the quality and level of each immigrant's education and work experience, these credentials may be adjudged differently than they were in the United States. In fact, the immigration evaluation procedure, foreign credential recognition procedure, and the procedure to qualify and find work in a designated field are completely separate processes.[264] If an immigrant works in a regulated field, the qualifications are determined by a territorial or provincial agency.[265] If the occupation's field is unregulated, foreign credential recognition is up to the discretion of the employer.[266]

Jack Layton, the former Canadian New Democratic Party Leader, called the inconsistent foreign credential recognition procedures "one of the

262. *See* Help Wanted, CTV NEWS (Mar. 19, 2004), http://www.ctv.ca/ CTVNews /WFive/20040319/wfive_careers_040320/.

263. Garnett Picot, Feng Hou & Simon Coulombe, Chronic Low Income and Low-Income Dynamics among Recent Immigrants, STATISTICS CAN., Jan. 2007, at 4.

264. Qualifying to Immigrate to Canada Does Not Mean That Your Qualifications Will be Recognized, FOREIGN CREDENTIALS REFERRAL OFFICE, http://www. credentials. gc.ca/recognition/why/immigration.asp (last modified May 31, 2011).

265. How to Get Your Credentials Recognized, FOREIGN CREDENTIALS REFERRAL OFFICE, http://www.credentials.gc.ca/recognition/how.asp (last modified May 31, 2011).

266. *Id.*

great tragedies we see in all of our immigrant communities."[267] Layton highlighted the discrepancy between the standards used in evaluating education and work experience during the immigration evaluation and the weight Canadian employers actually give these credentials, proclaiming, "The tragic fact is that we lure people to come here, we give them points for experience, and their professional credentials . . . . They tell their families that Canada wants us as doctors, accountants, engineers, experts . . . [T]hey come here and the doors are simply closed."[268] The unemployment rate among recent immigrants to Canada is so high that it will take over a decade for their unemployment level to drop low enough to match the rate of the Canadian-born population.[269]

Even if immigrants can afford to spend the time and money required to have their credentials assessed and recognized, finding employment equivalent to the job they left behind is hardly guaranteed.[270] Obviously, if the immigrants cannot transfer their credentials completely, if at all, they must start again from the bottom. In 2007, an estimated 4,000 foreign-trained doctors in Ontario alone were unable to practice because they could not get a Canadian license.[271] One recent arrival to Canada was eligible to immigrate based on her master's degree in Pharmacy.[272] After nine months of searching for an occupation in the pharmaceutical field, she was relegated to taking a job as a grocery store cashier.[273] Another same-sex couple had to leave their well-paying jobs behind after their arrival in Canada. One husband was previously a medical technologist, but is now working at a local office supply store.[274] The other husband was able to find an occupation in his field, but had to trade a secure career for a temporary job that paid $25,000 less per year with poor benefits.[275]

Sometimes, however, over-qualification may be a death knell to a recent immigrant's employment prospects. The writer of "Two Moms to Canada," a blog detailing a same-sex couple's expatriation, was a tenured

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267. David Akin, NDP Calls for Recognition of Foreign Credentials, CTV NEWS (Feb. 18, 2007), http://www.ctv.ca/CTVNews/CTVNewsAt11/20070218/layton_credentials_070218/.

268. *Id.*

269. CLARENCE LOCHHEAD, THE TRANSITION PENALTY: UNEMPLOYMENT AMONG RECENT IMMIGRANTS TO CANADA 2–3 (2003), *available at* http://www.clbc.ca/files/reports/fitting_in/transition_penalty_e-clbc.pdf.

270. *Id.*

271. Akin, *supra* note 267.

272. *Id.*

273. *Id.*

274. Bernard, *supra* note 229.

275. *Id.*

professor in the United States.[276] This achievement, however, prevented her from obtaining any academic employment in Canada, as she had too much seniority.[277] Because of the limited job opportunities available that offered the level of pay required to support her family, the blogger was forced to leave her wife and child behind and seek employment back in the United States.[278] She is now working as a professor in Minnesota and only sees her family on academic holidays.[279]

c. Social Costs

Along with financial and occupational costs, there are also the immeasurable, and at times more excruciating, social costs associated with an international move. "I'm losing my home," one same-sex partner laments. "I'm losing the community I love, the neighbors I love."[280] The transition is much more impactful than mere homesickness, as immigrants are often confronted by acute cultural differences at every turn, even in the nuances of everyday life. When Morgan first moved to Canada from the friendly Midwest, it took her a while to adjust to her new job and community. Morgan was accustomed to easily striking up long-winded, personal conversations with strangers, but found this attitude was incredibly off-putting to her new countrymen.[281] At first, she felt that "Canadians did not care to get to know [her]."[282] Eventually, Morgan realized that Midwesterners and Canadians simply have different social boundaries. She now reconciles their seemingly hostile behavior as "just acting Canadian," and constantly has to remind herself of that.[283] This realization, however, does not make the social isolation any easier.

