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THE MEANING OF MARRIAGE: IMMIGRATION RULES AND  
THEIR IMPLICATIONS FOR SAME-SEX SPOUSES IN A  
WORLD WITHOUT DOMA

SCOTT C. TITSHAW\*

ABSTRACT

An estimated 35,000 U.S. citizens are living in our country with same-sex foreign partners, but these couples have no right to stay here together on the basis of their relationship. Many of these Americans are faced with a choice between their partners and the country they love. This is true even if the couple is legally married in one of the growing number of U.S. states and foreign countries that recognize same-sex marriage. The Defense of Marriage Act (DOMA), which defines “marriage” for all federal purposes as an exclusively heterosexual institution, stands squarely in their way.

Reform options that would help these couples stay together in the United States include a judicial determination that marriage discrimination violates the U.S. Constitution, federal legislation specifically recognizing these couples under U.S. immigration law, and the repeal or striking down of DOMA. This article focuses on the latter possibility.

Repealing or striking down DOMA would not necessarily result in a clear, uniform rule recognizing all same-sex marriages under the Immigration and Nationality Act (INA). There is, however, a wealth of guidance about how our immigration system deals with marriages that are recognized in some, but not all, U.S. states. This article maps out the legal terrain that would remain in an immigration world without DOMA.

U.S. immigration cases involving marriage validity have been decided in a piecemeal, case-specific manner. A systematic review of the case law, however, reveals that U.S. Attorneys General, the Board of Immigration Appeals (BIA), immigration officials, and most federal

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\* Assistant Professor of Law at Mercer University School of Law. I thank Linda Jellum, Mark Jones, Hal Lewis, and Linda Berger for their thoughtful comments. I thank my research assistant Charlie Crowe for helping me to locate many of the cases described in this article. I also thank the Mercer University School of Law and Dean Daisy Floyd for their confidence and the summer stipend that enabled me to write this article. Finally, I thank Vickie Neilson, the Legal Director of Immigration Equality, for her many useful comments and for her tireless work on behalf of the thousands of same-sex binational couples living the same unimaginable nightmare as Mayor Lown, Shirley Tan and their partners.

courts have consistently applied the same standards to determine marriage validity under the INA. These standards have been employed in dozens of cases involving biracial marriage, marriage between close relatives, marriage involving minors, marriage involving transgender spouses, proxy marriage, polygamy, and even same-sex marriage before DOMA.

After distilling and describing a three-step test that embodies the well-established rules for dealing with disputed categories of marriage, this article applies this analysis to same-sex spouses whose marriages are recognized by a U.S. state or a foreign country. It identifies some answers and illuminates possible approaches to a few hard questions that would remain.

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#### INTRODUCTION

*The mayor of this West Texas sheep ranching town offered a stunning explanation when he suddenly resigned: He was in love with a man who was an illegal immigrant and had gone to Mexico.*

*They had to move, he said, because there was no legal way for them to remain together in the United States.*

*"It wasn't a decision that any U.S. citizen should have to make," former Mayor J.W. Lown said in an interview from Mexico. "I left a home. I left a ranch. I left a promising political career."*

*His local prominence and his run for the border on the day he was supposed to be sworn in for a fourth term caused jaws to drop, but it also became a high-profile example of the thousands of Americans who face a similar choice — separate or move abroad — because they can't secure green cards for their partners like heterosexual spouses can.<sup>1</sup>*

An estimated 35,000 U.S. citizens are living here with foreign same-sex partners, and many are faced with the same choice as Mayor Lown because their relationships are not recognized under federal immigration law.<sup>2</sup> This is true even if the couples were legally married in one of the nine foreign countries<sup>3</sup> or seven U.S. jurisdictions that have licensed marriages for same-sex couples.<sup>4</sup>

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1. Michelle Roberts, *Gay Couples Forced to Flee U.S. over Immigration Law*, ASSOCIATED PRESS, June 10, 2009, <http://www.chron.com/disp/story.mpl/nation/6469222.html>.

2. HUMAN RIGHTS WATCH & IMMIGRATION EQUALITY, FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 7 (2006), <http://www.hrw.org/sites/default/files/reports/FamilyUnvalued.pdf> [hereinafter FAMILY, UNVALUED] (basing calculations on the 2000 census estimate of 35,820 such couples). This may be a slight overestimate, however, because the number also appears to include same-sex couples in the United States consisting of two foreign nationals. *Id.* at 173.

3. Currently the Netherlands, Belgium, Spain, Canada, South Africa, Norway, and Sweden offer full marriage equality to same-sex couples. Freedom to Marry, International Progress Toward the Freedom to Marry (Apr. 2009), [http://www.freedomtomarry.org/get\\_informed/marriage\\_basics/history/international\\_progress.php](http://www.freedomtomarry.org/get_informed/marriage_basics/history/international_progress.php). Buenos Aires, Argentina, and Mexico City also now recognize same-sex marriage within their jurisdictions. Associated Press, *Marriage License is Granted to Argentine Gay Couple*, N.Y. TIMES, Nov. 17, 2009, at A10; Anne-Marie O'Connor, *With Gay Marriage Law, Mexico City Enters Fray*, WASH. POST, Mar. 3, 2010, at A8.

4. Five states currently issue marriage licenses to same-sex couples: Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 481-82 (Conn. 2008) (recognizing the statutory ban on same-sex couples as unconstitutional and concluding "that gay persons are entitled to marry the otherwise qualified same sex partner of their choice"); *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (striking statutory language "limiting civil marriage to a man and a woman" and allowing gay and lesbian persons to marry); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (construing civil marriage as a "voluntary union of two persons as spouses" and expressly allowing same-sex couples access to "the protections, benefits, and obligations of civil marriage"); Abby Goodnough, *New Hampshire Approves Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A19 (reporting Governor Lynch's signing of New Hampshire's same-sex marriage bill); Abby Goodnough, *Rejecting Veto*,

With the exception of a provision excluding unconsummated proxy marriages,<sup>5</sup> the U.S. Immigration and Nationality Act (INA) does not define the words “marriage” and “spouse.”<sup>6</sup> In 1982, however, the Ninth Circuit Court of Appeals held in *Adams v. Howerton* that the terms referred only to heterosexual marriage.<sup>7</sup> The 1996 Defense of Marriage Act (DOMA) clarified the issue by defining “marriage” for all federal purposes as “a legal union between one man and one woman as husband and wife.”<sup>8</sup> DOMA closed the door to same-sex marriage recognition under the INA for now,<sup>9</sup> but DOMA may be repealed or struck down.

Legislation to repeal DOMA was introduced with ninety-two original co-sponsors in the House of Representatives in September,

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*Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1 (reporting that Vermont’s legislature overrode Governor Jim Douglas’s veto of that state’s same-sex marriage bill); see also National Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships (Jan. 2010), <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx> [hereinafter NCSL Marriage Report] (providing a history and list of facts about same-sex marriage in the United States).

Marriage licenses were issued to same-sex couples in California following a state supreme court decision requiring that “the designation of marriage [must be] available both to opposite-sex and same-sex couples.” *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008). Following the passage of a statewide referendum rejecting same-sex marriage in November, 2008, new licenses are no longer issued in California; however, that state does still recognize the marriages of approximately 18,000 couples who were married during the seven months when marriage licenses were issued. Maura Dolan, *Battles Brew as Gay Marriage Ban is Upheld*, L.A. TIMES, May 27, 2009, at A1. As of March 3, 2010, the District of Columbia also recognizes same-sex marriages. Keith L. Alexander & Ann. E. Marimow, *For Gays, a D.C. Day to Treasure: Joyful Couples Turn out as City Begins Licensing Same-Sex Couples*, WASH. POST, Mar. 4, 2010, at A1. In addition to the states that have issued marriage licenses to same-sex couples, Rhode Island, New York, and Maryland have expressly recognized same-sex marriages celebrated elsewhere. NCSL Marriage Report, *supra*; Aaron C. Davis & John Wagner, *Maryland to Recognize Gay Marriages from other Places*, WASH. POST, Feb. 25, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/24/AR2010022405686.html>.

On May 6, 2009, Governor John Baldacci of Maine signed into law legislation that would recognize same-sex marriage. Abby Goodnough, *Maine Governor Signs Same-Sex Marriage Bill as Opponents Plan a Veto*, N.Y. TIMES, May 7, 2009, at A21. Opponents of the marriage bill, however, obtained enough signatures to suspend its implementation until a public referendum successfully blocked implementation of the legislation on November 3, 2009. Associated Press, *Voters in Maine Will Decide Fate of Same-Sex Marriage Law*, N.Y. TIMES, Sept. 3, 2009, at A16; Abby Goodnough, *Gay Rights Rebuke May Result in a Change in Tactics*, N.Y. TIMES, Nov. 5, 2009, at A25.

5. Immigration and Nationality Act § 101(a)(35), 8 U.S.C. § 1101(a)(35) (2006).

6. Immigration and Nationality Act § 101, 8 U.S.C. § 1101.

7. 673 F.2d 1036, 1040-41 (9th Cir. 1982).

8. Defense of Marriage Act, Pub. L. No. 104-199, §§ 1-3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).

9. Courts have found that “[t]he language of DOMA is clear and unambiguous. It states that, in all acts of Congress, the term ‘marriage’ means only the legal union between one man and one woman, and the word ‘spouse’ refers only to a person of the opposite sex that is a husband or wife.” *In re Kandu*, 315 B.R. 123, 134 (Bankr. W.D. Wash. 2004).

2009.<sup>10</sup> President Obama and his administration have declared a desire to repeal DOMA.<sup>11</sup> President Clinton, who supported and signed DOMA into law in 1996, now apparently favors federal recognition of state same-sex marriages.<sup>12</sup> The American Bar Association (ABA) recently called on Congress to repeal the federal definition of “marriage” in DOMA.<sup>13</sup> Even former U.S. Congressman Bob Barr, the original sponsor of DOMA in the U.S. House of Representatives, has changed

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10. Respect for Marriage Act of 2009, H.R. 3567, 111th Cong. (1st Sess. 2009). If enacted in its present form, the Respect for Marriage Act of 2009 would greatly simplify the analysis described in this article with regard to most categories of marriage, including same-sex marriage. It would require federal recognition of any marriage valid in the state or country where celebrated as long as that marriage “could have been entered into in a State” (i.e., as long as at least one U.S. state recognizes the category of marriage). This would largely eliminate federal consideration of categorical public policy exceptions to marriage in a couple’s state of domicile. The bill would not, however, require recognition of polygamy or other marital forms that are recognized by no U.S. state. Nor would it eliminate specific, express federal public policy exceptions to the recognition of sham marriages or unconsummated proxy marriages in the immigration context. *Id.* Of course, there is no guarantee that the Respect for Marriage Act will be enacted in its present form, if it is enacted at all.

11. *See, e.g.*, Ethan Jacobs, *Obama Administration Mum on DOMA Challenge*, BAY WINDOWS, Mar. 5, 2009, at 1 (quoting an Obama administration official on the President’s support for repeal of DOMA); Chris Johnson, *White House Affirms Support for DOMA Repeal: Obama Wants Marriage Issue ‘Left to the States,’* WASH. BLADE, May 22, 2009, [http://www.washblade.com/thelatest/thelatest.cfm?blog\\_id=24630](http://www.washblade.com/thelatest/thelatest.cfm?blog_id=24630), reprinted in OUT WORDS, June 2009, at 3 (quoting a statement by the Obama administration regarding its support for the repeal of DOMA). Faced with political pressure from lesbian, gay, bisexual and transgender (LGBT) activists due to its defense of the constitutionality of DOMA, the Obama Justice Department even took the unusual step of expressly explaining in a brief defending DOMA’s constitutionality that “this Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal.” Reply Memorandum in Support of Defendant United States of America’s Motion to Dismiss at 2, *Smelt v. United States*, No. 8:09-cv-00286-DOC-MLG (C.D. Cal. Aug. 17, 2009).

President Obama’s position on the repeal of DOMA is clearly a mainstream view within the Democratic Party. All of his major rivals in the 2008 Democratic presidential primary also supported a repeal of at least the federal definition section of DOMA. Kevin Naff, Editorial, *Hillary for President*, WASH. BLADE, Dec. 21, 2007, at 18 (describing Clinton’s position in favor of repealing the federal definition section of DOMA as well as positions in favor of repealing DOMA in its entirety by presidential candidates John Edwards, Bill Richardson, and Barack Obama).

12. Michael Tracey, *Bill Clinton Backs Same-Sex Marriage*, THE NATION, July 14, 2009, <http://www.thenation.com/doc/20090720/tracey> (describing President Clinton’s “evolving” support of same-sex marriage in general and his opposition to viewing marriage as a “federal question,” presumably including the federal definition of “marriage” in DOMA); *see also* Press Release, Rep. Jerrold Nadler, The Respect for Marriage Act Garners Support of President Clinton and Former Rep. Bob Barr, DOMA’s Original Author (Sept. 15, 2009), [http://www.house.gov/apps/list/press/ny08\\_nadler/DOMA20090915.html](http://www.house.gov/apps/list/press/ny08_nadler/DOMA20090915.html) [hereinafter Press Release, Nadler] (quoting former President Clinton and former Representative Bob Barr on their support for the Respect for Marriage Act).

13. Edward Adams, *Gay Marriage Measure Passes House Without Debate* (ABA Chicago), A.B.A. J., Aug. 3, 2009, [http://www.abajournal.com/news/gay\\_marriage\\_measure\\_passes\\_house\\_without\\_debate\\_abachicago/](http://www.abajournal.com/news/gay_marriage_measure_passes_house_without_debate_abachicago/).

his mind and called for its repeal.<sup>14</sup> With so much political movement on the issue, the possibility of Congressional repeal of DOMA is now possible for the first time since its enactment in 1996.

In addition to potential legislative action, there are several prominent lawsuits currently making their way through the federal court system, any one of which could lead a court to strike down the federal definition of “marriage” in DOMA as unconstitutional.<sup>15</sup> A number

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14. Bob Barr, Op-Ed., *Wedding Blues*, L.A. TIMES, Jan. 5, 2009, at A13 (explaining his change of mind on the basis of his improved understanding of DOMA’s negative relationship to his concept of federalism); see also Press Release, Nadler, *supra* note 12 (quoting Bob Barr’s support for the Respect for Marriage Act of 2009).

