ONE OF THESE THINGS IS NOT LIKE THE OTHER: AN ANALYSIS OF MARRIAGE UNDER THE IMMIGRATION AND NATIONALITY ACT

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The United States’ immigration legal framework regulates the flow of people into the country by generally requiring some type of connection between the intending immigrant and an individual or business already present in the United States.¹ One of the primary features of the Immigration and Nationality Act (INA) is that the individual or business must “petition” for the intending immigrant’s admission² into the country as a lawful permanent resident. In the case of an individual petitioner, the petition must be predicated on a pre-existing familial relationship.³ However, the INA strictly limits the universe of family members who may petition for an intending immigrant through its definition of the concepts of “family” and “spouse.”⁴ This Article will focus exclusively on the “spouse” category and the interpretation of “marriage” within the immigration legal framework, including how the term has been defined and limited throughout time, as well as the legal effects of those limitations.

Prior to the 1996 passage of the Defense of Marriage Act (DOMA), no statute within the immigration legal framework restricted – or even touched upon – the application of the term “marriage” to only opposite-sex marriages.⁵ In fact, the INA itself has never contained

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¹ Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, § 204(b), 66 Stat. 163 (1952) [hereinafter INA of 1952]; INA § 201(b)(2)(A)(i)(I) (2011); INA § 203(a) (2011). This Article will only address the issue of obtaining lawful permanent residency, or a “green card,” through a family relationship and will not touch upon the issue of nonimmigrant (i.e. temporary) immigration status, or the employment-based lawful permanent residency process. INA of 1952 § 205; 8 U.S.C. § 1151(b)(2)(A)(i), (c) (2011).

² “Admission” should not be confused with “entry” into the United States. 8 U.S.C. § 1101(a)(13)(A) (2012); see IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 55 (12th ed. 2010). A person may be admitted to permanent resident status from within the United States and that “admission” is not considered an “entry” into the United States. In re Adetiba, 20 I. & N. Dec. 506 (B.I.A. 1992); In re Connelly, 19 I. & N. Dec. 156 (B.I.A. 1984). Admission is not only entry into the United States - the person must enter and be inspected and authorized. You used to be able to enter anywhere along the border (even without inspection by an immigration officer), but the new term “admission” changed that.

³ The INA of 1952 established the current family preference system, which gives priority to the relatives of United States citizens. Monique Lee Hawthorne, Family Unity in Immigration Law: Broadening the Scope of “Family”, 11 LEWIS & CLARK L. REV. 809, 810 (2007); INA of 1952 § 205; INA § 201(b)(2)(A)(i); INA § 203(a).


a statutory definition of “marriage.”6 However, since DOMA’s application to the immigration legal framework, thousands of legally married same-sex couples have been prevented from petitioning for an alien spouse’s admission into the United States as a lawful permanent resident.7 As a greater number of states recognize and officially sanction same-sex marriage as a fundamental right, the number of couples separated by this pernicious and illogical immigration policy continues to grow.8

Despite the Obama Administration’s recent determination that Section 3 of DOMA is unconstitutional and its decision to no longer defend the law in court, the Administration has not stopped enforcing DOMA.9 In the immigration context, this has meant that United States citizen and lawful permanent resident same-sex spouses still cannot petition for a foreign national spouse’s admission into the United States as a permanent resident. This has also meant that same-sex spouses cannot apply for relief from removal10 based on their legal marriage to a United States citizen or lawful permanent resident of the same sex.11 As

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6 The INA has, however, defined “husband,” “wife” and “spouse” over time. Immigration Act of 1924 § 28(n); INA of 1952 § 101(a)(35).
9 On February 23, 2011, Attorney General Eric Holder issued a statement confirming that the Obama Administration would no longer defend the constitutionality of Section 3 of DOMA in court. Press Release, Dep’t of Justice, Statement of the Att’y Gen. on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at http://www.justice.gov/opa/pr/2011/February/11-ag-222.html. Attorney General Holder explained that President Obama determined that Section 3 of DOMA, as applied to same-sex couples legally married under state law, violates the equal protection portion of the Fifth Amendment. Letter from Eric H. Holder, Jr., Att’y Gen., Dep’t of Justice, to The Honorable John A. Boehner, Speaker of the House (Feb. 23, 2011), available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. “Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch.” Id.
10 On April 1, 1997, Congress created new “removal” procedures for people who had previously been subject to “deportation” or “exclusion” hearings. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(c), 110 Stat. 3009 (1996) [hereinafter IIRIRA]. Several categories of relief from removal are only available to individuals with a “qualifying relative,” such as a United States citizen or lawful permanent resident spouse, child or parent. See 8 U.S.C. § 1229B(b)(1), (b)(2), (b)(6) (2012).
11 There has been some minor progress in this area, with the U.S. Department of Homeland Security’s recently issued prosecutorial discretion memorandum, which directs Immigration and Customs Enforcement (“ICE”), the agency charged with detaining, prosecuting and removing aliens, to focus on the agency’s enforcement priorities and exercise broader discretion. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to Field Office Dirs., Special Agents in Charge & Chief Counsel (June 17, 2011), available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. Senior Obama Administration officials have confirmed that same-sex partners or spouses of United States citizens and lawful permanent residents are eligible for inclusion in the Memo’s reference to “family relationships.” Chris Geidner, Prosecutorial Discretion: Homeland Security announces implementation of changes that will enable some in same-sex relationships to avoid deportation, METROWEEKLY (Aug. 18, 2011), http://metroweekly.com/news/?ak=6513.
a result, thousands of individuals who would otherwise be immediately eligible to apply for lawful permanent residency live in limbo, unable to plan or begin their married lives free from fear of separation.

This Article will examine the current official application of the term “spouse” to only opposite-sex married couples, leaving same-sex marriage as the only type of marriage that may be legally entered into within the United States, but that is categorically invalid for immigration purposes. This Article will also demonstrate that the federally-imposed definition of marriage not only violates the Tenth Amendment, but cannot preempt a state law recognizing same-sex marriage for federal immigration purposes under the Supreme Court’s current Supremacy Clause jurisprudence. This Article is presented in three parts. Part I will address the development of the definitions of “marriage” and “spouse” for immigration purposes, as well as the current legal regime governing spousal immigrant visa petitions. Part II will examine the types of marriage recognized and unrecognized for purposes of an immigrant visa petition, as well as DOMA’s singular, blanket exclusion of lawfully performed same-sex marriages from consideration as a lawful marriage. Part III examines the serious Supremacy Clause and Tenth Amendment problems posed by applying DOMA to the INA, particularly in light of recent federal court decisions finding the application of DOMA unconstitutional in legal contexts other than immigration. This Article serves to both chronicle what has become DOMA’s steady march towards demise and to argue that the legal justifications for DOMA’s disposal in the immigration sphere already exist and lack only application.

I. An Overview of “Marriage” in U.S. Immigration Law

Prior to the passage of the Immigration and Nationality Act of 1952, immigration law in the United States consisted largely of a patchwork of provisions primarily focused on excluding immigrants based upon their country of origin. Not until 1952 did Congress develop the legal framework for petition-based immigration predicated upon family relationships. This policy of family reunification and preservation has become one of the

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13 Although unconsummated proxy marriages may be legally entered into within some of the United States and are not recognized under the INA, no blanket prohibition on proxy marriages exists. 8 U.S.C. § 1101(a)(35) (2012), INA of 1952, Pub. L. No. 82-414, §101(a)(35), 66 Stat. 163, 170. Moreover, the INA allows an alien party to an unconsummated marriage to cure the legal defect by sanctioning admission to the United States as a fiancée, which status may be later adjusted to that of a permanent resident. U.S. Dep’t of State, Visas 9 FAM. 40.1, n.1.3 (2008), available at http://www.state.gov/documents/organization/86920.pdf.


defining policy goals of modern immigration law,\textsuperscript{17} although the reality of the current immigration system falls far short of that goal.\textsuperscript{18} The stark difference between policy ideal and practical reality rings particularly true for same-sex families who have been excluded from participation in the family-based immigration system. This exclusion first took the form of agency policy and federal court decisions,\textsuperscript{19} because Congress did not include gendered terms in its statutory definition of “spouse,” leaving plenty of room for interpretation.\textsuperscript{20} However, the Defense of Marriage Act of 1996 explicitly codified the

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\item For example, although the INA included “psychopathic personality” – not “homosexuality” – as a ground for exclusion, Congress and agencies charged with implementing immigration laws interpreted that term to encompass “homosexuals.” S. REP. NO. 1137, at 9 (1952) (“The Public Health Service has advised that the provision for 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”). In 1965, Congress amended the INA to exclude individuals “afflicted with . . . sexual deviation” from the United States, which was defined to encompass LGBTI individuals. INA of 1965, Pub. L. No. 89-236, § 212(a)(4), 79 Stat. 911 (1965). However, it was the 9th Circuit Court of Appeals decision in Adams v. Howerton, discussed in more detail below, which barred a legally married same-sex couple from classification as a married couple under the INA. Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982). The decision was based, in part, on the existence of the provision in the INA excluding individuals suffering from “psychopathic personality” and Congress’ intent for that term to include “homosexuals,” from immigrating to the United States. Id. at 1040-41. USCIS also continued the policy of non-recognition of same-sex marriages following the Howerton decision and the passage of DOMA. Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigration Servs., to Reg’l Dir., Serv. Ctr. Dir., & Dist. Dir. (Apr. 16, 2004), available at http://www.scribd.com/doc/22576819/Memo-From-William-Yates-on-Adjudication-of-Petitions-and-Applications-Filed-by-or-on-Behalf-of-Or-Document-Requests-by-Transsexual-Individuals-April-“It is well settled that, in enacting immigration and nationality laws, Congress intended the terms ‘spouse’ and ‘marriage’ to include only the partners to a legal, monogamous marriage between one man and one woman. Moreover, the 1996 Defense of Marriage Act (DOMA), 1 U.S.C. § 7, bans any Federal recognition of same-sex marriages for immigration purposes . . .”)
\item Immigration Act of 1924, Pub. L. No. 68-139, § 28(n), 43 Stat. 153 (1924); INA of 1952 § 101(a)(35); 8 U.S.C. 1101(a)(35) (2012). In Adams v. Howerton, the Ninth Circuit decision relied heavily on statutory construction to decide that the ordinary meaning of the term “spouse” does not encompass the parties in a same-sex marriage. 673 F.2d at 1040. The Ninth Circuit could not rely on the same reasoning today, as the ordinary meaning of the term, including the dictionary sources the court cited in the decision, has grown to include same-sex married couples. Daniel Redman, Noah Webster Gives His Blessing, Dictionaries recognize
blanket exclusion of legally married same-sex couples from the immigration statutory scheme for the first time. 21

A. The Development of the Definitions of “Spouse” and “Marriage”

In reviewing the development of the definitions of “spouse” and “marriage” in the immigration legal framework through an LGBTI lens, one must consider both the definitions themselves, as well as the evolving treatment of LGBTI individuals within federal immigration law. The INA has never defined the term “marriage” and never explicitly excluded same-sex marriages from the definition of “spouse,” “husband,” or “wife.” 22 In fact, LGBTI individuals have never been explicitly mentioned in the immigration and nationality statutes. However, Congress has historically sought to exclude “homosexuals” from immigrating to the United States by implementing medical grounds of exclusion intended to encompass the term. 23 The tension between the open definition of “spouse” in the INA and the treatment of LGBTI immigrants, as a group, has led to the development of an inherently contradictory legal framework as it relates to same-sex couples.