A resettled same-sex couple's social isolation can be two-fold, as old friends fade away in the face of struggle, and new friends are hard to find. One same-sex partner forlornly revealed that the difficulties of immigration and citizenship "become the center of your life; you're

276. MSEH, Extreme Commuting, TWO MOMS TO CAN. (Aug. 21, 2011, 7:38 AM), http://2moms2canada.blogspot.com.
277. *Id.*
278. *Id.*
279. *Id.*
280. Marech, *supra* note 219.
281. MJB, Difficulties Making Friends, MY LIFE IN EXILE DE FACTO (Dec. 23, 2008, 4:09 PM), http://exiledefacto.blogspot.com/2008/12/difficulties-making-friends.html.
282. *Id.*
283. *Id.*

not the fun friend anymore . . . . I'd say that probably most of my friends don't call anymore."[284] The emotional and physical distance from a social support network is painful, especially around the holidays. In a blog entry entitled, "Holidays and Loneliness," Morgan lamented, "As [Canadian] Thanksgiving approaches, I overhear all the conversations around me about family gatherings, preparations for big meals, talk of turkey. Then I remember with a jolt that Sierra and I will not be spending time with any family as we don't have any within a five-hour drive. That is the point where I start to feel sad and lonely."[285] To make matters worse, Morgan did not have enough vacation days accumulated to take time off from work to visit her own family and friends during American Thanksgiving.[286] For some, the social costs of immigration extend beyond friends and family, as a same-sex partner considering a Canadian move explains, "A sense of place and belonging is what's being sacrificed, . . . for thinking of myself as an American . . . a sense of pride in my own country."[287]

V. "YES, WE CAN" SUPPORT MARRIAGE BETWEEN A (WO)MAN AND A (WO)MAN: PENDING SOLUTIONS TO DOMA DEPORTATION UNDER THE OBAMA ADMINISTRATION

Since its passage in 1996, DOMA opponents have actively lobbied for Congress to repeal it. Various bills have been introduced and re-introduced to eliminate, or at least mitigate, DOMA's overarching detrimental effect on LGBT citizens. The Uniting American Families Act proposes to amend the INA by granting "permanent partners" the same immigration rights as formal spouses.[288] The Respect for Marriage Act would overturn DOMA altogether and federally recognize same-sex marriages.[289] Both of these bills are still in the early stages of Congressional approval.[290]

On May 9, 2012, President Barack Obama became the first sitting president to publicly state his support for same-sex marriage.[291] Obama's

284. FAMILY, UNVALUED, *supra* note 23, at 107.
285. MJB, Holidays and Loneliness, MY LIFE IN EXILE DE FACTO (Oct. 11, 2010, 11:57 PM), http://exiledefacto.blogspot.com/2010/10/holidays-and-loneliness.html.
286. *Id*.
287. Marech, *supra* note 219.
288. Uniting American Families Act of 2011, H.R. 1537, 112th Cong. (2011) [hereinafter UAFA].
289. Respect for Marriage Act, H.R. 1116, 112th Cong. (2011) [hereinafter RFMA].
290. *See* UAFA (referred to Subcommittee on Immigration Policy and Enforcement on June 1, 2011); *see also* RFMA (referred to Subcommittee on the Constitution on June 1, 2011).
291. Carol E. Lee, *Obama Backs Gay Marriage*, WALL ST. J., May 10, 2012, at A1.

announcement came a mere day after North Carolina's residents overwhelmingly voted to amend their state constitution to ban same-sex marriage, thus becoming the thirtieth state in the nation to do so.[292] The timing of Obama's declaration created a storm of controversy, with many believing his remarks were politically motivated and made as a bid for re-election.[293] Addressing these concerns, Obama emphasized his statements solely reflected his personal beliefs:

> I've been going through an evolution on this issue. I've always been adamant that—gay and lesbian—Americans should be treated fairly and equally . . . . I've stood on the side of broader equality—for the LGBT community. And I had hesitated on gay marriage,—in part, because I thought civil unions would be sufficient. That that was something that would give people hospital visitation rights and—other—elements that we take for granted. And—I was sensitive to the fact that—for a lot of people, you know, the—the word marriage was something that evokes very powerful traditions, religious beliefs, and so forth.
>
> At a certain point, I've just concluded that—for me personally, it is important for me to go ahead and affirm that—I think same-sex couples should be able to get married. Now—I have to tell you that part of my hesitation on this has also been I didn't want to nationalize the issue. There's a tendency when I weigh in to think [that] suddenly [the issue] becomes political and it becomes polarized.[294]

Thus, President Obama made it clear that his personal opinion should have no effect on the federal recognition of same-sex marriage. Unfortunately, Obama's actions regarding DOMA have had as much of an impact as his words have, amounting to only a token effect at most.

A. Deprioritizing DOMA Deportations

In early 2011, the Obama administration made an announcement that appeared to signal the end of DOMA's draconian reign. On February 23, 2011, Attorney General Eric Holder wrote a letter announcing that the DOJ, with President Obama's approval, had determined that sexual orientation classifications should be subjected to heightened scrutiny when challenged by claims of equal protection violations.[295] Accordingly,

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292. Campbell Robertson, *Ban on Gay Marriage Passes in North Carolina*, N.Y. TIMES, May 9, 2012, at A15.

293. Peter Baker & Dalia Sussman, *New Poll Finds Voters Dubious of Obama's Announcement on Same-Sex Marriage*, N.Y. TIMES, May 15, 2012, at A17.

294. Transcript: Robin Roberts ABC News Interview with President Obama, ABC NEWS (May 9, 2012), *available at* http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president obama/story?id=16316043&singlePage=true#.T8cC5NX2aSo.

295. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker of the U.S. House of Representatives (Feb. 23, 2011) (on file with author), *available at* http://

the DOJ held section three of DOMA unconstitutional and stopped defending it in court.[296]

Four months after Attorney General Holder's ground-breaking letter, the Director of the United States Immigration and Customs Enforcement (ICE) issued a memorandum that ordered "prosecutorial discretion" in "removal proceedings," otherwise known as deportations.[297] The memorandum included a non-exhaustive list of factors that immigration officials should consider in deciding which deportations to pursue.[298] These factors included "the person's ties and contributions to the community, including family relationships," and "whether the person has a U.S. citizen or permanent resident spouse, child, or parent."[299] An ICE attorney therefore has the "prosecutorial discretion to dismiss, suspend, or close" a deportation case after considering the person's "totality of circumstances."[300]

The ICE memorandum does not explicitly refer to same-sex marriage, but given the DOJ's prior determination of DOMA as unconstitutional, many have speculated (and some have unofficially confirmed) that unlawfully present same-sex partners qualify as "low-priority cases," so their deportations will not be enforced.[301] On its face, this is encouraging

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www.justice.gov/opa/pr/2011/February/11-ag-223.html ("After careful consideration, including review of a recommendation from me, the President . . . has made the determination that Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. . . . [T]he President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.").

296. *Id.* ("Furthermore, pursuant to the President's instructions, and upon further

pending DOMA litigation of the President's and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.").

297. Memorandum from John Morton, Dir. of U.S. Immigration and Customs Enforcement, to U.S. Immigration and Customs Enforcement Pers. (June 17, 2011) (on file with author), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf ("Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise 'prosecutorial discretion' if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual.").