15. Gill v. Office of Pers. Mgmt., No. 1:09-CV-10309 (D. Mass. filed July 31, 2009); Commonwealth v. U.S. Dep’t of Health & Human Serv., No. 1:09-CV-11156 (D. Mass. filed July 8, 2009); see also Glad.org, Commonwealth Files Suit Challenging DOMA Sec 3 (July 8, 2009), <http://www.glad.org/current/news-detail/commonwealth-files-suit-challenge-doma-sec-3/> (reporting on the suit brought by the Commonwealth of Massachusetts); Glad.org, Gill et al. v. Office of Personnel Management et al., <http://www.glad.org/work/cases/gill-vs-office-of-personnel-management/> (last visited Jan. 23, 2010) (describing the legal challenges brought by Gay and Lesbian Advocates and Defenders (GLAD)).

Neither of these cases challenges DOMA’s federal definition in the specific context of federal immigration law. Perhaps this is because of the well-recognized doctrine that Congress has near-plenary powers to regulate in the area of immigration, including the recognition or refusal to recognize sham marriages. *Fiallo v. Bell*, 430 U.S. 787, 797-99 (1977) (applying a highly deferential standard to congressional decisions regarding immigration policy to find no constitutional violation in a law discriminating in the definition of “child” for immigration purposes between the natural children of U.S. citizen mothers and U.S. citizen fathers); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“The Court without exception has sustained Congress’ plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”(quotation marks and citations omitted)); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“[T]hat the formulation of these [immigration procedural] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”); *Lutwak v. United States*, 344 U.S. 604, 611 (1954) (upholding decision of immigration authorities to deny entry based on marriage when the otherwise valid marriage was not entered into in good faith); *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953) (stating that immigration is a political power “largely immune from judicial control”); *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (“[O]ver no conceivable subject is the legislative power of Congress more complete than it is over” the admission of aliens.); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603 (1889) (upholding the Chinese Exclusion Act as applied to former U.S. residents based on the broad federal power to admit or exclude foreign nationals as “an incident of every independent nation”). This doctrine has been so widely recognized that the *Merriam-Webster Dictionary* uses the following sentence as its example for the use of the word “plenary,” meaning “complete in every respect”: “The U.S. Congress has plenary power to pass laws regulating immigration and naturalization.” *Merriam-Webster Online Dictionary* (May 21, 2009), <http://www.merriam-webster.com/cgi-bin/mwodarch.pl?May.21.2009>.

Courts apply this highly deferential standard even where immigration benefits are denied on grounds that would be constitutionally suspect, triggering heightened scrutiny, or otherwise impermissible in another context. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976); see also *Miller v. Albright*, 523 U.S. 420, 445 (1998) (finding Congress can impose immigration restrictions based on gender); *Kleindienst*, 408 U.S. at 769-70 (holding that courts will not question the discretion of Congress in immigration nor balance it against



of prominent legal scholars agree that the law is unconstitutional.<sup>16</sup>

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the First Amendment); *Boutilier v. INS*, 387 U.S. 118, 118-19 (1967) (affirming the Court of Appeals finding that Congress intended to prevent homosexuals from entering the United States); *Nazareno v. Att'y Gen. of U.S.*, 512 F.2d 936, 937 (D.C. Cir. 1975) (finding that the Board of Immigration Appeals' interpretation of a statute allowed it to exclude based on age); *Dunn v. INS*, 499 F.2d 856, 858 (9th Cir. 1974) (finding Congress has the power to exclude foreigners based on race); *Faustino v. INS*, 432 F.2d 429, 431 (2d Cir. 1970) (finding Congress may exclude based on national origin); *United States v. Esperdy*, 277 F.2d 537, 539 (2d Cir. 1960) (finding Congress may exclude based on medical condition); *Fiallo v. Levi*, 406 F. Supp. 162, 165 (E.D.N.Y. 1975) (finding Congress's plenary power in immigration has few limits, even if constitutionally suspect in other situations). Even under this highly deferential standard, however, there are some limitations on congressional and executive power in the area of immigration. See *The Chinese Exclusion Case*, 130 U.S. at 604 (explaining that the sovereign power of the federal government to control immigration is restricted by the Constitution and "considerations of public policy and justice which control, more or less, the conduct of all civilized nations"); see also Matthew S. Pinix, *The Unconstitutionality of DOMA + INA: How Immigration Law Provides a Forum for Attacking DOMA*, 18 GEO. MASON U. CIV. RTS. L.J. 455, 457-58 (2008) (arguing that DOMA is particularly vulnerable to a constitutional attack in the immigration context). Some scholars have argued that the plenary powers doctrine may be in a state of decline. See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549-50 (1990) (describing "the gradual demise of the plenary power doctrine . . . as a function of the tension in immigration cases between constitutional doctrine and statutory interpretation"); Peter Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002) (focusing on two 2001 cases that could signal a retreat from the doctrine). But see T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 366 (2002) (suggesting that *Zadvydas* did not "represent the death knell for the plenary power doctrine").

Perhaps the choice not to include immigration plaintiffs in these challenges to DOMA is a well-advised litigation strategy, given the complicated arguments that would otherwise ensue. However, it is not obvious that this plenary power doctrine of extreme deference to Congress's powers to regulate U.S. immigration applies to a general definition, like DOMA, which was not specifically aimed at immigration policy.

Powerful and talented lawyers and legislators are currently pursuing two other strategies that would achieve the recognition of same-sex relationships under U.S. immigration law. First, Bush administration Solicitor General Theodore Olson and David Boies, his adversary in *Bush v. Gore*, together filed *Perry v. Schwarzenegger*, arguing that marriage discrimination violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Complaint at 8-9, *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. 2009). If the U.S. Supreme Court should eventually agree with them on that point, then every state would have to recognize same-sex marriage. Second, the Judiciary Committee in the U.S. Senate recently held hearings regarding the Uniting American Families Act (UAFAs), which would specifically recognize qualifying same-sex permanent partners for immigration purposes, regardless of their marital status. *The Uniting Families Act: Addressing Inequality in Federal Immigration Law Before the S. Comm. on the Judiciary*, 111th Cong. (2009). UAFAs and the repeal of DOMA would each result in the recognition of many same-sex couples under U.S. immigration laws. However, they would not help all of the same couples. UAFAs would recognize some couples who could not marry in their jurisdictions, but it would not recognize some recently married couples or fiancées who would qualify under the INA if DOMA is repealed. See *infra* Part VI.A (discussing the limitations of UAFAs).

16. See, e.g., Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1075-76 (1999) (arguing that DOMA is unconstitutional because it improperly substitutes substantive federal rules for state sovereign legislative power); Larry Kramer, *Same-Sex Marriage, Conflict*

While courts have not yet responded favorably to suits challenging DOMA,<sup>17</sup> at least one federal appellate court judge has already found that the federal definition of “marriage” in DOMA is unconstitutional in the context of denying health insurance coverage to the legal same-sex spouses of federal employees.<sup>18</sup>

Of course, there is no certainty regarding when, or if, DOMA will be repealed or struck down. One goal of this article is to explain the landscape that will exist if it is. Even without DOMA, some legal same-sex marriages may not be recognized under U.S. immigration law. Fortunately, there is a wealth of guidance about how our immigration system deals with marriages that are recognized in some, but not all, states. That guidance would likely apply to same-sex marriage in a world without DOMA.

The other primary goal of this article is to illuminate the analysis that federal courts, U.S. Attorneys General, the Board of Immigration Appeals (BIA or Board) and immigration officials have consistently applied to determine the validity of marriages under the INA. This article distills and describes the consistent analytical framework recognized piecemeal in the dozens of cases involving marriages of uncles and nieces, spouses of different races, transgender spouses and other disputed marriages. This three-step analysis should assist practitioners and scholars to understand the system currently defining the legal validity under the INA of marriages not recognized in all U.S. states.

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*of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1966-67 (1997) (arguing that both the public policy exception and DOMA are incompatible with the Full Faith and Credit Clause of Article IV of the U.S. Constitution); Emma Ruby-Sachs, *Obama's Law Professor Says DOMA Unconstitutional*, HUFFINGTON POST, June 5, 2009, [http://www.huffingtonpost.com/emma-rubysachs/obamas-law-professor=says\\_b\\_211854.html](http://www.huffingtonpost.com/emma-rubysachs/obamas-law-professor=says_b_211854.html) (quoting leading constitutional scholar and Harvard Law Professor Laurence Tribe's comment that “Section 3 of DOMA is unconstitutional, at least as applied to couples like those who are currently challenging it in federal court . . . in Massachusetts. . . . I think the equality component of the Fifth Amendment's Due Process Clause forbids the federal government to deny same-sex spouses benefits identical to those it would grant to opposite-sex spouses when the spouses are ‘married’ under the law of their state.”). *But see* Lynn D. Wardle, *Revisiting DOMA*, OR. ST. B. BULL. 21, 23-25 (June 1998) (arguing that DOMA actually preserves federalism and is constitutional).

17. *See* *Smelt v. County of Orange*, 447 F.3d 673, 686 (9th Cir. 2006) (finding plaintiffs had no standing to challenge DOMA); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303-04 (M.D. Fla. 2005) (upholding DOMA as constitutional in a challenge to the interstate recognition component found in Section 2); *In re Kandau*, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004) (upholding DOMA's constitutionality in the context of a bankruptcy case).

18. In *In re Levenson*, Judge Reinhardt found DOMA unconstitutional under Fifth Amendment equal protection as applied to deny federal benefits to the same-sex spouse of a federal public defender. 560 F.3d 1145, 1151 (9th Cir. 2009). In another instance, in *In re Golinski*, Chief Judge Kozinski ordered that benefits be allowed to the same-sex spouse of a staff attorney with the Ninth Circuit Court of Appeals, but he did so on the basis of perceived ambiguity of the term “family” in the federal employee benefits law. 587 F.3d 901, 902-04 (9th Cir. 2009).

Part I of this article briefly explains the pervasive significance of the terms “marriage” and “spouse” throughout all areas of U.S. immigration law. Part II systematically maps out a three-step test embodying the rules that have been consistently applied to determine the validity of marriages for immigration purposes. Part III demonstrates in detail the precedents applying the various components of this analytical framework to specific categories of marriage that are, or were, not universally recognized, including biracial marriage, marriage between close relatives, marriage involving minors, marriage involving transgender spouses, proxy marriage, polygamy, and same-sex marriage. Part IV evaluates *Adams v. Howerton*, the sole federal appellate case addressing the validity of same-sex marriage under the INA before the enactment of DOMA.<sup>19</sup> While *Adams*’s holding seems sound, the court’s reasoning is, in part, misguided, and, in part, well-founded but legislatively superseded. In anticipation of a world without DOMA, Part V applies the analytical framework set out in Parts II and III in the context of same-sex marriage cases, to identify which same-sex marriages would be recognized if DOMA were repealed or struck down. Finally, Part VI briefly describes other current strategies that could result in recognition of same-sex relationships under the INA, including a pending federal constitutional challenge to marriage discrimination in California and the Uniting American Families Act (UAFAs); it then identifies the different potential results of each strategy.

### I. THE SIGNIFICANCE OF “MARRIAGE” UNDER THE INA

Family unity, particularly among spouses and their minor children, is the primary concern of U.S. immigration law today.<sup>20</sup> As INS Commissioner Doris Meissner testified in 1995, “[f]amily reunification has been the centerpiece of our legal immigration system for decades, and it should remain so.”<sup>21</sup>

Under current law, most U.S. immigrants are allowed to immigrate on the basis of family unity. The primary category of immigrant visa not subject to a specific numerical quota is that of “spouses” and

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19. IMMIGRATION EQUAL. & TRANSGENDER LAW CTR., IMMIGRATION LAW AND THE TRANSGENDER CLIENT § 4.1.1 (2008), <http://www.immigrationequality.org/template3.php?pageid=1135>.

20. See *Reform of Legal Immigration: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 104th Cong. 13 (1995) (INS Commissioner Doris Meissner’s testimony expressing the strong support of the Clinton Administration and the nonpartisan Jordan Commission for keeping “the reunification of U.S. citizens with their spouses and minor children as legal immigration’s top priority”).

21. *Id.*

other “immediate relatives” of U.S. citizens.<sup>22</sup> In addition, the vast majority of those subject to immigrant visa quotas also base their claims to immigrate on their recognized familial relationships.

The annual quota for the “immediate relatives” of lawful permanent residents (“green card” holders) ranges from 226,000 to 480,000 people.<sup>23</sup> This far exceeds the combined total of 140,000 immigrants allowed in the employment-based visa category<sup>24</sup> and 55,000 generally reserved under the nationality-based “diversity visa lottery” category.<sup>25</sup> Furthermore, spouses and children are allowed to immigrate as “derivatives” of the primary beneficiaries of employment and diversity based petitions, and these derivative family members are counted against the employment and diversity visa quotas.<sup>26</sup> Therefore, it is likely that the majority of immigrants in even the employment and diversity visa categories actually qualify because they are the “spouses” or children of someone else.

The recognition of a foreign national’s “marriage” under U.S. immigration law is essential to everything from eligibility for a family-based nonimmigrant or immigrant visa,<sup>27</sup> to eligibility as the dependent of another foreign national who is a visa holder,<sup>28</sup>

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22. Immigration and Nationality Act § 201(b)(2), 8 U.S.C. § 1151(b)(2) (2006). Other than spouses, the term “immediate relative” encompasses children and parents, if their U.S. citizen child is at least twenty-one years old. *Id.*

23. Immigration and Nationality Act § 201(c), 8 U.S.C. § 1151(c).

24. Immigration and Nationality Act § 201(d), 8 U.S.C. § 1151(d). Although this 140,000 visa limitation could theoretically be increased by unused family-based visa quota numbers, that is not likely to happen.

25. Immigration and Nationality Act § 201(e), 8 U.S.C. § 1151(e). This number is currently reduced by the amount of visas allotted to immigrants under the NACARA program. IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 660 (10th ed. 2006).