The Immigration Act of 1924 provided the first broad definition of the terms “husband” and “wife” to exclude only “a wife or husband by reason of proxy or picture marriage.” 24 The Act did not outline any other requirements for the terms. 25 The trend continued with the first major piece of immigration legislation, the INA of 1952, which combined the piecemeal immigration framework into a single act. 26 The INA of 1952 defined “spouse,” “wife,” or “husband” only to exclude a spouse, wife, or husband “by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.” 27 These broad statutory definitions align with the longstanding acceptance within immigration law of the common

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21 DOMA, Pub. L. No. 104-199, § 3, 110 Stat. 2419, codified at 1 U.S.C. § 7 (2012). The INA provision interpreted to exclude LGBTI immigrants was scrapped in 1990. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990). Though the Ninth Circuit decision in Adams v. Howerton has not been overruled, it is highly unlikely the Court of Appeals would continue to uphold the ruling in light of recent decisions and the fact that the court’s decision was largely supported by the existence of an INA exclusion provision that was later discarded, as well as evolving attitudes and acceptance of same-sex marriage (officially and unofficially).

22 8 U.S.C. § 1101(a); INA of 1952 § 101(a); Immigration Act of 1924 § 28.

23 This is to say that the INA itself has never defined the term “spouse” to exclude same-sex married couples, though the INA did exclude “homosexuals” from immigrating to the United States until 1990. See INA of 1952 § 101(a)(35).


25 Immigration Act of 1924 § 28(n).

26 Id. at § 28(l) (defining the term “unmarried” as “an individual who at such time is not married, whether or not previously married”).


28 INA of 1952 § 101(a)(35). The INA of 1952 also defines “unmarried” as “an individual who at such time is not married, whether or not previously married.” § 101(a)(39).
law rule that a marriage is considered valid as long as the marriage was valid in the jurisdiction where it occurred. In fact, this remains the legal standard under the current regime, with limited exceptions, which this Article will address in detail.

The next major piece of immigration legislation, the Immigration and Nationality Act (INA) of 1965, did not alter the definition of “spouse,” “wife,” and “husband” contained in the INA of 1952. However, the INA of 1965 dealt a blow to LGBT immigrants when Congress codified the practice of excluding LGBT individuals from immigrating to the United States by adding “psychopathic personality” to the grounds of exclusion and interpreted that term to include “homosexuality.” With this action, Congress achieved a more explicit exclusion of LGBT individuals from immigrating to the United States. In 1982, the Ninth Circuit Court of Appeals issued its decision in *Adams v. Howerton*, providing further support for the exclusion of legally married same-sex couples from the immigration scheme. In *Adams*, the court held that immigration spousal privileges did not extend to a legally married same-sex couple, reasoning that the “ordinary meaning” of spouse did not encompass spouses of the same-sex and that the INA’s blanket exclusion of “homosexuals” clearly supported such a reading of the statute. In this one decision, the court effectively closed the INA’s previously non-gendered definition of “spouse” to same-sex couples.

Not until 1990, with the passage of the Immigration Act of 1990, did Congress officially repeal the classification of “psychopathic personality” as a ground for exclusion

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31 In re Lovo-Lara, 23 I. & N. Dec. 746, 748 (B.I.A. 2005); U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR’S FIELD MANUAL ch. 21.3(a)(2)(B), (C) (2012), available at http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0de91a0/?CH=afm&vgnextchannel=fa7e539dc4bed010VgnVCM100000ec190aRCRD&vgnextoid=fa7e539dc4bed010VgnVCM100000ec190aRCRD; but see Id. at ch. 21.3(a)(2)(I) (regarding same-sex marriages).


33 See note 20, supra.

34 Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir. 1982). In 1971, Richard Adams, a United States citizen, met Anthony Sullivan, an Australian citizen visiting the United States as a tourist, and began a relationship. Adams v. Howerton, 486 F. Supp. 1119, 1120 (C.D. Cal., 1980). On January 7, 1974, Anthony’s tourist visa expired. *Id.* On April 21, 1975, the couple legally married in Boulder, Colorado and filed a family petition to classify Anthony as Richard’s “immediate relative” spouse, which would allow Anthony to become a lawful permanent resident. *Id.* The Immigration and Nationality Service (INS) denied the petition in 1975. *Id.* The couple appealed the denial of the petition and the district court ordered summary judgment for the INS. *Adams*, 673 F.2d at 1038. On appeal, the Ninth Circuit also ruled against the couple, finding that the ordinary meaning of the term “spouse” did not encompass the parties in a same-sex marriage and that rules of statutory construction compelled a finding that the INA definition of “spouse” would not include a legally married same-sex couple. *Id.* at 1040. The Ninth Circuit also relied heavily on the existence of the provision in the INA excluding individuals with “psychopathic personality” from immigrating to the United States, and Congress’ intent that the term include “homosexuals,” to provide support for its decision in *Howerton*. *Id.* at 1040-41.

35 *Adams*, 673 F.2d 1036.

36 In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which also did not amend the INA definitions of “marriage” or “spouse” and focused primarily on addressing the issue of unlawful immigration. Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986).
and effectively remove “homosexuality” as an exclusionary ground. 37 Although Congress would no longer exclude LGBT individuals as a class from immigrating to the United States, the Act did not address the question of whether immigration privileges should be extended to legally married same-sex couples, effectively leaving the court and agency prohibitions in place. 38 However, by this time, stirrings had already begun within the United States legal landscape that legal prohibitions on same-sex marriage might be struck down either through a court decision or legislation. 39 In 1993, the Hawaii Supreme Court held that the restriction of marriage to opposite-sex couples would be presumed unconstitutional, unless the state could demonstrate a compelling state interest in the restriction. 40 With this decision, Hawaii was poised to become the first state to legalize same-sex marriage.

Instead, in response to the court’s decision, Hawaii’s legislature amended the state constitution to prohibit same-sex marriage. 41 A similar response also took shape at the federal level, with the introduction of DOMA. 42 Proponents of DOMA feared that if certain states legalized same-sex marriage, other states and the federal government would be forced to follow suit. 43 Section 3 of DOMA would define “marriage” to include “only a legal union between one man and one woman as husband and wife” and the term “spouse” to refer “only to a person of the opposite sex who is a husband or a wife.” 44 The DOMA definitions of “marriage” and “spouse” were written to apply to all Acts of Congress, as well as rulings, regulations and interpretations of the various administrative agencies. 45 On September 21, 1996, President Bill Clinton signed DOMA into law.

Since DOMA’s passage, it has been interpreted to apply to the Immigration and Nationality Act and to deny immigration privileges to legally married, bi-national, same-sex couples. 46 The negative impact on bi-national same-sex couples has only become more visible with each passing year, since the number of jurisdictions allowing same-sex marriage has rapidly increased. In 2000, the Netherlands became the first country in the world to

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38 Id.; Adams, 673 F.2d at 1038.


41 HAW. CONST. art. I, § 23.


45 Id.

46 Memorandum from William R. Yates, supra note 19 (“It is well settled that, in enacting immigration and nationality laws, Congress intended the terms “spouse” and “marriage” to include only the partners to a legal, monogamous marriage between one man and one woman. Moreover, the 1996 Defense of Marriage Act (DOMA), 1 U.S.C. § 7, bans any Federal recognition of same-sex marriages for immigration purposes . . . .) (citation omitted). Following the passage of DOMA, Congress enacted its final major piece of immigration legislation with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, which did not change, or even address, the statutory definitions of “spouse” or “marriage” in the INA. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996).

With the number of jurisdictions recognizing same-sex marriage on the rise, the tension created by DOMA’s prohibition on the recognition of same-sex marriages under federal law and the immigration statutory scheme’s longstanding acceptance of marriages as valid if they were valid in the jurisdiction in which they were performed, cannot be sustained. This tension mirrors a similar legal discourse that has played out in recent years, relating to the extent of states’ rights under the Tenth Amendment to the U.S. Constitution. Nothing within the INA itself prohibits the federal government from recognizing valid, same-sex marriages conducted within the United States for immigration purposes. Only the application of DOMA to the INA prevents legally married same-sex spouses from enjoying the benefits of an immigration scheme fundamentally based upon family connections.