298. *Id.*

299. *Id.*

300. *Id.*

301. Carolyn Lochhead, Fed. Deportation Decision May Benefit S.F. Gay Couple, S.F. CHRON., Aug. 20, 2011, http://www.sfgate.com/politics/article/Fed-deportation-decision-may-benefit-SF-gay-couple-2334397.php ("A spokesman for the Department of Homeland Security who requested he not be identified said gay and lesbian couples are included in the definition of family.").

news to same-sex bi-national couples. Unfortunately, neither the DOJ nor ICE has established clear guidelines delineating how immigration officials should implement the incredibly discretionary policy. The American Immigration Lawyers Association (AILA) held an audio teleconference titled "Late-Breaking Seminar: Major Developments in Challenging DOMA" to discuss the ICE memorandum's effect on immigration law and to answer members' questions about their same-sex clients' situations.[302] To the disappointment of many members during the question-and-answer session, the consensus among the moderators was nothing more than "wait and see."[303]

In the absence of clear guidelines for the implementation of the ICE memorandum, courts are still bound by precedent. On September 29, 2011, a district court judge dismissed Lui v. Holder, a case that challenged DOMA's constitutionality when it forbade a United States citizen from sponsoring his Indonesian husband through a family reunification visa.[304] The judge reluctantly refused to address the constitutional claims against section three of DOMA, stating:

> "While Plaintiffs and Defendants point out the alleged deficiencies in the reasoning in Adams [v. Howerton], this Court is not in a position to decline to follow Adams or critique its reasoning simply because Plaintiffs and Defendants believe that Adams is poorly reasoned. . . . The Court feels bound by Ninth Circuit precedent, and believes those precedents are sufficiently clear."[305]

Thus, though the DOJ itself refuses to defend DOMA and uphold Adams because of "changing legal and social understandings," the Ninth Circuit is still forced to abide by the Adams definition of marriage absent any federal decisions to the contrary.[306]

B. The Uniting American Families Act

The Uniting American Families Act (UAFA), formerly known as the Permanent Partners Immigration Act, would amend section 101(a) of the

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302. *Rose Saxe, Victoria Neilson & Beth Werlin Discuss Major Developments in Challenging DOMA*, AM. IMMIGRATION LAWYERS ASS'N (Sept. 14, 2011), http://eo2.commpartners.com/users/aila/register.php?id=7321.

303. *Id.*

304. In Chambers Order on Defendants' Partial Motion to Dismiss and Intervenor's Motion to Dismiss, Lui v. Holder (C.D. Cal. Sept. 28, 2011) (No. 2:11-CV-01267-SVW-JCG).

305. *Id.*

306. *Id.*

INA to include "permanent partnership" as an alternative familial basis for permanent residency.[307] A "permanent partner" is defined as an individual eighteen years of age or older who:

> (A) is in a committed, intimate relationship with another individual 18 years of age or older in which both parties intend a lifelong commitment;
> (B) is financially interdependent with that other individual;
> (C) is not married to or in a permanent partnership with anyone other than that other individual;
> (D) is unable to contract with that other individual a marriage cognizable under this Act; and
> (E) is not a first, second, or third degree blood relation of that other individual.[308]

The UAFA has been repeatedly submitted to Congress since the turn of the century.[309] Most recently, it was introduced on April 14, 2011, and is currently being referred to both the House and Senate Judiciary Committees.[310]

The UAFA is a safe and practical solution that would end the separation of bi-national same-sex couples without completely repealing DOMA. However, many members of Congress, in addition to President Obama, are reluctant to pass UAFA, which they believe may be vulnerable to marriage fraud, because it would be difficult for immigration officials to ascertain whether same-sex couples have an established relationship.[311] Furthermore, religious opponents believe UAFA will "erode the institution of marriage and family."[312] This argument holds little merit, however, as UAFA will not federally recognize same-sex marriages, but will only add "permanent partners" as an alternative to marriage. Thus, one criticism of UAFA is that it does not go far enough in initiating social change. After living sixteen years under the oppression of DOMA, the United States cannot afford to lose more of its LGBT community to the gay drain. Even if a foreign partner is able to obtain permanent residency through "permanent partnership," same-sex couples will still be unable to obtain federal marriage benefits because same-sex marriages will still be unrecognized. Thus, cost of living for same-sex couples remains much

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307. UAFA of 2011, H.R. 153, 112th Cong. (2011).
308. *Id*.
309. *See* Permanent Partners Immigration Act of 2000, H.R. 3650, 106th Cong. (2000) [hereinafter PPIA]; PPIA of 2001, H.R. 690, 107th Cong. (2001); PPIA of 2003, H.R. 832, 108th Cong. (2003); PPIA of 2005, H.R. 3006, 109th Cong. (2005); UAFA of 2007, H.R. 2221, 111th Cong. (2007); UAFA of 2009, H.R. 1024, 111th Cong. (2009).
310. *See* UAFA of 2011, H.R. 1537, 112th Cong. (2011) (referred to Subcommittee on Immigration Policy and Enforcement on June 1, 2011).
311. *See* Timothy R. Carraher, Some Suggestions for the UAFA: A Bill for Same-Sex Binational Couples, 4 NW. J. L. & SOC. POL'Y 150, 151 (2009); *see also* Julia Preston, Bill Proposes Immigration Rights for Gay Couples, N.Y. TIMES, June 3, 2009, at A19.
312. Preston, *supra* note 311.

higher than that for their heterosexual counterparts, perpetuating the socioeconomic reasons that compel same-sex expatriation.