26. Immigration and Nationality Act § 201(f)(4), 8 U.S.C. § 1151(f)(4).

27. *See, e.g.*, Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (family-sponsored spouses and other immediate relatives admissible to the United States without regard to per country quotas); Immigration and Nationality Act § 202(a)(4), 8 U.S.C. § 1152(a)(4) (special rules setting aside seventy-five percent of second preference immigrant visas for the spouses and children of lawful permanent residents from the per country limit); Immigration and Nationality Act § 202(b)(2), 8 U.S.C. § 1152(b)(2) (allowing applicants for lawful permanent residence to “cross-charge” and be counted against the less subscribed quota of a spouse’s country of nativity); Immigration and Nationality Act § 203(a)(2), 8 U.S.C. § 1153(a)(2) (setting aside seventy-seven percent of second preference immigrant visas for the spouses and children of lawful permanent residents); Immigration and Nationality Act § 216, 8 U.S.C. § 1186a (prescribing procedures for conditional permanent residence for couples married for less than twenty-four months as well as the later removal of that conditionality).

28. *See, e.g.*, Immigration and Nationality Act § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E) (providing for nonimmigrant visa status for the spouses of nonimmigrant investors and Australians performing specialty occupations in the United States); Immigration and Nationality Act § 101(a)(15)(F)(ii), 8 U.S.C. § 1101(a)(15)(F)(ii) (providing for the spouses of student visa holders); Immigration and Nationality Act § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) (providing for the spouses of H visa holders); Immigration and Nationality Act § 101(a)(15)(J), 8 U.S.C. § 1101(a)(15)(J) (providing for nonimmigrant visa status for

immigrant,<sup>29</sup> or refugee;<sup>30</sup> to exceptions to, or eligibility for, waivers of deportability, inadmissibility, or benefit ineligibility.<sup>31</sup> For instance,

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the spouses of practical trainees and other J visa holders); Immigration and Nationality Act § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) (providing for the spouses of intra-company transferees); Immigration and Nationality Act § 101(a)(15)(R), 8 U.S.C. § 1101(a)(15)(R) (providing for nonimmigrant visa status for the spouses of religious workers).

29. *See, e.g.*, Immigration and Nationality Act § 203, 8 U.S.C. § 1153 (providing for the spouses and children of applicants for lawful permanent residence on the basis of extraordinary ability; employment as an outstanding researcher or professor, multinational manager or executive, advanced degree professional, alien of exceptional ability, professional, skilled worker, or other worker; or a million dollar U.S. investment); Immigration and Nationality Act § 216A, 8 U.S.C. § 1186b (prescribing procedures for two-year conditional permanent residence for the spouses of immigrant investors as well as the later removal of that conditionality).

30. *See, e.g.*, Immigration and Nationality Act § 207(c)(2), 8 U.S.C. § 1157(c)(2) (providing for the admission of the spouse of a recognized refugee); Immigration and Nationality Act § 208(b)(3), 8 U.S.C. § 1158(b)(3) (providing derivative status for the spouse of a foreign national granted asylum in the United States); Immigration and Nationality Act § 209(b)(3), 8 U.S.C. § 1159(b)(3) (providing for lawful permanent residence adjustment of status for the spouses of individuals granted asylum in the United States).

31. *See, e.g.*, Immigration and Nationality Act § 212(a)(3)(D)(iv), 8 U.S.C. § 1182(a)(3)(D)(iv) (providing a waiver to inadmissibility based on membership in a totalitarian party to the spouse of a U.S. citizen or lawful permanent resident); Immigration and Nationality Act § 212(a)(4)(C)(i)(i), 8 U.S.C. § 1182(a)(4)(C)(i)(i) (providing an exception to general inadmissibility as a likely public charge for the spouse of a U.S. citizen or lawful permanent resident); Immigration and Nationality Act § 212(a)(6)(E)(ii), 8 U.S.C. § 1182(a)(6)(E)(ii) (providing an exception to inadmissibility based on alien smuggling in certain circumstances where an alien “aided only the alien’s spouse, parent, son, or daughter”); Immigration and Nationality Act § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) (providing a waiver to inadmissibility due to unlawful presence in the United States to prevent extreme hardship to the U.S. citizen or lawful permanent resident spouse of the foreign national); Immigration and Nationality Act §§ 212(d)(11)-(12), 8 U.S.C. §§ 1182(d)(11)-(12) (providing for waivers to inadmissibility “for humanitarian purposes or to assure family unity,” specifically referring to assistance to a spouse); Immigration and Nationality Act § 212(g)(1)(A), 8 U.S.C. § 1182(g)(1)(A) (providing a waiver to inadmissibility of a foreign national on health related grounds for the spouse of a U.S. citizen or lawful permanent resident); Immigration and Nationality Act § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B) (providing a waiver to crime-based inadmissibility that would result in “extreme hardship” to a U.S. citizen or lawful permanent resident spouse); Immigration and Nationality Act § 212(i)(1), 8 U.S.C. § 1182(i)(1) (providing a waiver to inadmissibility based on misrepresentation where it would result in “extreme hardship” to a U.S. citizen or lawful permanent resident spouse); Immigration and Nationality Act § 237(a)(1)(E)(ii), 8 U.S.C. § 1227(a)(1)(E)(ii) (providing a special rule in favor of those eligible immigrants guilty of alien smuggling if they only assisted their own spouses, parents, sons or daughters); Immigration and Nationality Act § 237(a)(1)(E)(iii), 8 U.S.C. § 1227(a)(1)(E)(iii) (allowing a discretionary waiver for those guilty of alien smuggling if they only assisted their own spouses or other immediate relatives); Immigration and Nationality Act § 237(a)(1)(H)(i)(i), 8 U.S.C. § 1227(a)(1)(H)(i)(i) (providing for a waiver to inadmissibility based on fraud or other material misrepresentations for the spouses of U.S. citizens and lawful permanent residents); Immigration and Nationality Act § 237(a)(2)(C)(ii), 8 U.S.C. § 1227(a)(2)(C)(ii) (providing for a waiver of deportability for document fraud where the fraud was solely perpetrated for the benefit of a spouse or child); Immigration and Nationality Act § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (providing for cancellation of removal and adjustment of status in spite of inadmissibility of deportability if the foreign national has been in the United States for at least ten years, has fulfilled other preconditions, and has a U.S. citizen or lawful permanent resident spouse, parent or child who will suffer “extremely unusual

most immigrants illegally in the United States are barred from other immigration options (e.g., employment-based petitions) even if they would otherwise qualify.<sup>32</sup> For these millions of foreign nationals, marriage-based petitions are the only hope to legalize their status in the United States.

In summation, the recognition of a marriage frequently determines whether a foreign national may obtain a visa, enter the United States, legalize unlawful status, remain in the United States temporarily or permanently, become a U.S. citizen, or even be deported. The definition of marriage under the INA is critical in all of these cases.

## II. FRAMEWORK FOR ANALYZING THE VALIDITY OF A MARRIAGE UNDER THE INA

U.S. immigration cases involving marriage validity have been decided in a piecemeal, case-specific manner. A systematic review of the case law, however, reveals consistent standards that can be distilled and described as a three-step test.

Over the last century, these standards for analyzing the validity of purported “marriages” under U.S. immigration law have been remarkably stable. They have changed little from *Devine v. Rodgers*<sup>33</sup> in 1901 to U.S. Attorney General Mitchell’s 1933 Opinion regarding uncle-niece marriage<sup>34</sup> to the 2005 BIA case, *In re Lovo-Lara*, recognizing a transgender spouse’s marriage.<sup>35</sup>

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hardship” if the relative is removed); Immigration and Nationality Act § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (providing for cancellation of removal and adjustment of status for foreign nationals who have “been battered or subjected to extreme cruelty by” U.S. citizen or lawful permanent resident spouses); Immigration and Nationality Act § 245(e)(3), 8 U.S.C. § 1255(e)(3) (providing an exception to the general prohibition of spousal immigrant visa status to a foreign national who married while awaiting removal or admission in administrative or judicial proceedings in cases where the marriage is proven legitimate); Immigration and Nationality Act § 316(b), 8 U.S.C. § 1427(b) (providing an exception to some naturalization residence prerequisites where the applicant’s spouse has been working abroad for the U.S. government or abroad in certain other occupations in the U.S. national interest).

32. Immigration and Nationality Act § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i) (barred most foreign nationals who have been unlawfully present in the United States for one year or more from admission or most other immigration benefits until ten years after their departure from the United States).

33. 109 F. 886, 887-88 (E.D. Pa. 1901) (refusing to recognize a Russian marriage for immigration purposes after analyzing the validity of that marriage under the law where it was celebrated and the exception to the rule of recognition based on the public policy of Pennsylvania, which punished such uncle-niece marriages under state criminal law).

34. 37 Op. Att’y. Gen. 102, 102, 109-11 (1933) [hereinafter 1933 Attorney General Opinion] (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).

35. 23 I. & N. Dec. 746, 751 (B.I.A. 2005) (reiterating the essential importance of the

### A. *Three Steps to Marriage Recognition Under the INA*

In practice, the analysis of marriage validity under the INA can best be understood as a three-step test:

1. *Validity where celebrated*: Immigration officials and federal courts first insist that a marriage meets the procedural and substantive requirements of the state or country where the marriage was “celebrated,” whether those requirements involve state licensing, religious recognition or even no “celebration” at all in the case of “common law” marriage.<sup>36</sup> The widely recognized general rule is that a marriage will be recognized everywhere if it is valid where “celebrated.”<sup>37</sup>

2. *Categorical public policy exceptions*: The rare categorical exceptions to the general federal public policy in favor of universal recognition are based on strongly held specific public policy objections regarding who may marry whom, either in the couple’s state of domicile, or intended domicile, or under federal immigration law.<sup>38</sup>

3. *Bona fides*: Finally, even if a marriage is legally valid where celebrated and there is no strong public policy exception to recognition of that category of relationship, U.S. immigration officials look at the particular facts of a couple’s life together to determine whether their individual marriage is *bona fide* for immigration purposes.<sup>39</sup> This *bona fides* test is a practical concession to the fact that U.S. immigration benefits are so desirable that some people are willing to enter into “fraudulent” marriages merely for the purpose of obtaining those immigration benefits.<sup>40</sup> While legally valid for other purposes, these marriages are not valid under the INA.<sup>41</sup>

Foreign nationals and U.S. citizens have consistently satisfied all three steps before their relationships are recognized as “marriages” under U.S. immigration law.<sup>42</sup> Courts and the BIA have, however,

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validity of a marriage in the jurisdiction where it was celebrated, the federal recognition of marriage as “almost exclusively a State matter”).

36. See *infra* Part III.A (discussing the rule that marriages valid where celebrated are valid everywhere).

37. See *infra* Part III.A (discussing the rule that marriages valid where celebrated are valid everywhere).

38. See *infra* Part III.B-C (discussing state and federal public policy exceptions to the general rule of marriage validity).

39. See *infra* Part III.C.1 (discussing “marriage fraud”).

40. See *infra* Part III.C.1 (discussing “marriage fraud”).

41. See *infra* Part III.C.1 (discussing “marriage fraud”).

42. See *Agyeman v. INS*, 296 F.3d 871, 879 n.2 (9th Cir. 2002) (listing three similar but not identical requirements of “legal validity,” “bona fides,” and “public policy”). *But see Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982) (describing the test for “marriage validity” as a two-step test: (1) validity under state law and (2) validity under federal immigration law). While technically correct, the *Adams* test is an incomplete and misleading way to conceptualize this issue. Unlike the analysis long applied by the BIA

addressed these issues in an unsystematic, piecemeal fashion. Step one provides a strong general presumption in favor of universal recognition of marriages that are valid where celebrated. Therefore, the BIA and courts tend to discuss the other factors only when one has been raised to justify an exception to this rule of recognition.

While not identical, the analysis underlying steps one and two generally parallels the analysis of marital portability under conflict of law rules, including comity<sup>43</sup> and the Full Faith and Credit Clause of the U.S. Constitution.<sup>44</sup> Step three is a new and specific test based

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and other courts, it fails to recognize the significance of marriage validity where celebrated (whether a foreign jurisdiction or U.S. state). It blurs the distinction between states as the place of marital celebration and as the location of a couple's current domicile, and it places undue focus on the rare instances where a strong federal public policy exception has been expressed, inviting courts to create a new federal definition of "marriage" where none was intended. *See infra* Part IV (criticizing and reevaluating the reasoning in *Adams*).

43. "Comity" is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Unlike the constitutional requirement of interstate "full faith and credit," state courts are at liberty to recognize, or fail to recognize, comity within their own jurisdictions as they see fit, and without federal judicial interference. *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 (1912); *see also In re Kandu*, 315 B.R. 123, 133 (Bankr. W.D. Wash. 2004) (refusing comity to a same-sex couple married in British Columbia).

44. U.S. CONST. art. IV, § 1 provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Supreme Court decisions have, however, clarified that there is an exception to full faith and credit for acts, such as marriage, when a state has a strongly held public policy objection to its recognition. *Nevada v. Hall*, 440 U.S. 410, 422 (1979) (citing *Pac. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939)); *see also Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303-04 (M.D. Fla. 2005) (finding that a Massachusetts same-sex marriage "clearly conflicts with Florida's legitimate public policy of opposing same-sex marriage" based *inter alia* on its state mini-DOMA statute). On the other hand, there is "no roving 'public policy exception'" to final judgments of courts of law, such as divorces. *Baker v. Gen. Motors Corp.* 522 U.S. 222, 223 (1998); *see also Loughran v. Loughran*, 292 U.S. 216, 227-28 (1934) (noting that in spite of a public policy exception to the recognition of "rights acquired elsewhere," once those rights "have ripened into a judgment of a court in another State, the full faith and credit clause applies"). Article IV requires recognition that a sister state's "decree of divorce is a conclusive adjudication of everything except" jurisdiction. *Williams v. North Carolina*, 325 U.S. 226, 232 (1945). Even the issue of jurisdiction is precluded from collateral attack where it was decided in adherence with due process and with both parties present. *Sherrer v. Sherrer*, 334 U.S. 343, 349, 351-52 (1948) (distinguishing *Williams*).