B. Current Legal Regime Governing Immigrant Visa Petitions

The Immigration and Nationality Act of 1952 forms the basis of the modern immigration scheme. Although the 1952 Act continued to restrict the number of immigrants coming into the United States through quotas based on national origin, it allowed certain groups of foreign nationals to immigrate without restriction. These “nonquota immigrants” notably included the children or spouse of a United States citizen. The Act of 1952 divided relatives falling outside of this narrow group into “preference”

47 Dan Fastenberg, A Brief History of International Gay Marriage, TIME (July 22, 2010), http://www.time.com/time/world/article/0,8599,2005678,00.html.
48 Id.
49 In re Marriage Cases, 183 P.3d 384 (Cal. 2008); CAL. CONST. art. I, § 7.5.
55 Id.
57 Id.
categories, with limitations on the number of immigrant visas issued to each category.\footnote{INA of 1952 § 201(a). In the “preference” scheme, the first category was comprised of highly skilled workers, the second of parents of United States citizens over the age of twenty-one, the third of spouses and children of lawful permanent residents and the fourth of brothers, sisters, son and daughters (over the age of twenty-one) of United States citizens. } In addition to creating a “preference” system for family immigration, the Act created a system by which any individual or business\footnote{INA of 1952 §§ (a)(27), (a)(32) (distinguishing between employment-based immigrants, or those with a connection to a business, and family-based immigrants, those with a connection to a United States citizen or lawful permanent resident family member).} must file a petition with the Attorney General to classify a foreign national as an “immigrant” before the foreign national could enter the country as a lawful permanent resident.\footnote{Id. at § 204(b).}

Subsequent reforms to the INA scrapped the “nonquota immigrant” label and replaced it with the category of “immediate relative,” which includes the spouse, minor children, and parents of a United States citizen over the age of twenty-one.\footnote{INA of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).} Like a “nonquota immigrant,” an “immediate relative” does not fall subject to a numerical quota.\footnote{Id.} The Immigration Act of 1990 then redefined the family-based “preference” system by revising the relative categories.\footnote{Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 4986-87 (1990).} Under the current framework, the family-based preference system consists of four categories. The first category is reserved for sons and daughters (over the age of twenty-one) of United States citizens.\footnote{Id.} The second category is split into two subcategories. The first subcategory is comprised of spouses and minor children of permanent residents and the second subcategory of unmarried adult sons and daughters of permanent residents.\footnote{Id.} The third category is comprised of the married sons and daughters of United States citizens and the fourth category for the brothers and sisters of adult United States citizens.\footnote{Id.} In dividing the groups in such a way, Congress created a system favoring certain family relationships over others with the spouse, minor children and parents of U.S. citizens given primacy.\footnote{Id.}

The “petition” process that Congress created with the INA of 1952 remains an integral part of modern immigration law. In order to sponsor a relative for an immigrant visa, the petitioner and intending immigrant must meet a number of qualifications.\footnote{The qualifications include filing the appropriate forms and providing documentation to establish both the status of the petitioner as a U.S. citizen or permanent resident, as well as the validity of the relationship. For spousal petitions, in addition to meeting these documentary requirements, the couple must also demonstrate that the marriage is “bona fide.” For instance, a marriage is not “bona fide” if it was entered into for the purpose of evading immigration laws. In re Mckee, 17 I. & N. Dec. 332, 333 (B.I.A. 1980).} The qualifications are outlined in the INA, but are also subject to regulations and application procedures set forth by the Attorney General. 8 C.F.R. § 204.2(a)(1), (2)(b)-(g) (2011); U.S. CIVILIAN & IMMIGRATION SERVS., supra note 31, at ch. 21.3(a)(1)(B). The qualifications are also subject to regulations and application procedures set forth by the Attorney General. 8 C.F.R. § 204.2(a)(1), (2)(b)-(g).
Relative” will determine how long the intending immigrant must wait to become a lawful permanent resident. 71

A spousal petition may be initiated on behalf of an “immediate relative” spouse of a United States citizen, or the preference category spouse of a lawful permanent resident. 72 In the case of a United States citizen petitioning for an “immediate relative” spouse, the spouse is not subject to a numerical quota and does not have to wait for an immigrant visa to become available. Therefore, once the relative petition has been approved by USCIS, 73 the spouse becomes immediately eligible to apply for lawful permanent residency. 74 In the case of a lawful permanent resident petitioning for a “preference” spouse, the petition and lawful permanent residency process can take years to complete because visas in the preference category are numerically limited. 75 However, regardless of whether filing an “immediate relative” or “preference” petition, after 1996, spousal petitions must not only meet the criteria set forth in the INA and agency regulations, they must also comply with the restrictions of DOMA. 76

C. Marriage and the INA

The federal government has long applied the principle that a marriage, if valid where celebrated, is valid everywhere to the INA and immigration adjudications. 77 Indeed, the INA itself has invited a broad interpretation of its vague definition of the term “spouse” by

(“A marriage that is entered into for the primary purpose of circumventing the immigration laws, referred to as a fraudulent or sham marriage, has not been recognized as enabling an alien spouse to obtain immigration benefits.”) (citing Lutwak v. United States, 344 U.S. 604 (1953)); In re M., 8 I. & N. Dec. 118 (B.I.A. 1958).

71 INA § 203(a) (2011); 8 U.S.C. § 1153(a).

72 There are many other ways, beyond spousal petitions, that the definition of “spouse” can affect an individual’s eligibility for immigration benefits. For example, the spouse of an intending preference immigrant may be entitled to “accompany” or “follow to join” the principal intending immigrant. 8 C.F.R. § 204.21(d)(4), (g)(4) (2011). Moreover, an individual may be eligible for certain types of relief from removal if they have a qualifying “spouse.” See INA § 240A(b)(1)(D), (b)(2)(A), (b)(6)(A)(i). However, these types of scenarios will not be addressed, as they are beyond the scope of this article.

73 Immediate relatives and preference immigrants, where a visa number is available, may take advantage of a “concurrent filing” process, which for simplicity will not be discussed here. 8 C.F.R. § 103.2(a)(1) (2011); see also Concurrent Filing, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=32d80a5659083210VgnVCM100000082ca60aRCRD&vgnextchannel=32d80a5659083210VgnVCM100000082ca60aRCRD (last updated Apr. 22, 2011).

74 An intending immigrant can generally apply for lawful permanent residency through “adjustment of status” within the United States, or through an “immigrant visa” at a U.S. consulate abroad. INA § 245(a); INA § 204(a); 8 C.F.R. § 245.1(a) (2011); 22 C.F.R. § 42.21 (2011); 22 C.F.R. § 42.31, 32, 33 (2011).

75 1 U.S.C. § 7 (2012); 28 U.S.C. § 1738C (2012). Although the Ninth Circuit in Adams v. Howerton found that the ordinary meaning of the term “spouse” did not encompass the parties in a same-sex marriage and that rules of statutory construction compelled a finding that the INA definition of “spouse” would not include a legally married same-sex couple, that ruling only binds the immigration service with regard to cases arising within the Ninth Circuit. 673 F.2d 1036, 1040 (9th Cir. 1982). The ruling did not bind the immigration service with regard to any other jurisdiction, unlike DOMA, which applies to the entire United States.

76 See United States v. Sacco, 428 F.2d 264, 268 (9th Cir. 1970) (stating the general principle of recognizing the validity of a marriage if it is valid where celebrated); Cynthia M. Reed, Note, When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage, 28 COLUM. HUM. RTS. L. REV. 97, 101 (1996).
not attaching many restrictions to the term. Practically speaking, this represents a rational approach to recognizing that individuals seeking to immigrate to the United States may have married in any number of jurisdictions throughout the world, and that marriage ceremonies may not be ritually or culturally identical to typical Western ceremonies. This approach also means that marriages that may not be accepted in some jurisdictions within the United States as a violation of public policy may still be considered valid for the purpose of petitioning one’s spouse for lawful permanent residency.

However, within federal immigration law, certain exceptions to the general rule of marriage recognition may exist where there is a strong public policy objection to a marriage, where the marriage evades the laws of the couple’s domicile at the time of marriage, or where the marriage is a “sham” and entered into for the purpose of evading immigration laws. As a practical matter, the question of whether a marriage should be recognized for immigration purposes is generally decided on a case-by-case basis. As an evidentiary matter, the immigration service evaluates whether the marriage was valid in the jurisdiction it was celebrated, whether there exists some public policy or other reason to render the marriage invalid for immigration purposes, and whether the marriage is bona fide. This Article only focuses on the first two criteria as fairly broad criteria that allow for the recognition of a wide variety of marriages for immigration purposes. With the

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78 INA § 101(A)(35).
79 The BIA and federal courts generally require evidence of criminal liability in the state of domicile (or intended domicile) to find a public policy exception strong enough to invalidate an otherwise valid marriage. Titshaw, supra note 30, at 554 n.58 (2010); United States ex rel. Devine v. Rodgers, 109 F. 886, 887-88 (E.D. Pa. 1901) (refusing to recognize an uncle-niece marriage that constituted criminal incest in Pennsylvania); In re Hirabayashi, 10 I. & N. Dec. 722, 724 (B.I.A. 1964) (recognizing a Colorado marriage between first cousins residing in Illinois, since cohabitation between first cousins is no longer a crime under Illinois statutes); In re C----, 4 I. & N. Dec. 632, 633-38 (B.I.A. 1952) (recognizing the marriage of an uncle and niece in Rhode Island since Pennsylvania, their state of residence, did not view their cohabitation as criminal); In re M----, 3 I. & N. Dec. 465, 465-67 (B.I.A. 1948) (recognizing Italian marriage of uncle and niece when the couple's cohabitation "would not subject them to criminal prosecution" in Illinois). It should be noted that same-sex marriage is not criminalized in any of the United States. See generally, Lawrence v. Texas, 539 U.S. 558 (2003).
80 Reed, supra note 77, at 101-02. U.S. Citizenship and Immigration Services (“USCIS”) will refuse to recognize a marriage for immigration purposes where the couple married in a different jurisdiction for the purpose of evading the marriage laws of a state where at least one of the spouses resided prior to marriage and both intend to reside after the marriage. Id. at 114; see In re Zappia 12 I. & N. Dec. 439 (B.I.A. 1967) (holding that first cousins evaded Wisconsin law by marrying in South Carolina). It is critical to note that the immigration scheme narrowly interprets the criteria for a finding of “marriage evasion” and such findings are uncommon. Id.
81 This article does not discuss a “sham marriage” as a category of marriage, because a sham marriage touches on the issue of the bona fides of the marriage, not whether the marriage was legally entered into or valid in the jurisdiction where it was celebrated. A couple petitioning for a spouse must provide evidence of the bona fides of the marriage, regardless of what type of marriage is performed, unless the type of marriage is categorically prohibited. 8 C.F.R. § 204.2(a)(1)(ii) (2011).
82 Titshaw, supra note 30, at 550.
83 United States v. Sacco, 428 F.2d 264, 268 (9th Cir. 1970) (citing the general common law rule); In re P, 4 I. & N. Dec. 610, 613 (B.I.A. 1952) (acting Attorney General opinion) (“The status of 'wife' is necessarily dependent upon the validity of the marriage which created it.”).
84 Titshaw, supra note 30, at 550.
85 This Article does not address the question of bona fides of a marriage for immigration purposes, because whether a marriage is bona fide is a fact-driven inquiry regarding whether a couple has entered into a marriage solely for immigration purposes. 8 C.F.R. § 204.2(a)(1)(ii). This inquiry is undertaken after the first two steps have been analyzed. Titshaw, supra note 30, at 550.
exception of same-sex marriage, no federal public policy or definition of marriage exists to prevent the recognition of a marriage, legally conducted in the United States, for immigration purposes.  