C. The Respect for Marriage Act

Unlike the UAFA, the Respect for Marriage Act (RFMA) takes a tougher stance against DOMA. The RFMA would actively repeal DOMA and federally recognize same-sex marriage.[313] However, the RFMA would not force states to recognize same-sex marriage. Instead, the text of RFMA would amend Section 7 of Title I of the United States Code to read:

> (a) For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a State.
> (b) In this section, the term 'State' means a State, the District of Columbia, the United States.[314]

Ironically, two of the RFMA's staunchest supporters are former United States Representative Bob Barr, who was DOMA's original sponsor, and former President Bill Clinton, who signed DOMA into law in 1996.[315] Furthermore, the current Obama administration actively endorses RFMA, which was approved by the Senate Judiciary Committee on November 10, 2011 and sent to the Senate floor.[316]

RFMA would resolve the bi-national same-sex expatriation issue once and for all. Unfortunately, however, RFMA will not likely be enacted. Currently, the bill is being referred to the House Judiciary Committee,

313. *See* RFMA, H.R. 1116, 112th Cong. (2011).
314. *Id.*
315. Press Release, Ilan Kayatsky, The Respect for Marriage Act Garners Support of President Clinton and Former Rep. Bob Barr, DOMA's Original Author (Sept. 15, 2009) (on file with Rep. Jerrold Nadler), *available at* http://www.house.gov/apps/list/press/ny08_nadler/ DOMA20090915.html.
316. *See* Chris Geidner, *Breaking:* Obama Endorses DOMA Repeal Bill, Respect for Marriage Act, Spokesman Says, METRO WEEKLY (July 19, 2011), http://www.metroweekly.com/poliglot/2011/07/obama-endorses-doma-repeal-bil.html; *see also* Chris Geidner, Senate Judiciary Committee Passes DOMA Repeal Bill Out of Committee, METRO WEEKLY (Nov. 10, 2011), http://metroweekly.com/poliglot/2011/11/senatejudiciary-committee-mee.html.

and President Obama has said that he doubts it will pass there.[317] In fact, when questioned about resolving DOMA's detrimental effects on bi-national same-sex couples, President Obama left the issue of repealing DOMA up to the judiciary, declaring:

> [W]e made a decision that was a very significant decision, based on my assessment of the Constitution, that this administration would not defend DOMA in the federal courts. It's not going to be years before this issue is settled. This is going to be settled fairly soon, because right now we have cases pending in the federal courts. . . .
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> . . . .
>
> . . . I've already said that I'm also supportive of Congress repealing DOMA on its own and not waiting for the courts. The likelihood of us being able to get the votes in the House of Representatives for DOMA repeal are very low at this point so, truthfully, the recourse to the courts is probably going to be the best approach.[318]

Unfortunately, it seems we will have to continue waiting for the courts. To date, only two of thirteen circuit courts have ruled against DOMA.[319] Several DOMA cases, including *Windsor*, *Golinski*, and *Gill*, have been submitted to the Supreme Court for review.[320] However, the Supreme Court has yet to grant a review, or "writ of certiorari," of any DOMA petition.[321]

D. Blesch v. Holder

On April 3, 2012, five bi-national same-sex couples sued the DOJ and the Department of Homeland Security, alleging DOMA's denial of green cards to same-sex spouses violates the Fourteenth Amendment right of equal protection, which applies to the federal government via the Fifth Amendment due process clause[322] The couples were lawfully married in South Africa and the states of Vermont, Connecticut, and New York.[323]

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317. Chris Geidner, Obama Talks Bullying, DOMA and Immigration at White House Roundtable, METRO WEEKLY (Sept. 28, 2011), http://metroweekly.com/poliglot/2011/09/obama-talks-bullying-doma-and.html.

318. *Id*.