DOMA actually purports to be acting on Congress's authority by prescribing the effect of state acts, records and proceedings under the Full Faith and Credit Clause of Article IV, § 1 of the U.S. Constitution. Unlike other statutes implementing the Full Faith and Credit Clause, DOMA expressly permits states to refuse recognition to the acts, records and judicial proceedings of other states to the extent they recognize same-sex marriage. *Cf.* 28 U.S.C. § 1738A (2006) (requiring interstate full faith and credit for final child custody or visitation determinations); 28 U.S.C. § 1738B (regulating the interstate recognition and modification of child support orders). This procedural preference for state substantive policy with which Congress agrees has been attacked as an inappropriate or unconstitutional exercise of legislative authority. *Cox, supra* note 16, at 1063. Of course, in light of the Supreme Court's construction of a "public policy exception" to acts under the Full



on particular concerns arising in the immigration context.<sup>45</sup> In fact, there are strong arguments that state and federal authorities could not employ this intrusive examination of marital *bona fides* in contexts other than immigration, where Congress's broad authority is arguably at its apex.<sup>46</sup>

A "sham marriage" that fails case-specific review of its *bona fides* under step three could be viewed as one category of federal public policy exception described under step two. Instead, courts have generally described sham marriages as a matter of definition: when Congress used the words "marriage" and "spouse" in the INA, Congress intended these words to mean marriages that were not entered solely for the purpose of obtaining immigration benefits.<sup>47</sup> And, in specifying the necessary proof of marriage legitimacy for conditional lawful permanent residence status, Congress expressly categorized the question of marriage fraud separately from other considerations regarding marriage validity, such as validity in the place of celebration and divorce.<sup>48</sup>

Whatever its theoretical underpinnings, the intrusive, case-specific factual examination of marital *bona fides* is such a departure from the government's role in recognizing marriage in other contexts and such a major focus of immigration practice that it deserves to be classified separately. In practice, one would not consider the *bona fides* of a specific marriage unless that marriage fits into a category that passes muster under both steps one and two. For instance, an immigration examiner would not delve into the *bona fides* of a polygamous marriage, since it is categorically excluded under step two above.

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Faith and Credit Clause, the only likely conflict between Article II of DOMA and the Full Faith and Credit Clause would be in the area of final judgments of courts of competent jurisdiction such as divorce decrees.

45. See *infra* Part III.C.1 (discussing the issue of "marriage fraud" in immigration).

46. For discussion of plenary powers in the immigration context, see *supra* note 15.

47. See *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963) ("Of course Congress may adopt a federal standard of *bona fides* for the limited purpose of denying immigration priorities to persons whose marriages do not meet that standard. That standard [is] embodied in the Congressional understanding of the terms 'marriage' or 'spouse' as those terms appear in the immigration statutes . . ."). Excluding "sham marriages," only three federal exceptions to the rule of recognition have been found: unconsummated proxy marriages, polygamy and same sex marriage. For further discussion of these exceptions, see *infra* Part III.C. Like "sham marriages," all of these federal exceptions could be viewed as both strongly held public policy objections and federal definitional limits on the word "marriage" in light of the direct or implied objections expressed in the text of the INA. For purposes of describing and employing the three step process detailed in this paper, I find it most useful to classify them with the other public policy exceptions in step two.

48. Immigration and Nationality Act § 216(d)(1)(A)(i), 8 U.S.C. § 1186a(d)(1)(A)(i) (2006).

Although it first points out how these three steps work together, this article focuses mainly on step two, delineating the contours of those exceptional situations in which U.S. immigration law refuses to recognize legally valid marriages due to strongly held public policy objections. It is important to remember throughout this discussion, however, that these situations are merely exceptions to the overriding federal public policy favoring recognition of marriages that are valid where celebrated.

*B. The Rules for Assessing Whether Public Policy Warrants an Exception to the General Rule Favoring Marriage Recognition*

For well over a century, courts and immigration authorities have recognized the general rule that marriages, valid in the country or state where celebrated, are valid everywhere.<sup>49</sup> In 1986, Congress codified that rule in the context of conditional marriage-based immigration benefits in the INA.<sup>50</sup> Neither the rule nor its recognized exceptions have changed greatly since the term “marriage” was first introduced in the INA. The exceptions depend either on the strongly held public policy of the state of domicile or on express federal public policies, such as the policies against polygamy and against unconsummated proxy marriages.<sup>51</sup>

*1. Strong Public Policy Exceptions of a Couple’s State of Domicile*

Even a marriage recognized as valid in the state or foreign country where it was celebrated may not be valid for immigration purposes if the couple’s state of domicile, or intended domicile, has expressed a strong public policy objecting to the type of marriage in question.<sup>52</sup> This exception echoes conflict of law rules, especially the

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49. *Patterson v. Gaines*, 47 U.S. 550, 587 (1848); *Devine v. Rodgers*, 109 F. 886, 887 (E.D. Pa. 1901); *In re Rodriguez-Cruz*, 18 I. & N. Dec. 72, 73 (B.I.A. 1981); *In re Freeman*, 11 I. & N. Dec. 482, 483 (B.I.A. 1966); *In re P---*, 4 I. & N. Dec. 610, 613 (A.G. 1952; B.I.A. 1952). This rule also applies to divorce. *Jahed v. Acri*, 468 F.3d 230, 235 (4th Cir. 2006); *In re Luna*, 18 I. & N. Dec. 385, 386 (B.I.A. 1983).

50. Immigration and Nationality Act § 216(d)(1)(A)(i)(i), 8 U.S.C. § 1186a(d)(1)(A)(i)(i).

51. See *infra* Part III.B-C (discussing state and federal public policy exceptions to marriage validity).

52. See *infra* Part III.B (discussing state public policy exceptions). This has been a particular focus in the context of spouses who evade marriage requirements in their state of domicile by traveling to another state or country for the sole purpose of avoiding the state law. See, e.g., *In re Zappia*, 12 I. & N. Dec. 439, 439-40 (B.I.A. 1967) (refusing to recognize the marriage of second cousins in South Carolina, since the couple’s trip to South Carolina was solely for the purpose of evading Wisconsin’s criminal incest law); *In re M---*, 3 I. & N. Dec. 465, 466 (B.I.A. 1948) (finding no intentional evasion of Illinois

Supreme Court's construction of the Full Faith and Credit Clause of Article IV, Section 1 of the U.S. Constitution.<sup>53</sup> For instance, a policy exception must generally be expressed in a written statute before it will be recognized as an exception to the general rule of recognition.<sup>54</sup> There are some major differences, however. For instance, the requirements for a sufficiently strong state policy objection appear to be greater in the area of immigration law than under the Full Faith and Credit Clause.<sup>55</sup>

The earliest immigration cases recognizing state public policy objections to marriage, anti-miscegenation (biracial relationships) and consanguinity (relationships between close relatives), demonstrated a refusal to recognize marriages when the state of domicile expressly and specifically criminalized cohabitation by the couple or evasion of the state's law to marry in another state and return to live in that domicile.<sup>56</sup> This is still the rule with regard to consanguinity.<sup>57</sup> It is not enough that the state of domicile has clearly expressed its refusal to recognize an uncle-niece marriage.<sup>58</sup> If a state makes the

law); 1933 Attorney General Opinion, *supra* note 34, at 103-04 (focusing on a spouse's lack of intent to evade Virginia marriage law by marrying in Poland).

Outside the context of evasion, research reveals no reported BIA case refusing to recognize a marriage validly celebrated in another state. Therefore, one might argue that states are more deferential to marriages entered into in their sister states than those celebrated in foreign countries. The BIA, however, has repeatedly stated its public policy exception test in language that does not distinguish between foreign and domestic marital jurisdictions, and it has applied that test in several cases, albeit without finding a state public policy objection sufficient to reject another state's marriage. *See, e.g., In re Hirabayashi*, 10 I. & N. Dec. 722, 724 (B.I.A. 1964) (recognizing a Colorado marriage between second cousins domiciled in Illinois since the marriage was not criminal in that state); *In re C--*, 4 I. & N. Dec. 632, 637-38 (B.I.A. 1952) (recognizing a Rhode Island uncle-niece marriage because there was no demonstration of a sufficiently strong Pennsylvania public policy criminalizing the underlying relationship).

53. *See supra* notes 43-44 and accompanying text (discussing comity and the Full Faith and Credit clause).

54. Part III, *infra*, demonstrates this implicit requirement of express statutory language in the immigration context, with the exception of *Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982), and *Kahn v. INS*, 36 F.3d 1412, 1414 (9th Cir. 1994). Outside of that context, Justice Brandeis's majority opinion for the U.S. Supreme Court in *Loughran v. Loughran* explained that "[m]arriages, not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction." 292 U.S. 216, 223 (1934) (citing *Meister v. Moore*, 96 U.S. 76, 78 (1877), and *Travers v. Reinhardt*, 205 U.S. 423, 440 (1907)). Justice Brandeis continued to explain, in the context of state prohibitions of remarriage after divorce, that "[t]he mere statutory prohibition by the State of the domicile . . . is given only territorial effect. Such a statute does not invalidate a marriage solemnized in another State in conformity with the laws thereof." *Id.* at 223.

55. *See infra* Part III.B.2 (discussing consanguinity).

56. *See infra* Part III.B (discussing state public policy exceptions to marriage validity).

57. *See infra* Part III.B.2 (discussing consanguinity).

58. *See infra* notes 154-155 and accompanying text (stating that criminal liability has generally been necessary to find a strong enough public policy exception to warrant invalidation of a marriage that was valid where celebrated).

consanguineous relationship underlying that marriage a crime, it demonstrates a sufficiently strong public policy, at least if the law is enforced.<sup>59</sup>

Marriages to which a state of domicile objects on the basis of a spouse's age or gender reassignment have been recognized in all reported BIA cases when they were valid in the state where celebrated.<sup>60</sup> Age of consent cases raise a unique standard, distinguishing between marriages that are void *ab initio* where celebrated and those merely voidable if the minor spouse acts to negate it before reaching the age of majority.<sup>61</sup> Transgender cases focus on determining whether state law views a marriage as one between opposite or same sex spouses, i.e., whether DOMA applies.<sup>62</sup>

## *2. Federal Immigration Policy Exceptions to Marriage Recognition*

The BIA, immigration officials, and most federal courts agree that Congress has the authority to define the terms "marriage" and "spouse" for immigration purposes, and they have recognized exceptions to the general rule of marriage recognition in the very limited areas where Congress has expressly demonstrated a relevant exclusionary public policy. Absent a clear expression of legislative intent, however, these authorities generally appear to view the primary intent of Congress to be continued deference to the traditional state authority to regulate marital status.

In two cases over a thirty year period, *Adams v. Howerton*<sup>63</sup> and *Kahn v. INS*,<sup>64</sup> the Ninth Circuit Court of Appeals appeared to be searching for new federal definitions of "marriage" and "family," distinct from either state family law or express statutory language. The BIA, other courts, and even some Ninth Circuit judges have not been willing to assume that Congress was silently redefining the terms "marriage" and "spouse" when it used them, without comment in the INA. In spite of its sporadic quest for federally defined family status, even the Ninth Circuit majority has failed to recognize a federal exception to the general rule of marriage recognition except in

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59. See *infra* notes 154-155 and accompanying text (discussing criminal liability as a basis for public policy exception to marriage validity).

60. See *infra* Part III.B.3-4 (discussing age-of-consent requirements and marriage that involves a transgender spouse).

61. See *infra* Part III.B.3 (discussing age-of-consent requirements as a public policy exception).

62. See *infra* Part III.B.4 (discussing marriage involving a transgender spouse as a public policy exception).

63. 673 F.2d 1036 (9th Cir. 1982).

64. 36 F.3d 1412 (9th Cir. 1994).

cases that involved a relevant, express statutory expression of federal public policy.

*C. Federal Law Frequently Relies on State Law to Determine Status Within State Purview*

Immigration is not the only subject area that relies on state law to determine status under federal law, particularly family status. United States Supreme Court and courts of appeals opinions constructing other federal statutes have also relied on state law to determine whether someone is “married” or not for purposes of federal law, where that marriage is not specifically defined in the relevant federal statute. For instance, in the context of federal copyright law, the Supreme Court found that:

The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.<sup>65</sup>

This federal reliance on state law concepts and status has been widely recognized, especially in regard to matters of particular state concern, such as family law.<sup>66</sup> In fact, in a heated dissent in *Kahn v.*

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65. *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (citations omitted) (focusing on state domestic law to determine whether a child was “legitimate” and, therefore, covered by the term “children” under federal copyright law). *De Sylva* also implies that the federal government might not properly rely on a state law that is “entirely strange to those familiar with [a term’s] ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept of ‘children’ we deem state law controlling.” *Id.* at 581. A gender-neutral definition of marriage that is recognized in at least nine states, the District of Columbia, nine foreign countries, and Merriam Webster’s dictionary, is arguably far from “entirely strange” to those familiar with the term. Interestingly, unlike the Ninth Circuit in *Adams*, the Supreme Court majority in *De Sylva* did not attempt to discern the intent of Congress, absent any express provision indicating a desire to depart from state law definitions in the area of family law.

66. Federal courts have long recognized family law as a matter of almost exclusive state jurisdiction. See *United States v. Lopez*, 514 U.S. 549, 564, 624 (1995) (Chief Justice Rehnquist, for the Court, and Justice Breyer, in dissent, both seem to agree that marriage regulation is a matter of state, not federal, authority); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (upholding a residence requirement for divorce under the Due Process Clause of the Fourteenth Amendment and explaining that domestic relations is “an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact”); *Ohio ex. rel. Popovici v. Agler*, 280 U.S. 379, 382-83 (1930) (refusing to decide a suit for divorce against the Vice-Consul of Romania under the Supreme Court’s original jurisdiction under Article III, Section 2 of the Constitution “in all Cases affecting Ambassadors, other public Ministers and Consuls” because “the whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States” (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890))); *N. Securities Co. v. United States*, 193 U.S. 197, 402 (1904) (Holmes, C.J., dissenting) (“Commerce depends upon population,

*INS*, Circuit Judge Kozinski pointed out that “federal law virtually always relies on state law to define personal and family relationships.”<sup>67</sup> For example, federal bankruptcy law relies on state concepts of property rights.<sup>68</sup> Federal criminal law looks to the nature of state convictions to determine whether a federal law against possession of a firearm by a felon is triggered.<sup>69</sup> Federal authorities also frequently rely on state crimes as predicates for RICO offenses.<sup>70</sup> Most relevantly, state definitions of marriage are generally used to determine federal issues related to taxation,<sup>71</sup> social security,<sup>72</sup> or copyright law.<sup>73</sup> As demonstrated in the following Part, this has also been the prevailing rule throughout the history of U.S. immigration laws referencing “marriage” and “spouse.”