1. Types of Marriage Recognized for Immigration Purposes

Within the United States, at the federal and individual state levels, there exists the legal principle that a marriage, valid where celebrated, is valid everywhere. This principle has its basis in common law and finds support in the doctrine of comity with regard to foreign marriages and judgments, and the Full Faith and Credit Clause of the United States Constitution. Once determining whether a marriage is valid where celebrated, one must undertake an analysis of whether a strong public policy objection exists in the state of intended domicile, or with the federal government, that would invalidate the marriage for immigration purposes. Consistent with these legal principles, the INA recognizes a number of types of marriage for immigration purposes that may not be legally entered into in many of the constituent states of the United States, as follows:

a. Common Law Marriage

Common law marriage is marriage based on cohabitation without an official ceremony or marriage registration. As long as the couple live, or have lived, in a jurisdiction that recognizes common law marriage and the couple meets the marriage requirement of that jurisdiction, the marriage may be recognized for immigration purposes. Currently, only ten states and the District of Columbia recognize common law marriage. No federal public policy exists to prohibit recognition of common law marriage, nor does any federal definition of marriage exclude common law marriage, nor does any state or federal law criminalize common law marriage.

b. Customary Marriage

As federal law and every state within the United States criminalize polygamous marriage, polygamous marriage cannot be legally performed within the United States. Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862); see Reynolds v. United States, 98 U.S. 145, 161-67 (1878). Also, although the INA definition of “spouse” excludes a couple in an unconsummated proxy marriage, there are two critical distinctions between the INA’s treatment of this category of marriage and same-sex marriage. First, proxy marriages are not categorically barred from recognition under the INA, unlike same-sex marriage. Second, a spouse in an unconsummated proxy marriage can enter the United States as a fiancée in order to consummate the marriage and apply for lawful permanent residency. U.S. Dep’t of State, supra note 13. Same-sex married couples do not enjoy any benefits under the INA. See infra, Section II, A for a more detailed discussion of unconsummated proxy marriages.

Sacco, 428 F.2d at 268 (citing the general common law rule); Titshaw, supra note 30, at 564-65. Titshaw, supra note 30, at 550, 565; Reed, supra note 77, at 101-02. Beyond public policy exceptions, a marriage may also be found invalid for immigration purposes where the marriage has been entered into in order to evade the laws of the couple’s domicile at the time of marriage. In re Zappia, 12 I. & N. Dec. 439 (B.I.A. 1967) (finding that first cousins’ marriage in South Carolina evaded Wisconsin law).


Customary marriage occurs when the ceremony is not performed according to a legal proceeding, but rather according to local custom. A customary marriage may be recognized for immigration purposes if the civil authorities where the marriage was performed recognize the marriage. Customary marriage is actually recognized in the United States, as relates to Native American customary marriage. No federal public policy exists to prohibit recognition of customary marriage, nor does any federal definition of marriage exclude customary marriage, nor do any state or federal laws criminalize customary marriage.

c. Proxy Marriage

Proxy marriage occurs when one of the contracting parties is not present at the ceremony. Currently, a proxy marriage may be recognized for immigration purposes as long as the marriage is later consummated. Prior to the Immigration Act of 1924, the Gentleman's Agreement of 1907 with Japan allowed Japanese men within the United States to bring a wife, including "picture brides," into the United States. However, the Immigration Act of 1924 specifically barred recognition of unconsummated proxy marriages, due largely in part to a rise of racist sentiment against the Japanese. Within the United States today, California, Colorado, Montana, and Texas permit proxy marriage, including unconsummated proxy marriage. Currently, the INA continues to prohibit recognition of unconsummated proxy marriage. However, the INA does allow an alien who entered into an unconsummated proxy marriage to be processed as a fiancée and enter the United States to consummate the marriage. After the marriage has been consummated, the alien may apply for lawful permanent residency through their spouse. Therefore, although the definition of marriage in the INA excludes unconsummated proxy marriage, it

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94 Id.
95 Robert D. Cooter & Wolfgang Fikentscher, Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II), 46 AM. J. COMP. L. 509, 537–41 (1998). According to Cooter and Fikentscher, federal courts distinguish between Native American “tribal law,” which is created by native courts and addresses substantive matters such as what constitutes a valid marriage and “Indian law,” which is created by the federal government and addresses procedure and other issues specifically legislated by the federal government. See id. at 558–61. Federal courts generally defer to substantive findings of native courts with regard to “tribal law.” Id.; see also Laymon, supra note 93.
96 Titshaw, supra note 30, at 582.
97 INA § 101(a)(35) (2011). Despite the INA’s prohibition on unconsummated proxy marriages, a party of an unconsummated proxy marriage may enjoy immigration benefits as a fiancée, if the opposite party is a U.S. citizen. U.S. Dep’t of State, supra note 13.
98 A Japanese “picture bride” is part of an arranged marriage, usually brokered by friends and relatives who provide a bride’s parents in Japan with a picture and description of a potential Japanese groom living in the United States. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 151 (2000). If the families agreed, the couple would marry by proxy in Japan and the bride would immigrate to the United States to meet and live with her husband. Id.
99 Id.
102 U.S. Dep’t of State, supra note 13.
provides an avenue for applicants to consummate the marriage and does not prohibit all
types of proxy marriage. Moreover, there is no federal definition of marriage outside of the
INA that prohibits recognition of unconsummated proxy marriages, nor does a general
federal public policy on this issue exist, nor do any state or federal laws criminalize proxy
marriages.

d. Marriage to a Minor

Although each state has a minimum age-of-consent for marriage, in analyzing whether a
marriage to a minor is valid for immigration purposes, one must look to the law of the
state or foreign country where the marriage was celebrated. In determining the validity of
a marriage to a minor for immigration purposes, adjudicators also consider whether the
marriage was void ab initio, or whether it was simply voidable upon renunciation or
occurrence of another event. Presently, almost all states within the United States allow
minors below 18 years old to marry, subject to certain conditions. No blanket federal
public policy exists to prohibit recognition of marriage to a minor, nor does any federal
definition of marriage exclude marriage to a minor.

e. Consanguineous Marriage

Consanguineous marriage is a marriage between close family members. Whether a
consanguineous marriage will be valid for immigration purposes turns on the law of the
jurisdiction where the marriage was celebrated and the couple’s state of domicile (or of
intended domicile) in the United States. After determining whether a consanguineous
marriage was valid in the jurisdiction where performed, the Board of Immigration Appeals
(BIA) has found that because “immigration laws are silent on this point; recourse must be
to state law for expressions of such policy.” No federal public policy exists to

104 For the purposes of this article, “minor” is defined as a person under the age of eighteen.
105 Titshaw, supra note 30, at 574. For immigration purposes, the focus is more on specific aspects of the
law of the place of celebration and less on the state of domicile or intended domicile. Id.
106 Titshaw, supra note 30, at 574. A marriage void ab initio is an “absolute nullity” and no action must be
taken to render it invalid. In re Agoudemos, 10 I. & N. Dec. 444, 446 (B.I.A. 1964). A voidable marriage is
generally valid for immigration purposes where no affirmative action has been taken to void the marriage. Id.;
108 Though no state or federal law criminalizes the act of marrying a minor, even if the marriage is void ab
initio or voidable, all states have varying laws that criminalize sexual activities involving minors. U.S. Dep’t
110 Titshaw, supra note 30, at 569.
looking to the law of Poland, where the relationship was celebrated, to establish a presumption of validity,
finding that Congress had deferred to the traditional state role in regulating marriage, so there was no
applicable federal definition, and then examining whether a strongly held public policy was expressed in state
law criminalizing the relationship or evasion of state marriage laws. In re Da Silva, 15 I. & N. Dec. 778
(B.I.A. 1976) (out-of-state marriage of uncle and niece does not violate New York public policy; thus,
marring is valid for immigration purposes); In re T---, 8 I. & N. Dec. 529 (same result in Pennsylvania); In re
E---, 4 I. & N. Dec. 239 (B.I.A. 1951) (even though California prohibits that category of marriage, the
marriage was valid for immigration where the state did not prosecute when the marriage was lawfully entered
prohibit recognition of consanguineous marriage, nor does any federal definition of marriage exclude consanguineous marriage.112

f. Marriage Involving Transgender Spouse

Although there remains much to be clarified in the realm of the recognition of the marriage of transgender individuals for immigration purposes, the Board of Immigration Appeals (BIA) has at least held that “heterosexual marriages” of transgender individuals are valid for immigration purposes.113 In 2005, the BIA recognized that a marriage between a transgender individual who underwent sex reassignment surgery and had been issued a new birth certificate reflecting her female sex and a foreign-born man, lawfully conducted in North Carolina, was valid for immigration purposes. Currently, 29 states and the District of Columbia have explicit statutes allowing an individual’s birth certificate to be amended or reissued.114 Furthermore, most states do not have any statute that permits or denies marriage rights to transgender individuals, but some states have either recognized or rejected marriages involving transgender individuals.115 Federal public policy does not prohibit the “heterosexual marriage” of transgender individuals, and no federal definition of marriage specifically excludes a transgender spouse from marriage.116

In analyzing the categories of marriage listed above, as long as the marriage was entered into in a jurisdiction allowing for such marriages, no strong public policy objection exists in the state of intended domicile, or with the federal government, that would invalidate the marriages for immigration purposes. The inquiry would then move beyond these general questions of marriage validity and on to an individualized inquiry of whether the marriage is bona fide. With respect to each of these forms of marriage, the immigration framework adheres to the common law rule that a marriage valid where celebrated is valid everywhere.117 In other words, the marriage is valid for immigration purposes because certain jurisdictions within the United States recognize each of the types of marriage as

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112 “Congress has not expressed any public policy excluding a spouse on the ground of consanguinity . . .” Titshaw, supra note 30, at 569; In re T---, 8 I. & N. Dec. at 531 (citing 37 Op. Att’y Gen. 102, 109-11 (1933)).