319. Debra Cassens Weiss, *2nd Circuit Rules for Surviving Gay Spouse, Says DOMA Violates Equal Protection Clause*, ABA JOURNAL, http://www.abajournal.com/news/article/2nd_circuit_rules_for_surviving_gay_spouse_seeking_estate_tax_deduction_in_/ (Oct. 18, 2012).

320. *See* ACLU, *supra* note 98 (writ of certiorari petition for *Windsor*); Chris Geidner, *BREAKING: DOJ Asks Supreme Court to Take Two DOMA Cases, Maintains Law is Unconstitutional*, http://www.metroweekly.com/poliglot/2012/07/breaking-doj-asks-supreme-court-to-take-two-doma-c.html (July 3, 2012) (writ of certiorari petition for *Golinski* and *Gill*).

321. *See* ACLU, *supra* note 98.

322. *See* Complaint, Blesch v. Holder, No. 12-01578 (E.D.N.Y. Apr. 3, 2012).

323. *Id*. ¶¶ 1, 22.

Each foreign spouse had applied for an I-130 Petition for Alien Relative and was subsequently denied.[324] The complaint argues DOMA's separation of same-sex couples runs counter to the Fifth Amendment and cornerstone of the United States' immigration policy: family reunification.[325] In their Prayer for Relief, the couples asked the United States Citizenship and Immigration Services to re-adjudicate their I-130s without considering their gender or sexual orientation.[326]

If successful, this case will repeal DOMA's prohibition on same-sex immigration. Bi-national same-sex couples will finally be able to unite in the United States indefinitely. Clearly, this would be a momentous step for bi-national couples. However, they will then be similarly situated with citizen same-sex couples, who are still denied numerous federal benefits. Although Blesch is not a perfect solution, it has the potential to remove the greatest hurdle in maintaining a bi-national same-sex relationship.

VI. LET'S STAY TOGETHER: PROPOSING A SOLUTION TO THE UNITED STATES' APPROACH TOWARDS SAME-SEX IMMIGRATION

Repealing DOMA by passing RFMA would be the ideal situation for the LGBT community, especially for bi-national same-sex couples. As President Obama observed, however, Congress does not appear to be completely on board with this decision.[327] While UAFA would be an adequate solution for bi-national same-sex couples' immigration woes, it would only be a temporary fix. Once naturalized, the now mono-national same-sex couples would still have to face the socioeconomic hardships that DOMA has imposed on the LGBT community. If, however, we balance the extreme action of RFMA and non-action of UAFA, we may arrive at a solution that Congress will pass.

In order to achieve an acceptable middle ground, the INA, and all other federal statutes containing a provision for marriage, must accept "permanent partnership" as an alternative relationship. This modification would extend to federal marriage benefits, thus granting same-sex partners qualifying for permanent partnership the same government benefits as

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324. *Id*. *passim*.
325. *Id*. ¶¶ 6, 94–97.
326. Complaint: Prayers for Relief at ¶¶ 3–7, Blesch v. Holder, No. 12-1578 (E.D.N.Y. Apr. 3, 2012).
327. Geidner, Obama Talks Bullying, *supra* note 317.

their heterosexual counterparts. By using the term "permanent partnership" instead of "marriage," this solution should appease the religious opponents who place so much value on the definition of "marriage" as one man and one woman. Despite the mere difference in name, the benefits enjoyed by same-sex and heterosexual couples would be identical. In fact, "permanent partnership" may even entice heterosexual couples opposed to the institution of marriage, as they could also qualify for all of the federal benefits of a committed, permanent relationship without the label of "marriage."

This solution is not ideal for either side. Same-sex couples would have to settle for a second-tier label for a relationship that is the mirror image of marriage. Until this country can resolve the religious, moral, political, economical, and social debates on LGBT relationships, however, both sides to the issue will have to make concessions. In regard to this proposed solution, conceding a label in return for identical federal benefits that would permanently unite bi-national same-sex couples and eliminate socioeconomic reasons for expatriation is a relatively small loss. The LGBT community will undoubtedly benefit from such a solution. Opponents, in turn, will be able to preserve the sanctity of the marriage label, as same-sex marriage will remain federally unrecognized and the chances of marriage fraud will not increase. Until DOMA is finally repealed, this solution would effectively prevent the United States' gay drain, and hopefully transform it into the United States' gay gain.