### III. ANALYZING WHETHER A MARRIAGE IS A “MARRIAGE” UNDER THE INA

Section 101 of the INA is appropriately entitled “Definitions.”<sup>74</sup> In subsection (a) alone, it sets forth the definitions for well over fifty

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but Congress could not, on that ground, undertake to regulate marriage and divorce.”); *Simms v. Simms*, 175 U.S. 162, 167 (1899) (“Within the States of the Union, the whole subject of the domestic relations . . . belongs to the laws of the State, and not to the laws of the United States.” (citing *In re Burrus*, 136 U.S. at 593-94)); *In re Burrus*, 136 U.S. at 593-94 (“The 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.”); *Penny v. Neff*, 95 U.S. 714, 734-35 (1877) (“The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”). *But see* *Cleveland v. United States*, 329 U.S. 14, 19 (1946) (finding that the federal Mann Act constitutionally criminalizes polygamy under Congress’s commerce clause authority).

67. *Kahn v. INS*, 36 F.3d 1412, 1416 (9th Cir. 1994) (Kozinski, J., dissenting).

68. *Id.* (quoting *Butner v. United States*, 440 U.S. 48, 54 (1979)) (“Congress has generally left the determination of property rights in the assets of a bankrupt’s estate to state law.”); *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (“In the absence of any controlling federal law, ‘property’ and ‘interests in property’ are creatures of state law.”).

69. *Kahn*, 36 F.3d at 1417 (Kozinski, J., dissenting) (citing *United States v. Meeks*, 987 F.2d 575, 577 (9th Cir. 1993) and *United States v. Frushon*, 10 F.3d 663, 665-66 (9th Cir. 1993)).

70. *Id.* (citing *United States v. Freeman*, 6 F.3d 586, 596 (9th Cir. 1993) (“reviewing RICO conviction that was based in part on ‘predicate state law bribery crimes’”) and *Meeks*, 987 F.2d at 577 (Missouri burglary offense defined a felon for purposes of federal law prohibiting firearms possession)).

71. *Id.*; *see also* *United States v. Mitchell*, 403 U.S. 190, 197 (1971) (citation omitted) (“[W]ith respect to community income . . . federal income tax liability follows ownership. In the determination of ownership, state law controls.”); *Poe v. Seaborn*, 282 U.S. 101, 117-18 (1930) (citation omitted) (“[D]ifferences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity.”).

72. *Kahn*, 36 F.3d at 1417 (Kozinski, J., dissenting) (noting that “social security benefits often hinge on marital status” as defined by state law) (citing *Califano v. Jobst*, 434 U.S. 47, 52-53 n.8 (1977) and *Purganan v. Schweiker*, 665 F.2d 269, 271 (9th Cir. 1982)).

73. *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

74. Immigration and Nationality Act § 101, 8 U.S.C. § 1101 (2006).

terms used throughout the Act. Subsection (b) includes two sub-subsections, seven subdivisions of those sub-subsections, and numerous more detailed sub-subdivisions, elaborating on the meaning of the word “child.”<sup>75</sup> In contrast, the only definition of the words “spouse” and “marriage” in section 101, or anywhere else in the INA, is found at section 101(a)(35), which states, in its entirety: “The term ‘spouse’, ‘wife’, or ‘husband’ does not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.”<sup>76</sup>

Although the INA does not generally define the terms “marriage” and “spouse,” it does now expressly require an attestation that a marriage was valid where celebrated.<sup>77</sup> This codifies the longtime rule underlying step one of the test for marriage recognition described in Part II above. This rare provision relating to marriage validity under the INA lends support to the argument that the overriding congressional intent with regard to marriage recognition in the INA is continued deference to the states and, particularly, the rules of the place where the marriage was celebrated. It also implies congressional approval of the traditional presumption of universal validity of marriages valid where celebrated.

While offering no general definition of “marriage,” the INA does expressly set out certain evidentiary requirements related to marriage *bona fides*. For instance, it requires applicants for marriage-based conditional permanent residence to provide a “[s]tatement of proper marriage,” including an assurance that the marriage “was not entered into for the purpose of procuring an alien’s admission as an immigrant; and [that] . . . no fee or other consideration was given . . . for the filing.”<sup>78</sup>

The level of detail in the definition of other terms and the specific enumeration of evidence of marital *bona fides* demonstrates that Congress did not simply forget to delve into the traditional state area of family law to create a separate federal definition of marriage. The express language requiring an attestation that the marriage was valid where celebrated evidences both the importance of this factor and congressional deference to the marriage law of jurisdictions that have general competence in that area, states and foreign nations.

There have been well over 100 recorded appeals of disputes regarding the meaning of “marriage” and “spouse” under U.S. immigration

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75. Immigration and Nationality Act § 101(b)(1)-(2), 8 U.S.C. § 1101(b)(1)-(2).

76. Immigration and Nationality Act § 101(a)(35), 8 U.S.C. § 1101(a)(35).

77. Immigration and Nationality Act § 216(d)(1)(A)(i)(i), 8 U.S.C. § 1186a(d)(1)(A)(i)(i).

78. Immigration and Nationality Act § 216(d)(1)(A), 8 U.S.C. § 1186a(d)(1)(A) (internal numerals omitted).

law since those terms became the basis for quota preferences for the spouses of U.S. citizens in 1924.<sup>79</sup> For this reason, it seems extremely unlikely that Congress assumed it was using a clear term when it failed to define “marriage,” as it amended and redrafted that immigration law well over 100 times since 1924.<sup>80</sup> Congress was likely aware of the inter-jurisdictional conflicts, and its silence demonstrated an unwillingness to resolve them by creating a general federal definition of “marriage.” Therefore, the BIA and most federal courts have wisely focused on state law in determining whether a “marriage” is valid for immigration purposes.<sup>81</sup> As the BIA recently observed, while “the ultimate issue of the validity of a marriage for immigration purposes is one of Federal law, that law has, from the inception of our nation, recognized that the regulation of marriage is almost exclusively a State matter.”<sup>82</sup>

*A. The General Rule: Marriages Valid Where “Celebrated” are Valid Everywhere*

Generally, a marriage valid where celebrated is valid everywhere. This principle is well settled under both conflict of law rules and immigration law.<sup>83</sup> The BIA has explained that this rule of recognition was developed because “[i]nfinite mischief and confusion would ensue with respect to legitimacy, succession, and other rights if the

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79. A simple Lexis search for “immediate relatives and spouse and marriage and INA” revealed 117 cases in the database of Federal Immigration Cases and Agency Decisions. The Immigration Act of 1924 incorporated the first adoption of quota limitations for foreign nationals who were not excluded under specific racist limitations like the Chinese Exclusion Acts. U.S. CITIZENSHIP & IMMIGRATION SERV., LEGISLATION FROM 1910-1940, <http://www.uscis.gov/files/nativedocuments/Legislation%20from%201901-1940.pdf> (last visited Apr. 7, 2010). The Immigration Act of 1924 was largely rethought and reformulated in 1952, 1965, and 1990, without defining the omnipresent terms “marriage” and “spouse.” See U.S. Citizenship & Immigration Serv., Immigration Legal History, Historical Immigration and Naturalization Legislation, <http://www.uscis.gov> (search U.S. Citizenship and Immigration Services website for “Historical Immigration Legislation”; then follow “Historical Immigration and Naturalization Legislation” hyperlink under “Search Results”) (last visited Apr. 7, 2010) [hereinafter Immigration Legal History] (providing links to PDF documents that describe these reformulations).

80. Immigration Legal History, *supra* note 79 (providing links to PDF documents that briefly describe each of these legislative changes).

81. Only the two Ninth Circuit opinions discussed in Part IV, *infra*, have implied that “marriage” under the INA has an independent federal definition.

82. See *In re Lovo-Lara*, 23 I. & N. Dec. 746, 751 (B.I.A. 2005) (recognizing the marriage of a man to a transsexual woman under the INA, since it was recognized as a valid heterosexual marriage under state law).

83. *Patterson v. Gaines*, 47 U.S. 550, 587-89 (1848) (citing *Phillips v. Gregg*, 10 Watts 158, 168 (1840) and *Lacon v. Higgins*, 3 Stark. 178, 171 Eng. Rep. 813 (1822)); *Jahed v. Acri*, 468 F.3d 230, 235 (4th Cir. 2006) (citation omitted); *In re Luna*, 18 I. & N. Dec. 385, 386 (B.I.A. 1983).



validity of the marriage contract were not to be tested by the laws of the country where it was made.”<sup>84</sup>

The BIA apparently follows this general rule no matter how unfriendly the country or how illegitimate the legal system. For instance, two BIA cases soon after World War II carefully examined “the Hitler discriminatory legislation concerning interracial marriages” to determine the validity of “marriages” for U.S. immigration purposes.<sup>85</sup> The Board based its decisions on the “Hitler Law” regarding marriage and divorce even though the divorce in one case was coerced by Gestapo torture.<sup>86</sup>

### 1. Meeting Procedural Marriage Requirements

In most cases, a married couple followed the law in the jurisdiction where it was married, and it merely needs to document that process for U.S. immigration officials.<sup>87</sup> Marriage laws do vary widely around the globe, however, and there have been some disputes in U.S. immigration forums regarding the sufficiency of certain ceremonies or procedures in a foreign or U.S. state jurisdiction.<sup>88</sup>

While the very different ceremonial requirements of foreign or state marriage regimes vary greatly, most BIA cases rely entirely on whether the marriage is recognized under the law of the jurisdiction where it was celebrated. Following this rule, the Board has recognized a marriage in Macao (“Portuguese China”) by Chinese ceremonial custom even though the husband was so confused about that marriage’s validity that he indicated to U.S. immigration officials that he was single when he subsequently entered the United States.<sup>89</sup> The Board has recognized religious ceremonies in countries where they are legally valid,<sup>90</sup> and has generally refused to recognize these ceremonies if they were not valid where celebrated.<sup>91</sup>

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84. *In re C---*, 4 I. & N. Dec. 632, 636 (B.I.A. 1952) (citing 2 KENT’S COMMENTARIES 92).

85. *In re M---*, 3 I. & N. Dec. 850, 851-52, 855-56 (B.I.A. 1950); *In re P---* & S---, 5 I. & N. Dec. 1, 4-5 (B.I.A. 1947).

86. *In re P---* and S---, 5 I. & N. Dec. at 1-3.

87. See, e.g., U.S. DEP’T OF STATE, 9 FOREIGN AFF. MANUAL: VISAS, 40.1 NOTES 1.1(c) (2009), available at <http://www.state.gov/documents/organization/86920.pdf> (“The underlying principle in determining the validity of the marriage is that the law of the place of marriage celebration controls. If the law is complied with and the marriage is recognized, then the marriage is deemed to be valid for immigration purposes.”).

88. *In re L---*, 7 I. & N. Dec. 587, 588-89 (B.I.A. 1957).

89. *Id.* at 588-90.

90. See, e.g., *In re Rice*, 16 I. & N. Dec. 96, 97-98 (B.I.A. 1977) (concluding that although a marriage did not follow all the required procedures in the Philippines, it would have been valid there, so it is also valid for U.S. immigration purposes); *In re Duran-Montoya*, 10 I. & N. Dec. 767, 767-69 (B.I.A. 1963) (finding that a man was not “living in a husband and wife relationship” with the woman he married in Miami because of the continuing validity of his previous unregistered religious marriage, which was recognized as valid in Colombia).

91. Validity of Iranian Mosque Marriages Performed in Turkey, Op. INS Gen. Couns.

In a few unusual instances, the Board has been willing to stray from its focus on the validity of a marriage where celebrated,<sup>92</sup> but these are rare and particularly compelling exceptions. For instance, the BIA has recognized the child of a foreign marriage as “legitimate” even though the couple did not fulfill all of the technical requirements of the jurisdiction in question.<sup>93</sup> It has also recognized the validity of a religious ceremony that may not have been considered valid in Italy.<sup>94</sup> In *In re Coletti*, the court apparently made an exception because the man was attempting to game the system by immigrating to the United States under the more favorable quota preference category for the “unmarried son” of a U.S. permanent resident after marrying his pregnant girlfriend in a Catholic religious ceremony in Italy.<sup>95</sup>

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91-58 (July 25, 1991) (finding that an Iranian mosque marriage performed in Turkey is not valid under the INA because it is not valid under Turkish law); *see also In re Rodriguez-Cruz*, 18 I. & N. Dec. 72, 73-74 (B.I.A. 1981) (refusing to recognize a religious marriage ceremony in Mexico because it was not performed in accordance with civil formalities); *In re Lwin*, 16 I. & N. Dec. 1, 2 (B.I.A. 1976) (refusing to recognize marriage where none was registered with the Registrar as required for Christians under the laws of Burma); *In re Leon*, 15 I. & N. Dec. 248, 248-49 (B.I.A. 1975) (refusing to recognize the legitimacy of a man born after his parents’ religious ceremony but before they underwent a civil ceremony in Mexico, because the civil code of the State of Michoacán, Mexico, only recognized civil marriages, and distinguishing *In re Hernandez*, 14 I. & N. Dec. 608, 614-15 (B.I.A. 1973; A.G. 1974), because the common law marriage recognized in that case was valid in the State of Tamaulipas, Mexico).

92. In *Kahn v. INS*, the Ninth Circuit also recognized the unmarried heterosexual partner of a U.S. citizen for purposes of waiver of deportation under INA § 212(c). 36 F.3d 1412, 1413-14, 1416 (9th Cir. 1994). The problem of that split decision and *Adams v. Howerton* are discussed in detail in Part IV *infra*.

93. *In re K---*, 7 I. & N. Dec. 492, 492-94 (B.I.A. 1957). In *In re K---*, the BIA recognized the legitimacy of the adult son of a couple who had an Orthodox Jewish wedding, even though there was evidence that the marriage was not recognized under the Italian civil law, since the couple entered their marriage in good faith under “the color of a marriage ceremony.” *Id.* at 494. The Board explained that when the man “has always believed that his parents were lawfully married and that he was a legitimate child, I see no public advantage in making a search of the laws of some foreign state in order to prove that his parents were living in sin and that he is a bastard.” *Id.* This case probably says more about the changing view of legitimacy in the latter half of the twentieth century than it does about the broader question of marital validity. *In re Coletti*, 11 I. & N. Dec. 551 (B.I.A. 1965), discussed the presumption in favor of validity in a line of religious marriage cases, tracing them to a 1933 opinion of the Solicitor of Labor (Labor was the federal department responsible for immigration at the time) dealing with the legitimacy of the children upon the same rationale later cited in *In re K---*. *In re Coletti*, 11 I. & N. Dec. at 556. In fact, in spite of the broadly accepted view that U.S. public policy opposes any recognition of polygamous marriages, there have also been cases recognizing the children of those marriages as “legitimate” for immigration purposes. *In re Mahal*, 12 I. & N. Dec. 409, 410 (B.I.A. 1967); *In re B---S---*, 6 I. & N. Dec. 305, 305, 308-09 (B.I.A. 1955).