113 Essentially, the BIA held that marriages of transgender individuals who wed within jurisdictions that have recognized the individuals’ changed sex and recognize the marriages as heterosexuals are valid for immigration purposes. Titshaw, supra note 30, at 577; In re Lovo-Lara, 23 I. & N. Dec. 746 (B.I.A. 2005). The BIA holding does not specifically require that a transgender individual undergo sex reassignment surgery, but only requires that the individual’s changed sex be recognized under the law of the state where they were married. In re Lovo-Lara, 23 I. & N. Dec. at 753. This distinction is critical, because a transgender individual does not need to undergo surgical procedures in order to “transition” to another gender expression. See Transgender Issues 101, IMMIGRATIONEQUAL, http://www.immigrationequality.org/issues/law-library/trans-manual/transgender-issues-101/ (last visited May 4, 2012). However, in January of 2009, USCIS amended the Adjudicator’s Field Manual (AFM) section 21.3(j) to require a transgender individual to undergo sex reassignment surgery before a marriage may be recognized for immigration purposes, contrary to the BIA’s decision in Lovo-Lara which reaffirms the legal principle that the “validity of a marriage is determined by the law of the State where the marriage was celebrated.” In re Lovo-Lara, 23 I. & N. Dec. at 753.


115 Id.

116 In re Lovo-Lara, 23 I. & N. Dec. at 753.

117 Reed, supra note 77, at 101; United States v. Sacco, 428 F.2d 264, 268 (9th Cir. 1970) (citing the general common law rule).
valid, even though these types of marriage do not enjoy recognition in all of the United States.\footnote{118}

2. Marriages Not Recognized for Immigration Purposes

Where courts have found a marriage to violate federal or state public policy and to be invalid for immigration purposes, they have generally required evidence of criminal liability in the state of domicile (or intended domicile) to find a public policy exception strong enough to invalidate an otherwise valid marriage.\footnote{119} Courts have also invalidated otherwise valid marriages where the couple was found to have married in another jurisdiction to evade the marriage laws of their state of domicile.\footnote{120} The types of marriage discussed above are permitted in certain states, but lack widespread recognition and may even be criminally prohibited in other states.\footnote{121} Yet, in each of those cases, as long as the marriage was valid in the state in which it was celebrated and the couple lives, or intends to live, in a state that does not criminally prohibit the relationship, the marriage should be recognized for immigration purposes.

Currently, only three types of marriage generally cannot be recognized for immigration purposes, though same-sex marriage is the only type of marriage that categorically can never be recognized as a result of DOMA and its application to the INA. They are polygamous marriage, unconsummated proxy marriage and same-sex marriage.

a. Polygamous Marriage

Polygamous marriage is marriage to more than one person.\footnote{122} Although polygamous marriage is legally prohibited in all of the United States,\footnote{123} an individual in a polygamous marriage may have their first marriage recognized for immigration purposes.\footnote{124} The

\footnote{118} Reed, \textit{supra} note 77, at 101.
\footnote{119} \textit{Titshaw, supra} note 30, at 554 n.58; United States \textit{ex rel. Devine v. Rodgers}, 109 F. 886, 887-88 (E.D. Pa. 1901) (refusing to recognize an uncle-niece marriage that constituted criminal incest in Pennsylvania); \textit{In re Hirabayashi}, 10 I. & N. Dec. 722, 724 (B.I.A. 1964) (recognizing the Colorado marriage between first cousins residing in Illinois, since cohabitation between first cousins is no longer a crime under Illinois statutes); \textit{In re G---}, 6 I. & N. Dec. 337, 338-39 (B.I.A. 1954) (finding a valid Italian marriage invalid for immigration purposes because it would be both invalid and subject to criminal prosecution in Pennsylvania); \textit{In re M---}, 3 I. & N. Dec. 465, 467 (B.I.A. 1948) (finding Italian marriage of uncle and niece to be valid where the couple's cohabitation "would not subject them to criminal prosecution" in Illinois); \textit{In re E---}, 4 I. & N. Dec. 239, 239-40 (B.I.A. 1951) (recognizing a Portuguese uncle-niece marriage in reliance on a letter from the deputy attorney general of the State of California saying that the couple would not be prosecuted for violation of California law).
\footnote{120} \textit{In re Zappia}, 12 I. & N. Dec. 439 (B.I.A. 1967) (finding first cousins’ evasion of Wisconsin law through marriage in South Carolina). The details regarding marriage evasion are beyond the scope of this Article.
\footnote{123} Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862); \textit{see} Reynolds v. United States, 98 U.S. 145, 161-67 (1878); \textit{Titshaw, supra} note 30, at 585; \textit{cf. In re Ali}, No. A88-129-989, 2007 WL 4707517 (B.I.A. 2007) (finding that a polygamous marriage “cannot be recognized as a valid marriage for immigration purposes because there is a strong federal public policy against polygamy in this United States”).
\footnote{124} Polygamy in Senegal, 93 Op. INS Gen. Couns. 98 (1993). In 1993, the INS General Counsel's Office found that a Senegalese man with two wives in Senegal was not excludable from the United States, since the INA excludes only "immigrant[s] coming to the United States to practice polygamy," "if his application for
prohibition of recognition of polygamous marriage for immigration purposes fundamentally differs from the prohibition of recognition of same-sex marriages. First, same-sex marriage is not criminalized by any of the United States or the federal government. Second, same-sex marriage may be legally entered into in six states within the United States and District of Columbia, and the number is growing. As polygamous marriage is criminalized throughout the United States, including by the federal government, and may not legally be entered into in any state within the United States, this category of marriage fundamentally differs from same-sex marriage. Moreover, even though polygamous marriage is criminalized by the federal government and may not be legally entered into within the United States, the immigration service will still recognize a polygamist’s first marriage for immigration purposes. Conversely, same-sex marriage is never recognized for immigration purposes, due to DOMA.

b. Unconsummated Proxy Marriage

Unconsummated proxy marriage is a marriage between two people where at least one of the parties is not present at the ceremony and the couple has not consummated the marriage. The INA specifically excludes couples with an unconsummated proxy marriage from recognition as a “spouse” through the definition of that term. However, the INA’s non-recognition of this form of marriage also fundamentally differs from the categorical prohibition on recognition of same-sex marriage. First, neither the INA nor federal law includes a blanket prohibition on the entire category of proxy marriage from recognition for immigration purposes. Consummated proxy marriages are recognized for immigration purposes and where a couple married by proxy has not consummated the marriage, the alien spouse may be admitted to the United States as a fiancé to cure the legal defect. In the case of same-sex marriage, under no circumstances can the marriage confer immigration benefits on the alien spouse.

c. Same-Sex Marriage

The only type of marriage legally permitted in a number of states within the United States, but that will not be recognized as valid for immigration purposes, is same-sex marriage. If the agencies and courts charged with implementing and interpreting immigration law were to follow the longstanding tests for marriage validity described above, a lawfully performed same-sex marriage would undoubtedly meet the criterion for recognition for immigration purposes. Currently, six states and the District of Columbia allow same-sex marriage, and no states criminalize same-sex marriage or same-sex

admission also requested the admission of one of his wives. The presumption is that any other wife or wives would remain outside of the United States.” Id.

128 A party to an unconsummated proxy marriage may enjoy immigration benefits as a fiancé, if the opposite party is a U.S. citizen. U.S. Dep’t of State, supra note 13.
129 Id.
131 Although unconsummated proxy marriage is not recognized under the INA, the INA provides a mechanism for spouses in an unconsummated proxy marriage to cure the legal defect and consummate the marriage. U.S. Dep’t of State, supra note 13.
relationships. Therefore, as long as a same-sex, bi-national couple were married in a jurisdiction that allowed same-sex marriage and lived, or intended to live, in any of the United States, that marriage should be considered valid for immigration purposes.

However, with the passage of DOMA in 1996, Congress codified discrimination against same-sex couples within federal law and upended the federal government’s longstanding recognition of marriage as a matter for the states to define. Section 3 of DOMA, which defines “marriage” and “spouse” for all federal purposes, specifically prohibits recognition of same-sex marriage, regardless of whether the marriage was valid in the jurisdiction in which it was performed. In the immigration legal framework, DOMA operates to prohibit recognition of a same-sex marriage for immigration purposes, even where the marriage was performed in one of the United States where same-sex marriage is legal and even if the marriage does not violate the public policy of that state.

Ostensibly, DOMA sought to reinforce the power of states to refuse to recognize same-sex marriages legally performed in other states and was presented, in part, as a states’ rights measure. Yet, the practical, legal effect of DOMA has been to upend the federal government’s prior deferral to states on questions of validity of marriage and imbue the federal government with the sole authority to impose its definition of “marriage” and “spouse” on individual states. Nowhere in the current federal legal framework has Congress so clearly inserted itself in an area of authority reserved to the states, in order to specifically target a group of people for exclusion from the protection of federal law based upon a flawed policy that violates numerous provisions of the United States Constitution.

Still, nowhere are the massive contradictions wrought by DOMA more apparent than when DOMA is applied to the INA. The term “marriage” is not defined in the INA and is currently only defined by DOMA. For purposes of immigration law, Congress has always looked to state law to determine whether a marriage is valid, unless a rare, federal public policy exception applied to invalidate the marriage. Until the 1996 passage of DOMA, federal public policy only expressly prohibited polygamous marriage and unconsummated proxy marriage from recognition for immigration purposes. However, these public policy prohibitions critically differ from DOMA’s prohibition in a couple of key respects. First, not only do all states within the United States and the federal government criminalize polygamous marriage, someone in a polygamous marriage may still have their first marriage recognized for immigration purposes. Second, a proxy marriage may be recognized for

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134 Titshaw, supra note 30, at 593 n.259.


138 Titshaw, supra note 30, at n.186, 187.


immigration purposes as long as it is consummated.\textsuperscript{141} Moreover, the alien spouse of an individual in an unconsummated proxy marriage may be issued a fiancée visa to come to the United States to consummate the marriage and apply for lawful permanent residency.\textsuperscript{142} The INA does not contain a blanket prohibition from recognition for immigration purposes on all proxy marriages or all spouses in a polygamous marriage.

Due to DOMA, the federal immigration framework only places a blanket prohibition from recognition for immigration purposes on same-sex marriage.\textsuperscript{143} Although a number of states within the United States recognize and accept same-sex marriage as valid\textsuperscript{144} and no state criminalizes same-sex marriage, DOMA renders the prior approach to evaluating marriage validity inoperable, while impermissibly intruding on a state’s right to define “marriage.” The resulting dichotomy in the immigration statutory framework sets the stage for an absurd case of the exception swallowing the rule. For example, a U.S. citizen who marries his 16 year-old cousin in Poland, but who lives in Arizona, might petition for his wife to enter the United States as a lawful permanent resident because such an arrangement, currently not legally sanctioned in Arizona, is not criminally prohibited in Arizona.\textsuperscript{145} On the other hand, a U.S. citizen who lives in Iowa and marries her bi-national, same-sex fiancée in Iowa, where same-sex marriage is legally sanctioned, may not petition for her wife to enter the United States as a lawful permanent resident.\textsuperscript{146}

Due in part to the growing number of states that allow same-sex marriage, the absurdity of legally married bi-national couples’ exclusion from federal immigration benefits has become increasingly visible. In February of 2011, the Obama Administration concluded that Section 3 of DOMA is unconstitutional and instructed the Justice Department to stop defending the policy in court.\textsuperscript{147} Despite this development, the Administration announced that it would continue to enforce DOMA.\textsuperscript{148} At the time of this writing, the effects of this change in policy on immigration law have been somewhat confusing and varied. Many foreign national spouses in removal proceedings have been removed,\textsuperscript{149} others have been allowed to stay until the DOMA issue is resolved,\textsuperscript{150} and USCIS has denied some applications for permanent residency by same-sex married couples and held others in limbo. However, there are a number of arguments that could be used before the administrative

\begin{thebibliography}{9}
\bibitem{141}8 U.S.C. § 1101(a)(35).
\bibitem{142}U.S. Dep’t of State, \textit{supra} note 13.
\bibitem{143}1 U.S.C. § 7 (2012).
\bibitem{145}ARIZ. REV. STAT. § 25-102 (2011).
\bibitem{146}1 U.S.C. § 7.
\bibitem{148}“Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch.” Id.
\bibitem{150}Matters have been further complicated in light of a recent memo issued by the Department of Homeland Security on prosecutorial discretion, which notes that a foreign national’s marriage to a same-sex spouse is a factor to consider in deciding whether to grant a stay of removal, administratively close or terminate a case in removal proceedings, or take some other discretionary action. Morton, \textit{supra} note 11; Preston, \textit{supra} note 8.
\end{thebibliography}
agencies charged with interpreting and implementing the immigration laws to challenge
DOMA’s displacement of state marriage definitions in the immigration context, which could
have a more immediate effect than a Congressional or a federal court decision overturning
DOMA. These arguments are discussed below.

II. DOMA Disrupts the Long-Established Immigration Scheme Relating to Marriage
and Cannot Continue to be Enforced

The United States Supreme Court and other federal courts have long relied upon state
law to “define personal and family relationships,”¹⁵¹ which are regarded as primarily matters
of state concern.¹⁵² This reasoning finds support not only in common law, which dictates
that a marriage, if valid where celebrated, should be recognized as valid throughout the
United States,¹⁵³ but also in the Tenth Amendment to the Constitution, which recognizes that
any power not delegated to the federal government under the Constitution is expressly
reserved “to the States respectively, or to the people.”¹⁵⁴ The immigration laws of the
United States have also historically embraced this reasoning when defining “marriage” and
“spouse.”¹⁵⁵ However, Congress’ passage of DOMA disrupts this long-standing legal
scheme, by inserting a general, federal definition of marriage where Congress lacks the
power to do so and where the Supremacy Clause jurisprudence of the Supreme Court
requires the federal court to cast aside DOMA’s definition of “spouse” and “marriage” and
recognize competing state constructions of the terms for immigration purposes.

A. Congress Cannot Pre-Empt State Authority to Define Marriage

One of the most basic principles underlying our federalist system is that “[e]very law
enacted by Congress must be based on one or more of its powers enumerated in the
Constitution.”¹⁵⁶ Therefore, the federal government can “exercise only the powers granted
to it.”¹⁵⁷ The Constitution specifically withholds from Congress “a plenary police power
that would authorize enactment of every type of legislation.”¹⁵⁸ The Tenth Amendment to
the Constitution further recognizes that “[t]he powers not delegated to the United States by
the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or
to the people.”¹⁵⁹ In determining the boundaries of federal and state power, the Supreme
Court looks to either whether an Act of Congress is authorized by Article I of the
Constitution under the Commerce or Spending Clauses, or whether an Act of Congress
intrudes upon state sovereignty preserved by the Tenth Amendment.¹⁶⁰

¹⁵¹ Kahn v. INS, 36 F.3d 1412, 1416 (9th Cir. 1994) (Kozinski, J., dissenting).
¹⁵² Titshaw, supra note 30, at 556 n.65.
¹⁵³ Reed, supra note 77.
¹⁵⁴ U.S. CONST. amend. X.
¹⁵⁵ Titshaw, supra note 30, at 566. The BIA has continued to affirm this principle. See also In re Lovo-Lara, 23 I. & N. Dec. 746 (B.I.A. 2005).
¹⁵⁸ Id. at 566; see also U.S. CONST. art. I, § 8.
¹⁵⁹ United States Dep’t of Health & Human Servs., 698 F. Supp. 2d at 246 (citing U.S. CONST. amend. X).
Whether an Act of Congress is authorized under either the Commerce or Spending Clauses of Article I of the Constitution requires an analysis of whether the Act contains “express jurisdictional elements” connecting the Act to an enumerated power. DOMA does not contain such jurisdictional elements, therefore, this article will analyze the Act under both the Commerce and Spending Clauses. First, the Commerce Clause endows Congress with the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” However, Congress’ power is limited and:

[Must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would eventually obliterate the distinction between what is national and what is local and create a completely centralized government.]

The Supreme Court has therefore “identified three broad categories of activity that Congress may regulate under its commerce power.” Congress may regulate the “use of the channels of interstate commerce,” the instrumentalities of interstate commerce or persons or things in interstate commerce, and activities that substantially affect interstate commerce. DOMA’s definition of marriage clearly does not involve either of the first two categories of activity, as the definition does not implicate channels or instrumentalities of commerce, nor persons in interstate commerce. Therefore, the analysis moves to the third category to determine whether a federal definition of marriage substantially affects interstate commerce. According to the Supreme Court’s Commerce Clause jurisprudence, DOMA does not.

To determine whether an activity substantially affects interstate commerce, the Court looks to the nature of the activity regulated by the federal statute in question, whether any jurisdictional element establishes the federal cause of action, and whether the statute is supported by findings of the activity’s impact upon interstate commerce. DOMA fails each of these tests. First, by its own terms DOMA regulates a noncriminal, noncommercial activity and does not purport to be part of a larger regulation of economic activity. Same-sex marriage is not, in any sense, economic activity. The Supreme Court has consistently held that federal regulation of interstate activity must be “some sort of economic endeavor” to fall within Congress’ Commerce Clause authority. DOMA’s regulation of the definition of marriage lacks this basic commercial character and does not fit within the

161 United States Dep’t of Health & Human Servs., 698 F. Supp. 2d at 246 (citing Morrison, 529 U.S. at 612; Lopez, 514 U.S. at 561-62).
163 Lopez, 514 U.S. at 556–57 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)); see also Morrison, 529 U.S. 598.
164 Lopez, 514 U.S. at 558 (citing Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264, 276 – 77 (1981)).
165 Lopez, 514 U.S. at 558 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964)).
166 Id. (citing Houston, E. & W.T.R. Co. v. United States, 234 U.S. 342 (1914)); see also Southern R. Co. v. United States, 222 U.S. 20 (1911)
167 Id. at 558–59 (citing NLRB, 301 U.S. at 37).
168 Morrison, 529 U.S. at 598.
169 Lopez 514 U.S. at 561, 580; Morrison, 529 U.S. at 598.
170 Id. at 599.
171 Id. at 611.
scope of cases where the Supreme Court has affirmed federal authority under the Commerce Clause.

Second, DOMA contains no jurisdictional element to establish the federal cause of action for inventing a federal definition of marriage.\textsuperscript{172} The Supreme Court has found that the presence of such a jurisdictional element “may establish that the enactment is in pursuance of Congress’ regulation of interstate commerce.”\textsuperscript{173} In fact, Congress flatly acknowledges in the legislative history of DOMA that “[t]he determination of who may marry in the United States is uniquely a function of state law.”\textsuperscript{174} However, “unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”\textsuperscript{175} In the case of DOMA, not only did Congress fail to include express jurisdictional language that would clearly convey its purpose, DOMA contains no language to demonstrate an “explicit connection with or effect on interstate commerce.”\textsuperscript{176} DOMA fails to include this language because the statute lacks the requisite nexus to interstate commerce.