94. *In re Coletti*, 11 I. & N. Dec. at 554-55.

95. *Id.* at 552. There was expert testimony that reporting the marriage under the civil law was “not merely a ministerial act but that the transcription ha[d] a constitutive effect.” *Id.* The Board focused instead on the fact that the validity of the marriage under Italian law dated back to the time of the religious ceremony once it was recorded and on its conviction that:

Although it normally assesses the law of the place of marriage celebration *de novo*, the BIA has also “felt constrained” to recognize the final judgment of a U.S. state court with regard to the validity of a foreign marriage, even where the BIA had a “concern with the procedure used to establish the validity of [that] marriage.”<sup>96</sup> Like many other aspects of federal recognition of marriages for immigration purposes, this opinion echoes federal Full Faith and Credit Clause jurisprudence.<sup>97</sup>

## 2. Celebration Without a Ceremony: Common Law Marriage

Despite the INA’s and BIA’s language about marital “celebration,” so-called “common law” marriages (marriages based on cohabitation without an official ceremony or registration) are recognized under the INA so long as they were valid where the cohabitation took place.<sup>98</sup> As in other cases evaluating the validity of a marriage for immigration purposes, the focus is on the law of the state or country where the marriage allegedly occurred.<sup>99</sup>

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Congress did not intend that the benefits of third preference status extended to unmarried sons or daughters who were regarded as part of the primary family unit, were to be easily circumvented by an alien who entered into a marriage relationship which because of some technicality of foreign law did not become formally final until after gaining status under the “unmarried son” visa category.

*Id.* at 554.

96. *In re Kwan*, 11 I. & N. Dec. 205, 206, 208 (B.I.A. 1965) (relying on a judgment of the Circuit Court of the State of Michigan to affirm the validity of a Venezuelan marriage under Michigan law despite the presence of a Chinese marriage certificate reflecting a prior purported marriage that had not been terminated, finding that “[t]he wisest course would be to accept at face value the marital status recognized in conformity with the laws of the state”).

97. See *supra* note 44 and accompanying text (discussing the Full Faith and Credit clause and the binding effect of final court judgments).

98. Common Law Marriage and Conditional Permanent Residence — Texas Declaration and Registration of Informal Marriage, Op. INS Gen. Couns. 95-8 (Aug. 26, 1995) [hereinafter 1995 Opinion on Common Law Marriage].

99. *Id.* (citing *In re P--*, 4 I. & N. Dec. 610, 614 (B.I.A. 1952; A.G. 1952)); see, e.g., *In re Schaad*, 10 I. & N. Dec. 555 (B.I.A. 1964) (refusing to recognize a longtime cohabitating couple as married because the law of Hungary, where they had lived together does not recognize such relationships as common law marriages). *In re Schaad* presents some parallel considerations to a recognized same-sex civil union, domestic partnership, or other legally recognized, non-marital relationship. Long-term cohabiting partners were legally recognized for some purposes under Hungarian law, but the relationship was not recognized as a “marriage” with all of its legal consequences (e.g., such cohabitants were not treated like a spouse with regard to alimony or intestate inheritance). *Id.* at 558-59. Of course, one might distinguish U.S. civil unions or domestic partnerships from the legal cohabitants in *In re Schaad* on at least two grounds: (1) many non-marital same-sex regimes in the United States actually do entail all of the same state rights as marriage; and (2) the Hungarian couple in *In re Schaad* did actually have the choice of entering a fully recognized legal marriage.

In most marriage cases, there is little difficulty determining where a marriage was “celebrated.” It is where a license was issued, where a ceremony occurred, or where the marriage was registered. In the case of “common law” marriage, the jurisdiction is also clear if the couple has only lived in one place throughout their entire relationship. It may be less obvious, however, if the couple has moved around over time.

If the relevant jurisdiction is a country or U.S. state that recognizes common law marriage and the couple met the requirements of that jurisdiction, the marriage will be recognized for immigration purposes.<sup>100</sup> Immigration officials consider the validity of the marriage according to the specific requirements of the particular jurisdiction where it was allegedly contracted.<sup>101</sup> In addition, they apparently must limit their inquiry regarding the legal validity of the marriage to the standard of proof required by the relevant states.<sup>102</sup> Of course, this limitation restricts very little in practice, since officials still have broad discretion to examine additional evidence to determine that the marriage is a *bona fide* one, not a relationship contracted solely for the purpose of obtaining immigration benefits.<sup>103</sup>

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100. 1995 Opinion on Common Law Marriage, *supra* note 98; *see also In re Garcia*, 16 I. & N. Dec. 623, 624 (B.I.A. 1978) (looking at specific requirements of Texas statutory and case law to determine that a common law marriage had not been established); *In re A---E---*, 4 I. & N. Dec. 405, 407-08 (B.I.A. 1951) (holding that a Mexican religious ceremony did not result in a valid marriage, but that a common law marriage, valid for immigration purposes, was later contracted in Texas, a state that recognizes common law marriage). This applies to both U.S. states and foreign countries, but the “spouses would bear the burden of proving that the relevant foreign law recognizes common law marriage.” 1995 Opinion on Common Law Marriage, *supra* note 98, at n.1 (citation omitted).

101. *See, e.g., In re Garcia*, 16 I. & N. Dec. 623, 624 (B.I.A. 1978) (looking to Texas case law for the “acid test” of common law marriage: whether the couple held themselves out to the public as married); *In re Megalogenis*, 10 I. & N. Dec. 609, 610-11 (B.I.A. 1964) (recognizing for immigration purposes the common law marriage of a couple, even though the couple had not cohabited or consummated the relationship, since these were not requirements under Pennsylvania law if a couple verbally contracted a common-law marriage); *In re H---T---W---*, 8 I. & N. Dec. 562, 564 (B.I.A. 1960) (applying the test under New York case law to find that a cohabitating couple without the requisite mutuality of consent had not entered a common law marriage). In *In re Megalogenis*, the BIA clearly expressed the mandatory nature of its deference to state law in this regard, explaining, “[s]ince the law of the State of Pennsylvania Controls [sic] in this matter we have no alternative but to rule that the petitioner is the lawful wife of the beneficiary.” *In re Megalogenis*, 10 I. & N. Dec. at 610-11.

102. 1995 Opinion on Common Law Marriage, *supra* note 98; *see also In re Carrubba*, 11 I. & N. Dec. 914, 918 (B.I.A. 1966) (refusing to recognize a common law marriage when the evidence “falls far short of the standard set forth by the Ohio courts to establish such a marriage — *i.e.*, clear and convincing evidence”); *In re F---*, 5 I. & N. Dec. 163, 164, 166-67 (B.I.A. 1953) (finding a valid common law marriage under the law of New York, and relying on the presumption of validity established by such a marriage in New York, even in the absence of evidence of divorce in a prior English marriage; interestingly, the BIA shifted the burden of proof regarding the first marriage to the government in light of this New York presumption of validity).

103. *See infra* Part III.C.1 (discussing “marriage fraud” in the immigration context).

One could argue that common law marriages should not be recognized under the INA because it was not specifically intended by Congress, but at least one federal court has expressly rejected that argument.<sup>104</sup> In *United States v. Gomez-Orozco*, a district court judge found that “Congress has clearly indicated [in parts of the INA] that the term ‘marriage’ would be defined by state law, at least insofar as the marriage conformed to common understandings of the term.”<sup>105</sup> Therefore, since “[s]everal states recognize common law marriages,” the court reasoned that “Congress intended to include those common law marriages . . . under the [INA].”<sup>106</sup>

Back in 1877, when most states still recognized common law marriage, the Supreme Court held that “[m]arriage is everywhere regarded as a civil contract. Statutes in many of the States, it is true, regulate the mode of entering into the contract, but they do not confer the right.”<sup>107</sup> Therefore, the Court held that the continued right to common law marriage is presumed unless a state expressly negates that common law right.<sup>108</sup> But this common law right was whittled away over the following century. By 1995, “only thirteen states [recognized] common law marriage,”<sup>109</sup> and that number has now shrunk to just ten states and the District of Columbia.<sup>110</sup>

### *B. Exceptions Based on the Strongly Held Public Policy of the State of Domicile or Intended Domicile*

The United States and all its constituent states unanimously recognize that a marriage, valid where celebrated, is valid everywhere.<sup>111</sup>

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104. *United States v. Gomez-Orozco*, 28 F. Supp. 2d 1092, 1095-97 (C.D. Ill. 1998).

105. *Id.* at 1096. The potential qualification related to the “common understandings of the term” marriage refers to the government’s reliance on *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), which focused on the dictionary meaning of the word “marriage” to construct a congressional intent not to recognize a same-sex marriage when it used the word. Judge Mills in *Gomez-Orozco* expressed no opinion regarding the legitimacy of that logic from *Adams v. Howerton*. Explaining that while “perhaps it is plausible to conclude that” same-sex marriages are not valid under the INA, “the ordinary meaning [of ‘marriage’] seems plainly to include common law marriages.” *Id.* In the end, the court was more focused on Congress’s intent that the term “marriage” be defined by the relevant state law. *Id.*

106. *Id.*

107. *Meister v. Moore*, 96 U.S. 76, 78 (1877).

108. *Id.* at 79.

109. 1995 Opinion on Common Law Marriage, *supra* note 98 (citing Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1831 n.11 (1987) for the proposition that “[f]or many years, only thirteen states allowed common law marriage”).

110. John L. McCormack, *Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage*, 42 VAL. U. L. REV. 461, 467 (2008).

111. *See supra* notes 83-84 and accompanying text (discussing the rule of marriage validity).

This rule is based on the doctrine of comity with regard to foreign marriages and judgments, and the constitutional full faith and credit commandment with regard to the marriages recognized in other U.S. states. U.S. immigration law has reflected this rule of recognition since at least 1924.<sup>112</sup>

State courts have occasionally recognized exceptions to the general rule of recognition if there is a strong public policy objection to a given marriage by the jurisdiction where couples are domiciled. The BIA and federal courts sometimes recognize these exceptions under the INA as well. A stronger state public policy appears to be necessary to refuse recognition of a marriage under the INA than that sufficient to justify state refusal to recognize a marriage under the doctrine of comity or the Full Faith and Credit Clause.

### 1. *Anti-Miscegenation Laws*

It is now hard to fathom, but in 1949, thirty U.S. states prohibited the marriage of men and women of different races; this prohibition was even incorporated into six state constitutions.<sup>113</sup> As late as 1967 when the United States Supreme Court finally held such laws unconstitutional, seventeen states still maintained anti-miscegenation laws prohibiting biracial marriages.<sup>114</sup>

There are only two reported cases concerning the recognition of biracial marriages for immigration purposes in spite of the prevalence of state anti-miscegenation laws into the second half of the twentieth century.<sup>115</sup> This dearth of cases may be the result of both social stigma and U.S. immigration trends and immigration policies that overwhelmingly favored European immigration until the Immigration and Nationality Act of 1952 finally made all races eligible for naturalization.<sup>116</sup>

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112. See, e.g., *Ex parte Suzanna*, 295 F. 713, 717 (D. Mass. 1924) (finding that a proxy marriage was valid in Pennsylvania because it was valid in Portugal, where it was celebrated).

113. *In re D---*, 3 I. & N. Dec. 480, 483 n.2 (B.I.A. 1949) (citing *Perez v. Sharp*, 198 P.2d 17, 38 (Cal. 1948) (Shenk, J., dissenting)).

114. *Loving v. Virginia*, 388 U.S. 1, 6, 11-12 (1967) (holding anti-miscegenation laws unconstitutional under both the due process and equal protection clauses of the Fourteenth Amendment).

115. See *infra* notes 119-123 (discussing *In re D---*, 3 I. & N. Dec. 480 (B.I.A. 1949)) and notes 124-130 (discussing *In re C---*, 7 I. & N. Dec. 108 (B.I.A. 1956)).

116. According to the U.S. Census Bureau, 97.6% of foreign-born people in the United States in 1950 were "white." U.S. Census Bureau, Table 9, Race and Hispanic Origin of the Foreign-Born Population: 1850 to 1990 (Mar. 9, 1999), <http://www.census.gov/population/www/documentation/twps0029/tab09.html>. The total number of foreign-born people of "races other than white" had increased to only 4.6% by 1960, just seven years before the United States Supreme Court struck down all remaining state immigration laws in *Loving v. Virginia*, 388 U.S. 1 (1967). *Id.*

The two BIA cases addressing the validity of marriages in light of anti-miscegenation laws fit within the analytical pattern described in Part II above. The BIA limited its test of “marriage” validity under the INA to an inquiry of whether a marriage violated express state criminal law provisions against miscegenation or against evasion of those provisions, read narrowly.<sup>117</sup> Although litigants challenged the constitutionality of discriminatory anti-miscegenation laws under the Equal Protection Clause in these cases, the Board found no violation of federal public policy, nor did it infer any non-discriminatory or other federal definition of “marriage” and “spouse” under U.S. immigration law.<sup>118</sup>

In *In re D---*, the BIA upheld a decision of the Immigration and the Naturalization Service (INS or Service)<sup>119</sup> Central Office refusing to recognize the legal Canadian marriage of a white Norwegian immigrant and a U.S. citizen of African descent.<sup>120</sup> The INS noted that the couple, which actually resided in North Dakota, had travelled to Canada to marry “for the purpose of circumventing” North Dakota’s criminal law prohibiting “cohabitation and marriages between negroes and white persons.”<sup>121</sup> It cited numerous cases for the proposition

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The history of overtly racist policies in U.S. immigration law is undeniable. From at least the time of the Chinese Exclusion Act of 1882, which barred Chinese nationals from becoming U.S. citizens, until enactment of the Immigration and Nationality Act of 1952, the U.S. government enforced systematic rules to discourage or eliminate immigration for various groups of non-white people. The Library of Congress, Anti-Chinese Movement and Chinese Exclusion, <http://memory.loc.gov/ammem/award99/cubhtml/theme9.html> (last visited Feb. 24, 2010). These policies apparently caused some Americans to lose their U.S. citizenship just because they married someone from Asian countries. *Toshiko Inaba v. Nagle*, 36 F.2d 481, 481 (9th Cir. 1929) (citing 8 U.S.C.A. § 9 for the proposition that “a native-born citizen of the United States” could lose “her citizenship by reason of her marriage to an alien ineligible to [sic] citizenship”). They also led to perverse legal disputes regarding who was “white.” See *infra* note 167 (discussing a range of cases that attempted to define “white”).