Third, neither DOMA itself, nor its legislative history contains express congressional findings regarding the effects of same-sex marriage on the federal government or the states.\textsuperscript{177} Though formal findings are not required, the existence of such findings enable the court “to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce . . . .”\textsuperscript{178} Instead of discussing specific findings regarding the effects of same-sex marriage, the legislative history is replete with recitations of Congress’ moral disapproval of “homosexuality” and desire to “defend the institution of traditional heterosexual marriage”\textsuperscript{179} and “conserve scarce resources.”\textsuperscript{180} Any argument of a link between same-sex marriage and a substantial effect on interstate commerce is attenuated, at best. Moreover, this reasoning has been squarely rejected by the Supreme Court in several recent cases because it would allow “Congress [to] regulate any activity that it found was related to the economic productivity of individual citizens . . . .”\textsuperscript{181} For all of these reasons, DOMA’s attempt to regulate the definition of marriage in the United States violates the constitutional limitations on Congress’ exercise of authority under the Commerce Clause.

Turning to an analysis under the Spending Clause, the Constitution provides that “Congress shall have Power to Lay and collect Taxes . . . . to pay Debts and provide for the common Defence and general Welfare of the United States . . . .”\textsuperscript{182} Congress’ exercise of the spending power is also limited and must satisfy five requirements: (1) it must be in pursuit of the ‘general welfare,’ (2) conditions of funding must be imposed unambiguously, so states are cognizant of the consequences of their participation, (3) conditions must not be ‘unrelated to the federal interest in particular national projects or programs’ funded under the challenged legislation, (4) the legislation must not be barred by other constitutional

\begin{footnotes}
\item[172] Id. at 612.
\item[173] Id.
\item[178] Id. at 612 (citing Lopez, 514 U.S. at 563).
\item[179] H.R. REP. NO. 104-664, at 12.
\item[180] Id. at 13, 18.
\item[181] Lopez, 514 U.S. at 564.
\item[182] U.S. CONST. art. I, § 8.
\end{footnotes}
provisions, and (5) the financial pressure created by the conditional grant of federal funds must not rise to the level of compulsion.\(^{183}\)

As an initial matter, DOMA has a far broader impact on federal law than simply directing how federal money should be spent.\(^{184}\) DOMA provides a general definition of “marriage” and “spouse,” which impacts the application of 1,138 federal statutory provisions, not all of which relate to the expenditure of public funds.\(^{185}\) Therefore, it is unclear at the outset whether Congress possessed the power under the Spending Clause to enact DOMA, simply because DOMA does not regulate spending in many of the statutory provisions that it impacts.\(^{186}\) Still, DOMA violates at least four of the five requirements outlined in *South Dakota v. Dole* and cannot sustain a finding that Congress acted pursuant to an enumerated power contained in the Spending Clause of the Constitution.

First, although Congress enjoys substantial deference to its judgment when determining whether an exercise of the spending power is in pursuit of the “general welfare,”\(^{187}\) Congress may not create a national definition of marriage in pursuit of an asserted federal interest in “defend[ing] the institution of traditional heterosexual marriage”\(^{188}\) if there is no interstate problem requiring a national solution. In cases where the Supreme Court has found the proper exercise of Congress’ authority under the Spending Clause, there existed some interstate problem that required a national solution.\(^{189}\) Same-sex marriage does not present an interstate problem, in part because it is not an interstate issue, but also because each state already has the authority to determine who may legally marry within its borders.\(^{190}\)


\(^{184}\) *See* *Massachusetts v. United States Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010).


\(^{186}\) *United States Dep’t of Health & Human Servs.*, 698 F. Supp. 2d at 247.

\(^{187}\) The United States Supreme Court recently addressed, at length, the fifth requirement of the *South Dakota v. Dole* test in Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (2011), more widely known as the “Health Care Decision.” The Court’s reasoning in the Health Care Decision adds further support to the argument that DOMA cannot be held constitutional pursuant to Congress’ powers contained in the Spending Clause. While “Congress may use its spending power to create incentives for States to act in accordance with federal policies,” “when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism.” Nat’l Fed’n of Indep. Bus. v. Sebelius, No. 11-393, slip op. at 47. Put more plainly, “the Constitution simply does not give Congress the authority to require the states to regulate.” *Id.* (quoting New York v. United States, 505 U.S. 144, 178 (1992)). In fact, when Congress acts under the Spending Clause the danger of coercion is even greater, “because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.” *Id.*, slip op. at 48. Therefore, Congress’ imposition of DOMA cannot be upheld under the Spending Clause as it constitutes an improper implementation of regulation that Congress could not impose directly under its enumerated powers.

\(^{188}\) *Dole*, 483 U.S. at 207.


\(^{190}\) *Dole*, 483 U.S. at 208 (Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution.) Helvering v. Davis, 301 U.S. 619, 641–44 (1937) (finding a “great mass of evidence” to support Congress’ decision to award old age benefits and that the national problem required a national solution authorized under the Spending Clause).

\(^{191}\) This is evidenced in the case of same-sex marriage by differences between states regarding whether to legally recognize same-sex marriage. Numerous states have passed constitutional amendments defining “marriage” to exclude marriages between two people of the same sex, while other states do legally sanction same-sex marriage.
Therefore, DOMA fails under this first requirement, because it fails to identify an interstate problem in need of a national solution. DOMA also fails under the second requirement of *South Dakota v. Dole*, with regard to the unambiguous imposition of conditions of funding. Since DOMA is a general definitional statute, it does not impose any specific conditions of funding on states. Instead, DOMA has the secondary effect of denying funding to states where the state definition of marriage conflicts with the federal definition. As a result, states are unable to “exercise their choice [to accept federal funding] knowingly, cognizant of the consequences of their participation,” because many state “marriage” definitions that allow same-sex marriages are a result of court findings that any other definition violated the state constitution. Even where a state “marriage” definition does not depend on a court finding, states are unable to exercise a knowing choice because DOMA simply states that the federal marriage definition applies to “any Act of Congress,” whether present or future. Clearly, a state cannot exercise a choice where there is no choice to be made.

DOMA similarly fails under the third requirement of *South Dakota v. Dole* regarding the fact that conditions of funding must be related to the federal interest in particular national projects or programs funded. In DOMA’s case, Congress did not express a federal interest related to a particular project or program, nor did Congress bother to engage in a meaningful review of the particular projects or programs that would be affected. The Supreme Court’s jurisprudence on this point suggests that Congress must delineate specific national projects or programs that the purported federal interest seeks to address.

DOMA also fails to satisfy the fourth requirement of *South Dakota v. Dole*, which mandates that the legislation must not be barred by other constitutional provisions. At
least one federal court has found that DOMA violates the equal protection principles of the Fifth Amendment to the Constitution and impermissibly imposes an unconstitutional condition on the receipt of federal funding.\(^{202}\) However, apart from the equal protection arguments, which will not be addressed in this article, DOMA also fails to satisfy the Tenth Amendment’s reservation of the power to regulate marriage to the states.\(^{203}\) Although the Tenth Amendment may not deprive “the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end,”\(^{204}\) the federal government must possess the authority to exercise a granted power in the first place. With regard to adopting a general definition of marriage, the “Constitution delegated no authority to the Government of the United States on [that subject].”\(^{205}\)

In the case of DOMA, those powers not delegated to the federal government under the Commerce and Spending Clauses are reserved to the states.\(^{206}\) The Tenth Amendment “is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.”\(^{207}\) Congress may only exercise its enumerated powers subject to the limitations imposed by the Constitution, including the Tenth Amendment.\(^{208}\) Whatever the extent of Congress’ disapproval of same-sex marriage, DOMA must be rooted in some constitutional power. Congress unquestionably failed in meeting this most basic requirement. Not only does DOMA find no basis in any of the powers given to Congress under the Constitution, it impermissibly intrudes into an area of law reserved to the states through centuries of jurisprudence.

The Supreme Court has long-held that “marriage is a social relation subject to the State’s police power.”\(^{209}\) In fact, the House Judiciary Committee’s Report on DOMA (“House Report”) explicitly acknowledges that “[t]he determination of who may marry in the United States is uniquely a function of state law.”\(^{210}\) To date, several states define marriage to include marriages between two, consenting adults of the same sex, thus conferring the same rights and responsibilities on all married couples under state law.\(^{211}\) Congress’ attempt to bar same-sex married couples from recognition under federal law impermissibly intrudes upon the authority of these states to regulate and define marriage


\(^{203}\) U.S. CONST. amend. X.


\(^{205}\) Haddock v. Haddock, 201 U.S. 562, 575 (1906) (“No one denies that the [S]tates, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce [and that] the Constitution delegated no authority to the Government of the United States on [that subject].”), overruled on other grounds by Williams v. North Carolina, 317 U.S. 287 (1942).

\(^{206}\) U.S. CONST. amend. X.

\(^{207}\) New York v. United States, 505 U.S. 144, 156 (1992) (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833)).

\(^{208}\) Id.

\(^{209}\) Loving v. Virginia, 388 U.S. 1, 7 (1967) (citing Maynard v. Hill, 125 U.S. 190 (1888)).


within their jurisdiction. Furthermore, with regard to federal immigration law, DOMA’s continued enforcement has rendered dysfunctional a well-established legal scheme relating to marriage recognition that impedes the objectives of our country’s family-based immigration framework, which are to keep families together, promote humanitarian values and family reunification. Therefore, not only did Congress exceed its authority in enacting DOMA, Congress created a massively dysfunctional and contradictory legal framework for determining what types of marriage may be considered valid under immigration law.

B. Challenging DOMA on Supremacy Clause Grounds

Family law is undoubtedly a matter of state law and the Supreme Court has “consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area.” Indeed, federal courts have repeatedly found federal jurisdiction lacking “over divorces that present no federal question.” However, when state family law does come into conflict with a federal statute, the Supreme Court limits its review under the Supremacy Clause to a finding of whether Congress has “positively required by direct enactment” the pre-emption of state law. In this analysis, state family law must do “major damage” to “clear and substantial” federal interests before federal law overrides the state law. Thus, “[t]he pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.”

In the context of federal immigration law, Section 3 of DOMA unequivocally fails the test for Supremacy Clause pre-emption for a number of reasons. As an initial matter, it is clear that a number of state laws providing full marriage rights for same-sex couples conflict with Section 3 of DOMA’s limitation of the terms “marriage” and “spouse” to only heterosexual couples for purposes of federal law.

212 See Boggs v. Boggs, 520 U.S. 833, 848 (1997) (“As a general matter, ‘[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’”) (citation omitted); Haddock v. Haddock, 201 U.S. 562, 575 (1906) (“No one denies that the [S]tates, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce [and that] the Constitution delegated no authority to the Government of the United States on [that subject].”), overruled on other grounds by Williams v. North Carolina, 317 U.S. 287 (1942).

213 Pinix, supra note 17, at 455, n.25, 26.


215 Id. at 581 (citing Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930)).

216 Id. (citing Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).

217 Id. (citing United States v. Yazell, 382 U.S. 341, 352 (1966)).

218 Id. at 583.

219 Congress’ plenary power to determine the immigration laws of the United States does not change this calculus. Chae Chan Ping v. United States, 130 U.S. 581 (1889) (holding that Congress’ power to control immigration is rooted in the federal government’s power over foreign policy and its national sovereignty). The federal prohibition on recognition of same-sex marriage is not found in the INA or any immigration-related statute. Instead, DOMA stands apart from the immigration framework as a statute that Congress intended to apply generally to all federal laws and regulations. 1 U.S.C. § 7 (2012); 28 U.S.C. § 1738C (2012). Nowhere in the legislative history or text of DOMA does Congress mention immigration, or its intent to regulate immigration through DOMA. Id. As DOMA does not even purport to be an exercise of Congress’ plenary power over immigration, the argument that the Plenary Power Doctrine somehow controls DOMA’s application to the immigration framework is misplaced.

Court has found that state family law did “major damage” to “clear and substantial” federal interests, the cases dealt with a conflict between federal and state rules for the allocation of a specific federal entitlement.\(^\text{221}\) In other words, the cases involved a federal law of specific application, such as a federal homestead law that conflicted with a state inheritance law, or the survivorship rules for a military life insurance program that conflicted with state community property law.\(^\text{222}\)

These cases sit in stark contrast to DOMA, which simply sets forth a general federal definition of marriage that necessarily conflicts with the law of every state providing for same-sex marriage as those laws relate to the enjoyment of any spousal benefits under federal law.\(^\text{223}\) Therefore, the argument that state same-sex marriage laws are pre-empted by DOMA logically requires Congress to have “positively required by direct enactment” the wholesale pre-emption of state law as it relates to the definition of “marriage” and “spouse.” However, DOMA cannot possibly "positively require" states to abandon their own law concerning the basic definition of “marriage” and “spouse,” because defining and regulating marriage is unquestionably a matter of state law and one of the rights reserved to the states under the Tenth Amendment to the Constitution.

The next inquiry involves whether state family law allowing same-sex marriage does “major damage” to “clear and substantial” federal interests. However, in a Supremacy Clause analysis, DOMA undoubtedly fails the “clear and substantial” federal interest test. DOMA includes broad, sweeping language that applies the Act’s general definitions to “any Act of Congress, or [ ] any ruling, regulation, or interpretation of administrative bureaus and agencies of the United States.”\(^\text{224}\) Not only is it unclear what federal interest is served by imposing a general federal definition of marriage, the federal government has not identified a substantial interest, nor does it have the power under the Tenth Amendment to the Constitution, to develop its own general definition of marriage.

First, regarding the clarity of the federal interest, DOMA purports to “defend the institution of traditional heterosexual marriage” by refusing to recognize same-sex marriage under federal law. Congress argued that by not recognizing lawful same-sex marriages, DOMA would serve to “encourag[e] responsible procreation and child rearing,”


\(^\text{222}\) McCune v. Essig, 199 U.S. 382 (1905) (federal homestead law prevailed over a daughter’s asserted inheritance); Yiatchos, 376 U.S. 306 (survivorship rules in federal savings bond and military life insurance programs override community property law); Free, 369 U.S. 663; Wissner, 338 U.S. 655. In fact, the Supreme Court noted in these decisions that the federal laws in question were “carefully targeted” to the congressional Congressional objectives. Hisquierdo, 439 U.S. at 584-85.


conserves scarce resources, and reflects Congress’ “moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.” However, Congress’ rationale was based entirely in generalities, devoid of evidence-based policy-making or even a logical connection between how federal interests would be served by simply refusing to recognize same-sex marriages. In each of the cases where the Supreme Court has found a “clear and substantial” federal interest, the Act of Congress in question protected a specific federal benefit that formed part of a national scheme in order to “guarantee a national uniformity that enhance[d] the effectiveness of congressional policy.”

One significant difference between DOMA and prior Supremacy Clause cases decided by the Supreme Court is that DOMA does not create or provide a federal benefit or right, but instead withholds benefits and rights from a discrete class of people – same-sex married couples – within the federal legal scheme. Moreover, in cases where the Supreme Court has found a “clear and substantial” federal interest, the federal programs possessed specific objectives that would be harmed if the Court were to apply the conflicting state law. As DOMA is a definitional law of general application that does not identify a clear, specific federal interest as it relates to any particular area of federal law, courts would be hard-pressed to ascertain the specific objectives DOMA seeks to accomplish as it relates to individual federal programs. For example, DOMA never mentions immigration and does not provide any “clear and substantial” federal interest that would be served particularly in the realm of immigration law. Instead, one must read that Congress seeks to “encourag[e] responsible procreation and child rearing,” conserve scarce resources, and reflect Congress’ “moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality” by depriving same-sex married couples of the right to be considered married under the immigration laws.

This type of extrapolation does not fit with the body of Supremacy Clause pre-emption law handed down by the Supreme Court. Congress’ general objectives behind DOMA run contrary to the main purpose of our country’s family-based immigration framework, which is to keep families together, promote humanitarian values and family reunification. Continuing to exclude legally married same-sex couples from the protection of our nation’s immigration laws actually prevents married couples from engaging in “responsible procreation and child rearing” by allowing a government-sanctioned policy of intentional family separation, including the separation of children from their parents. In addition,
failing to recognize same-sex marriages for immigration purposes wastes an immeasurable amount of scarce resources each year, as individuals who would otherwise be eligible for immigration benefits are placed into an expensive and time-consuming removal process that is already over capacity.\(^{237}\)

Finally, recognizing legally performed same-sex marriages under immigration law does not cause an injury to federal law that the Supremacy Clause forbids.\(^{238}\) Congress removed “homosexuality” as a ground of inadmissibility from the immigration legal scheme in 1990, ostensibly opening the way for lesbian, gay, bisexual and transgender individuals to freely immigrate to the United States.\(^{239}\) Therefore, moral disapproval of “homosexuality” no longer formed an independent moral or legal basis for exclusion under the immigration scheme. Similarly, the simple expression of Congress’ “moral disapproval of homosexuality” cannot form the basis of a “clear and substantial” federal interest, as is envisioned in the Supreme Court’s Supremacy Clause cases. The federal government has no “clear and substantial” interest in enacting its own general definition of marriage in an area of family law so clearly reserved to the states by the Tenth Amendment and centuries of case law, that complete federal pre-emption of a state’s general definition of marriage would engender an absurd result.

Any interest Congress might have in expressing its “moral disapproval of homosexuality” runs afoul of the basic goal of Supremacy Clause pre-emption that the Act of Congress in question “prevent[ ] the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy.”\(^{240}\) Instead, DOMA has the exact opposite effect in the area of immigration law. Federal courts have long dictated that a marriage, if valid where celebrated, should be recognized as valid throughout the United States.\(^{241}\) The immigration laws of the United States have also incorporated this principle of recognition when defining “marriage” and “spouse.”\(^{242}\) However, the continued application of Section 3 of DOMA to immigration law completely disrupts this long-standing and carefully crafted legal scheme. Never has there existed a national scheme to define marriage, nor a national uniformity among the states regarding who may legally marry within its borders. This reflects the founding principle that “[s]tates are not mere political subdivisions of the United States,” but sovereigns unto themselves.\(^{243}\) Therefore, in order to merit pre-emption under the Supremacy Clause, DOMA must supplant a state’s entire definition of marriage, which runs counter to centuries of case law and this country’s basic founding principles.


\(^{240}\) Titshaw, supra note 30, at 586 n.222.

\(^{241}\) Titshaw, supra note 30, at 564 n.111.

\(^{242}\) Id. at 566.

III. Conclusion

The continued application of DOMA’s definition of “marriage” and “spouse” to the Immigration and Nationality Act to exclude legally married same-sex couples disrupts long-standing legal principles, as well as the power of individual states to determine and prescribe their own laws relating to family matters. The United States Supreme Court and the agencies charged with interpreting and implementing federal immigration laws have consistently adhered to the principle that a marriage, valid where celebrated, is valid for immigration purposes. Currently, six states and the District of Columbia allow same-sex marriage, including all of the rights and responsibilities that come with it. However, the federal government’s continued application of DOMA to deny same-sex married couples’ rights under the INA has resulted in an illogical system where same-sex marriages legally performed within the United States are invalid for immigration purposes.

Now that a number of states allow for same-sex marriage, the tools to dismantle DOMA lack only in application. It is clear that Congress possesses no enumerated or implied authority to invent a general definition of marriage for any purpose, as the power to regulate family law belongs to the states under the Tenth Amendment and their police power. Furthermore, in the context of federal immigration law, DOMA cannot pre-empt state laws that allow for same-sex marriage. State family laws allowing for same-sex marriage do not do “major damage” to “clear and substantial” federal interests, in part because there is no federal interest in providing for a general definition of marriage. Therefore, DOMA’s application to the INA must be challenged on Supremacy Clause grounds, as well as on Tenth Amendment grounds, both before the agencies and the courts in order to stanch the tide of same-sex families being separated and left in administrative limbo for years on end.