117. For discussion of the relationship between criminal law and a “sufficient” public policy against miscegenation, see *infra* notes 120-133 and accompanying text.

118. *In re C---*, 7 I. & N. Dec. 108 (B.I.A. 1956); *In re D---*, 3 I. & N. Dec. 480, 481-83 (B.I.A. 1949).

119. The agency/agencies responsible for immigration benefits, immigration enforcement, and border control have been moved from the U.S. Department of Commerce to the Department of Labor to the Department of Justice to the Department of Homeland Security over the last century. The agency itself was called the Immigration and Naturalization Service (INS) for most of that time. After September 11, 2001, when the World Trade Center was destroyed by foreign terrorists who had entered the United States legally, the INS was moved from the Justice Department into the new Department of Homeland Security, and its three main functions were split among three new agencies: ICE (Immigration and Customs Enforcement), CBP (Customs and Border Protection), and USCIS (Citizenship and Immigration Services). U.S. Citizenship and Immigration Services, Our History, <http://www.uscis.gov> (click the “About Us” tab; then click the “Our History” link on the left side of the page) (last visited Feb. 24, 2010).

120. *In re D---*, 3 I. & N. Dec. at 480, 482-83.

121. *Id.* at 481. This evasion law was similar to the Virginia law under which the Lovings were convicted in *Loving v. Virginia*, 388 U.S. 1, 4 (1967).

that states may forbid marriages between persons of different races in order to promote the general welfare.<sup>122</sup> Not only did the Service refuse to recognize this marriage because it was invalid in the state where the couple resided, but it found an additional reason to deport the Norwegian based on bad character as exemplified by his “disregard of law . . . substantiated by [the] testimony that he ‘married’ in Canada to circumvent the law of North Dakota.”<sup>123</sup>

Later, in *In re C---*, the BIA again addressed a state anti-miscegenation law, this time indirectly.<sup>124</sup> That case actually hinged upon a finding that a Filipino man could not establish “good moral character” because of an adulterous relationship with a woman he eventually married in California.<sup>125</sup>

When the man married his first wife in the District of Columbia, they were domiciled in Maryland, which prohibited the marriage or “cohabitation of members of the white and Malay races.”<sup>126</sup> The Filipino man cited *In re D---* for the proposition that his first marriage was invalid, so he could not have committed “adultery” prior to his second marriage.<sup>127</sup> The BIA disagreed.

The Maryland Code stated that:

All marriages between a white person . . . and a member of the Malay race, . . . are forever prohibited, and shall be void; and any person violating the provisions of this section shall be deemed guilty of an infamous crime, and punished by imprisonment in the penitentiary not less than eighteen months nor more than ten years.<sup>128</sup>

The Board distinguished this statutory language from that in *In re D---*, since the Maryland law did not prohibit interracial cohabitation generally like the law of North Dakota and since this “Maryland statute is not expressly made applicable to marriages performed in other states between residents of Maryland.”<sup>129</sup> Quoting from *Corpus Juris Secundum (C.J.S.)*, the Board explained that a marriage that is valid where celebrated “will be held valid everywhere . . . . The fact

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122. *In re D---*, 3 I. & N. Dec. at 482.

123. *Id.* at 483.

124. 7 I. & N. Dec. 108, 108-09 (B.I.A. 1956).

125. *Id.* at 108.

126. *Id.* at 109, 111.

127. *Id.* at 112.

128. *Id.* at 110 (citing MD. CODE ANN., art. 27 § 466 (1951), “which is identical with section 445 of the 1939 Code”).

129. *In re C---*, 7 I. & N. Dec. 108, 112 (B.I.A. 1956). Although it discussed these issues at length, the BIA eventually recognized in *In re C---* that the relevant inquiry actually regarded the validity of the District of Columbia marriage in California, where the allegedly adulterous relationship took place. *Id.* at 111.



that the parties to the marriage left their domicile for the purpose of evading its laws which would have rendered the marriage invalid does not alter the general rule, unless a statute expressly provides to the contrary.”<sup>130</sup>

The North Dakota anti-miscegenation law in *In re D---* was a criminal prohibition.<sup>131</sup> The BIA, however, was not clear on whether it would have mattered if North Dakota had merely refused to recognize biracial marriages, particularly in light of the evasion finding in that case. BIA precedent, including *In re C---* and opinions related to other categories of marriage, indicates that a non-criminal anti-miscegenation law would not have been enough.

One aspect of *In re C---* that remains particularly interesting today is the BIA’s reading of the Maryland statute. It found no state public policy sufficient to invalidate the marriage for immigration purposes in spite of the couple’s evasion of a Maryland law that defined such a marriage as “forever prohibited,” “void,” and “an infamous crime.”<sup>132</sup> Apparently, only violation of an anti-cohabitation criminal prohibition or an express statute criminalizing the evasion of Maryland’s anti-miscegenation law would have been sufficient to trigger an immigration law exception.<sup>133</sup> This reading of the cases is consistent with that applied to other disputed categories of marriage, such as those between close relatives.

## 2. Consanguinity (Uncles, Nieces and Cousins)

Unlike the recognition of biracial marriages, marriages between close relatives have been the subject of numerous recorded cases since at least 1901.<sup>134</sup> All of these cases turn on the law of two jurisdictions:

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130. *Id.* at 109 (quoting 55 C.J.S. *Marriage* § 4).

131. Section 14-0304 of the North Dakota Revised Code of 1943 provided that:  
No white person residing or being in this state shall intermarry with any negro person. Every such marriage shall be void. Each of the contracting parties, upon conviction, shall be punished by imprisonment in the penitentiary for a term of not more than ten years, or by a fine of not more than two thousand dollars, or by both. . . .

N.D. REV. CODE § 14-0304 (1943) (repealed 1955).

132. *In re C---*, 7 I. & N. Dec. at 110-11.

133. *Id.*

134. See *United States ex rel. Devine v. Rodgers*, 109 F. 886, 887-88 (E.D. Pa. 1901) (finding that a valid Russian uncle-niece marriage was not valid for immigration purposes because the State of Pennsylvania would not recognize it, and because the couple could be criminally prosecuted for cohabiting together in that state). Note: the cases discussed all involve the marriages of uncles, nieces and cousins, which were allegedly valid where celebrated. There was dicta in several of these cases that laws against nature (polygamy and some incestuous relationships) are generally excepted because they “violate the law of nature.” A more modern, but similar formulation of this idea, delineates a general exception for “polygamous marriages or one [sic] that is by all civilized nations regarded

(1) the state or country where the marriage was celebrated, and (2) the couple's state of domicile (or of intended domicile) in the United States. As with biracial marriages, no case of consanguinity has turned on any implied federal definition or policy.

As the BIA has explained, "Congress has not expressed any public policy excluding a spouse on the ground of consanguinity and . . . immigration laws are silent on this point; recourse must be had to state law for expressions of such public policy."<sup>135</sup> Generally, so long as the couple's relationship would not violate the strong public policy expressed in the criminal law of its state of domicile, the marriage is valid for U.S. immigration purposes.<sup>136</sup> "The presumption of the validity of a marriage duly celebrated is a very strong one and should be overturned reluctantly, and then only by persuasive specific evidence requiring a contrary finding."<sup>137</sup>

*a. 1933 Opinion of the Attorney General*

In 1933, the United States Attorney General published a detailed opinion entitled "Issuance of Immigration Visa to an Alien Woman Married to her Uncle," examining the marriage of a Polish niece and her U.S. citizen uncle and laying out appropriate factors to consider in determining whether any particular foreign marriage between an uncle and niece is valid under U.S. immigration law.<sup>138</sup> Attorney General Mitchell focused on the law of Poland, where the marriage was celebrated, and the law of Virginia, where the uncle had established residency.<sup>139</sup> There was no dispute that the marriage was valid in Poland. The State of Virginia, however, prohibited both marriages between uncles and nieces and evasion of Virginia's law by leaving the state "for the purpose of being married, and with the intention of returning" after marrying an uncle or niece elsewhere.<sup>140</sup>

In either case, the newlyweds were subject to criminal prosecution.<sup>141</sup> The Attorney General, however, found that Virginia did not

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as incestuous and immoral." *In re C--*, 4 I. & N. Dec. 632, 636 (B.I.A. 1952); *see also In re T--*, 8 I. & N. Dec. 529, 531 (B.I.A. 1960) (viewing polygamy and incest as "immoral by the law of civilized nations"). The Board reasoned that uncle-niece marriages could not be subject to such a general exception, because they were valid in many "civilized" foreign countries (Russia, Poland, Germany, and Italy) and at least one U.S. state (Rhode Island). *In re C--*, 4 I. & N. Dec. at 636-37.

135. *In re T--*, 8 I. & N. Dec. 529, 531 (B.I.A. 1960) (citing the 1933 Attorney General Opinion, *supra* note 34).

136. *Id.*

137. *Id.*

138. 1933 Attorney General Opinion, *supra* note 34, at 102-03.

139. *Id.* at 103-04.

140. *Id.* (citing section 4540 of the Virginia Code of 1930).

141. *Id.*

forbid an uncle-niece couple from living there together as man and wife, so long as they did not marry inside the state of Virginia or intentionally travel to another jurisdiction for the purpose of evading Virginia's marriage laws.<sup>142</sup> Although he admitted a "great [deal of] difficulty in arriving at a satisfactory conclusion" in the case,<sup>143</sup> the Attorney General finally concluded that the Polish marriage was valid for immigration purposes, so long as the uncle travelled to Poland without the intention of marrying his niece.<sup>144</sup>

The Attorney General's analysis focused on state law. Because the District of Columbia and forty-seven of the then forty-eight U.S. states all specifically prohibited the contracting of uncle-niece marriages, he found it important that at least one U.S. state, Rhode Island, did permit uncle-niece marriages.<sup>145</sup> Noting that Congress only defined the term "marriage" in the context of proxy marriage, he analyzed the validity of the marriage on the basis of state law.<sup>146</sup> He explained that if an uncle and niece "could lawfully cohabit together as husband and wife" in no place in the United States, he would have "unhesitatingly conclude[d]" that the couple's marriage was not valid under U.S. immigration law, "because there is a clear implication from the statute that persons who cannot lawfully maintain the relation of husband and wife within the United States are not admissible because of that relation."<sup>147</sup> Congress would not silently undermine state law by granting advantageous federal immigration benefits to couples based on "marriages" when the couples could not lawfully live together as man and wife in any U.S. state.

It is noteworthy that the Attorney General inferred nothing regarding the specific intent of Congress to silently create a federal definition of "marriage" based on the status quo in almost all states.<sup>148</sup> In fact, he rejected the argument that Congress had demonstrated a federal public policy against recognizing uncle-niece marriages by expressly prohibiting them and criminalizing cohabitation in the

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142. *Id.* (citing an opinion of the Attorney General of Virginia).

143. *Id.* at 102.

144. *Id.* at 111.

145. *Id.* at 109. Rhode Island's recognition was apparently limited to uncle-niece marriages "between Jews." *Id.* The court stressed this point even though the couple in question was apparently not Jewish. It apparently placed more significance on the fact that there were some states, including Virginia, the couple's intended state of residence, where "they could . . . live together without infraction of law." *Id.* at 110.

146. *Id.* at 109.

147. *Id.*

148. Contrast this analysis with that of the court in *Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982), which apparently inferred a federal definition of what "marriage" and "spouse" do not mean, even though it largely deferred to the states and other countries regarding what the words do mean.

District of Columbia and other federally controlled territories.<sup>149</sup> Reasoning that “if Congress had intended to exclude alien wives of citizens on the ground of consanguinity it should have declared and announced that policy in the Immigration Act,” the Attorney General explained that “[t]he only public policy of the United States that I am authorized to recognize with respect to the admissibility of aliens is that found in the immigration law.”<sup>150</sup>

*b. Other Cases Regarding “Incestuous” Marriages*

Federal judges and the BIA have largely followed the framework of Attorney General Mitchell’s opinion since its issuance in 1933. They have, however, expounded and expanded on his analysis as new questions arose in different contexts.

After establishing that a marriage passes the threshold inquiry regarding its validity where celebrated,<sup>151</sup> the BIA and federal courts generally proceed with the presumption that the marriage is valid everywhere unless it violates the public policy of the couple’s state of domicile,<sup>152</sup> “distinctly expressed” in state legislation or the policy of Congress distinctly expressed in the INA.<sup>153</sup> Most of the BIA

149. 1933 Attorney General Opinion, *supra* note 34, at 109-10. Although the Attorney General referred to “exclusion” and “inadmissibility” here, his main focus was the meaning of “wife” and “marriage” under the Immigration Act of 1924. The issue regarding “inadmissibility” apparently arose from the argument that the wife might become a “public charge” due to imprisonment on a charge of incest. *Id.* at 108.

150. *Id.* at 110-11.

151. This is a serious step in the process of determining whether a marriage is legitimate for immigration purposes. The BIA has specifically rested its refusal to recognize some marriages on the invalidity of that marriage in the jurisdiction where it was purportedly celebrated. *See In re Dela Cruz*, 14 I. & N. Dec. 686, 686 (B.I.A. 1974) (first cousin marriage was no longer valid in the Philippines where it was purportedly celebrated); *In re S---*, 8 I. & N. Dec. 234, 234 (B.I.A. 1958) (marriage between first cousins was not valid in Illinois where purportedly celebrated, and, therefore, was not valid under the INA). It has also held at least one marriage to be valid based on its validity where celebrated without even expressly examining the law of the state where the U.S. couple lived or intended to live. *See In re Bautista*, 16 I. & N. Dec. 602, 602-03 (B.I.A. 1978) (recognizing the validity of a marriage for immigration purposes because such second-cousin marriages are valid in the Philippines, presumably because INS raised no issue regarding the couple’s state of domicile).

152. “Domicile” is generally “a person’s true, fixed, principal and permanent home.” BLACK’S LAW DICTIONARY 523 (8th ed. 2004). “Domicil[e] implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance.” *Williams v. North Carolina*, 325 U.S. 226, 229 (1945).

153. *In re M---*, 3 I. & N. Dec. 25, 26-27 (B.I.A. 1947) (recognizing a Romanian uncle-niece marriage for New York domiciliaries although the marriage could not have been celebrated in New York and although it was later annulled in New York); *see also In re T---*, 8 I. & N. Dec. 529, 529, 531 (B.I.A. 1960) (finding a Czech uncle-niece marriage valid for immigration purposes due to absence of strong state public policy against uncle-niece marriages in the form of a criminal prohibition).

opinions recognize a marriage, valid where celebrated, so long as it does not subject the couple to criminal prosecution in its state of domicile.<sup>154</sup> One case even goes so far as to find a marriage valid where the couple's cohabitation violated state criminal law but would not be prosecuted.<sup>155</sup>

As initially recognized by Attorney General Mitchell, there may also be an exception to the rule of recognition even in cases where no state law criminalizes the couple's cohabitation. If the couple violates a law of its state of domicile, which expressly prohibits the evasion of its marriage laws by travelling primarily for the purpose of marrying elsewhere and immediately returning, the BIA has stated that the marriage will not be recognized for immigration purposes.<sup>156</sup> However, the only reported case that refused to recognize an extraterritorial marriage on this basis also involved a criminal prohibition of the

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154. 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 the Colorado marriage between first cousins residing in Illinois, since cohabitation between first cousins is no longer a crime under Illinois statutes); *In re T---*, 8 I. & N. Dec. 529, 531 (B.I.A. 1960) (finding a marriage valid since "[t]he marriage of an uncle and niece has long been considered lawful for immigration purposes if valid where performed and in the absence of proof that . . . their intended residence regarded the cohabitation of such persons therein as criminal" and noting that Pennsylvania law had apparently changed again since *In re G---* was decided); *In re G---*, 6 I. & N. Dec. 337, 338-39 (B.I.A. 1954) (refusing to recognize a valid Italian marriage because it would be both invalid and subject to criminal prosecution in Pennsylvania, according to information submitted after *In re C---* was decided); *In re C---*, 4 I. & N. Dec. 632, 633, 638 (B.I.A. 1952) (recognizing the Rhode Island marriage of an uncle and niece since Pennsylvania, their state of residence, does not regard their cohabitation as criminal); *In re M---*, 3 I. & N. Dec. 465, 465, 467 (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).

155. *In re E---*, 4 I. & N. Dec. 239, 239-40 (B.I.A. 1951) (relying on a letter from the deputy attorney general of the State of California stating that the parties would not be prosecuted for violation of the California statute in order to recognize the Portuguese uncle-niece marriage of a California domiciliary).

156. *In re Balodis*, 17 I. & N. Dec. 428, 429 (B.I.A. 1980) (distinguishing *In re Zappia* because Michigan had no statute prohibiting evasion of its marriage law); *In re Da Silva*, 15 I. & N. Dec. 778, 779-80 (B.I.A. 1976) (distinguishing *In re Zappia* in order to recognize a Georgia uncle-niece marriage, because — unlike Wisconsin in that case — New York did not expressly declare incestuous a marriage between state residents contracted in another state for the purpose of evading statutory prohibitions); *In re Zappia*, 12 I. & N. Dec. 439, 442 (B.I.A. 1967) (refusing to recognize the valid South Carolina marriage of first cousins because they traveled to South Carolina for the purpose of evading Wisconsin's statutory prohibitions of both first-cousin marriages and the evasion of this marriage law); *Hirabayashi*, 10 I. & N. Dec. at 723-24 (citing 1933 Attorney General Opinion, *supra* note 34) (finding a marriage valid when the couple did not go to Colorado, where they married, "with the primary intention of evading the Illinois statutes prohibiting marriage of cousins"); *In re M---*, 3 I. & N. 465, 465, 467 (B.I.A. 1948) (finding a first-cousin marriage valid when the couple did not leave their domicile in Illinois solely for the purpose of marrying elsewhere to evade the state's marriage law and then returning immediately).

couple's cohabitation in their state of residence and could have been decided solely on that basis.<sup>157</sup>

Lesser legislative expressions of disapproval, such as general statutes regarding the invalidity of marriages between uncles and nieces or cousins, have not sufficed to demonstrate a state public policy strong enough to overcome the general presumption in favor of recognizing marriages that were valid where celebrated. In *In re Hirabayashi*, the BIA even found too weak an expression of public policy in a statute declaring that the marriage between first cousins would be both prohibited in Illinois and void if contracted in another state, absent a criminal law prohibiting the couple's cohabitation in Illinois.<sup>158</sup>

It is particularly interesting to note the extent to which federal authorities defer to states in these cases. The BIA changed its opinion about a foreign uncle-niece marriage in Pennsylvania between *In re C---* (1952) and *In re G---* (1954) because of additional evidence it received from the Governor and Attorney General of Pennsylvania prior to the second case regarding probable prosecution under the law of Pennsylvania.<sup>159</sup> In *In re E---*, the BIA even reconsidered and changed its own prior opinion in the same case in light of the subsequent opinion of the Office of the Attorney General of the State of California that an uncle and niece would not be prosecuted under California's criminal incest law, even though they could be.<sup>160</sup>

In general, it appears that marriages of uncles, nieces and cousins, valid where celebrated, will be recognized for U.S. immigration purposes, so long as two conditions are fulfilled: the couple's state of domicile, or intended domicile, does not criminally prosecute such couples for cohabitating, and the couple did not purposefully evade the law of its state of domicile in violation of a specific evasion statute.

### 3. Age-of-Consent Requirements

Unlike biracial marriages and the marriages of close relatives, marriages that some states find invalid or criminal on the basis of a spouse's age may become less objectionable over time. This has caused immigration officials and courts to focus more on specific aspects of the law of the place of celebration and very little on the state of domicile. As with biracial and consanguineous marriages, there has been no discussion at all of federal public policy or a federal definition of marriage in this context.

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157. *In re Zappia*, 12 I. & N. Dec. at 439-40, 442.

158. 10 I. & N. Dec. at 722, 724.

159. *In re G---*, 6 I. & N. Dec. at 340-41.

160. 4 I. & N. Dec. 239, 240 (B.I.A. 1951).

Like other marriages, marriages challenged due to the age of one or both of the purported spouses are first examined for validity in the state or country where they were celebrated. For instance, in one early case, *Toshiko Inaba v. Nagle*, the Ninth Circuit held that the law of Japan controlled the issue of whether an eighteen-year-old U.S. citizen's marriage to a Japanese man was valid, thereby triggering racist immigration laws on the books in 1929 and causing her to lose her U.S. citizenship.<sup>161</sup>

One consideration that is emphasized in age-of-consent cases, but not in cases involving other types of marriage, is the distinction between a marriage that was void *ab initio* and one that was merely voidable upon renunciation or the occurrence of some other event.<sup>162</sup> This unique emphasis is possibly because age-of-consent problems grow less troubling as time passes and spouses grow older.

In analyzing the marriage of a minor, the BIA focuses on the law of the state or foreign country where the marriage was celebrated. For instance, in *In re Agoudemos*, the Board held that a girl's marriage was valid for immigration purposes even though she was under sixteen, the age of consent for females in both the state of celebration (Indiana) and the couple's state of domicile (Wisconsin).<sup>163</sup> In that case, the BIA found it significant that the marriage was "voidable and not void" under both Indiana and Wisconsin state law.<sup>164</sup> The marriage was valid for immigration purposes, since it was valid under state law as long as the girl did not fail to ratify it when she reached the age of majority.<sup>165</sup>

Perhaps due to the amelioration of age-of-consent concerns as time passes, research reveals no case in which such a marriage was valid where celebrated, but not valid for immigration purposes. Presumably, like in other areas, a marriage that was validly celebrated could be challenged for immigration purposes based on the strongly held public policy of the couple's state of domicile against the marriage of a minor, such as an applicable statutory rape law. The BIA has not spoken clearly on this issue.<sup>166</sup> Given the practical

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161. *Toshiko Inaba v. Nagle*, 36 F.2d 481, 481-82 (1929); see also *In re A---*, 13 I. & N. Dec. 824, 824-25 (B.I.A. 1971) (focusing on the law of Michigan, the place of marriage celebration, to find the marriage of a fifteen-year-old Jordanian girl valid with parental permission).

162. To see this distinction drawn more clearly, see *infra* notes 163-165 and accompanying text.

163. 10 I. & N. Dec. 444, 445-46 (B.I.A. 1964).

164. *Id.* at 446.

165. *Id.* at 447; see also *In re G---*, 9 I. & N. Dec. 89, 89-91 (B.I.A. 1960) (focusing solely on Illinois state law, which classified marriage of minor as voidable, not void *ab initio*, to find her marriage valid for immigration purposes despite her ability to disavow the relationship upon reaching the age of consent).

166. In *In re Agoudemos*, the BIA considered both the law of the state of celebration and the state of domicile when determining marital validity; however, this may have been

timing considerations in these cases, it is also unlikely to do so in the future.

#### 4. *Marriage Involving a Transgender Spouse*

U.S. immigration authorities were initially more stymied by the subject of marriage for transgender persons than any subject since the nonsensical, yet cruel, pre-1952 requirement that limited the acquisition of U.S. citizenship to only “free white persons, and to aliens of African nativity.”<sup>167</sup>

*In re Lovo-Lara*, the only reported BIA opinion specifically assessing the validity of a marriage involving a transgender spouse, was

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an example of overkill, since it does not indicate what would have occurred if the laws of those states had been significantly different. 10 I. & N. Dec. at 446. The other case that appears to focus on the law of a couple’s intended state of domicile is *In re Manjoukis*, 13 I. & N. Dec. 705 (B.I.A. 1971). In that case, the BIA focused on whether the marriage of a fourteen-year-old female would be valid under the state law of Michigan, the state where the U.S. citizen resided. *Id.* at 705-06. This case, however, involved a fiancé visa petition, not an already married couple. There was not yet a “place of celebration” and a K-1 visa required the couple to marry in the United States within ninety days of the fiancé’s admission. *Id.* at 705. The Board logically focused on the law of Michigan, the state where the couple would presumably marry and reside once the fiancé was admitted into the United States. *Id.* at 706. In this case, the Board ordered denial of the fiancé visa, since the marriage would be void *ab initio*, rather than merely voidable, in Michigan. *Id.*

167. *Ozawa v. United States*, 260 U.S. 178, 190 (1922). The BIA, federal circuit courts, and even the United States Supreme Court resorted to semi-fictionalized “scientific,” historical, and social understandings of race during the first half of the twentieth century as they wrestled with the question of what it meant to be a “white person” as required to qualify to become a U.S. citizen and whether persons of the Japanese, Arabian, Hindu, Parsee, and Tartar “races” qualified. *See, e.g.*, *United States v. Thind*, 261 U.S. 204, 206, 208-10 (1923) (finding that in spite of the fact that his “stock” is Caucasian, a “high caste Hindu of full Indian blood” is not a “white person” according to “common understanding,” apparently because of Indians’ physical characteristics such as skin color); *Ozawa*, 260 U.S. at 192, 197-98 (discussing the history of racist naturalization requirements dating back to 1790 and discussing the intent of the framers in support of its holding that a Japanese man was not a “white person” even if his skin is white since “to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation”; the Court instead limited the definition of “white person” to “the Caucasian race”); *United States v. Balsara*, 180 F. 694, 695, 695-97, *aff’d* 171 F. 294 (2d Cir. 1939) (holding that a Parsee of a race which immigrated from Persia to India “some 1,200 years ago” is not a “white person”); *In re S---*, 4 I. & N. Dec. 104, 104, 105, 106, 106 n.2 (B.I.A. 1950) (finding that “Tartars of eastern Russian in the Ufa area are members of the white or so-called European race, in spite of their Asiatic origin[, t]he test . . . [being] the racial composition evaluated at the present time . . . [rather than] the origin of the applicant’s racial strain,” and citing *In re K---*, 2 I. & N. Dec. 253, 256 (B.I.A. 1945; A.G. 1945), for the proposition that Afghans are a “European race . . . [even though] some Afghans hav[e] some Mongoloid and Indian strains”); *In re S---*, 1 I. & N. Dec. 174, 174, 178 (B.I.A. 1941) (finding that an Iraqi citizen, whose parents were “full-blooded Arabians” of “Turkish stock,” was a “white person,” as distinguished from Parsees from Persia and “Hindus” and the other “teeming millions” of “Far East Asiatics” who do not qualify as “white”; “[t]he line has apparently been drawn at the Afghans” who are not “white”).



decided in 2005.<sup>168</sup> This is not surprising, since U.S. Citizenship and Immigration Services (USCIS) issued two different illogical policy memoranda in 2003 and 2004, causing confusion and hardship for couples before the BIA finally clarified the issue.

First, in 2003, USCIS purported to defer to congressional silence with regard to the meaning of the terms “man” and “woman” under DOMA, ruling that one’s sex at birth determines his or her sex for life under U.S. immigration law.<sup>169</sup> The agency apparently assumed that all transgender people are homosexual as viewed from the sex on their birth certificates; for example, that all male-to-female transgender women are sexually attracted to men. This assumption is not accurate.<sup>170</sup>

Apparently discovering that its bright-line “birth sex” rule could force it to recognize marriages between couples that are physically and legally of the same sex, USCIS appeared to throw its hands up in the air and declare that it would not recognize the ability of a transsexual to marry anyone. Its attempt at clarification declared that USCIS “shall not recognize the marriage . . . between two individuals where one or both of the parties claims to be a transsexual, regardless of whether either individual has undergone sex reassignment surgery.”<sup>171</sup>

In May 2005, the BIA stepped in to correct the USCIS. In *In re Lovo-Lara*, it issued a well-reasoned precedential decision recognizing the validity of a marriage between a transsexual woman and a foreign-born man when North Carolina, the state in which the marriage occurred, had previously issued a new birth certificate reflecting

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168. 23 I. & N. Dec. 746, 747 (B.I.A. 2005).

169. Nicole Lawrence Ezer, *The Intersection of Immigration Law and Family Law*, 40 FAM. L.Q. 339, 346 (2006) (“The 2003 Yates Memo stated that the service considers federal law to be controlling on this point, and without direct legislation from the Congress, the Service ‘has no legal basis on which to recognize change of sex so that a marriage between two persons born of the same sex can be recognized.’” (quoting Memorandum from William R. Yates, Assoc. Dir. of Operations, U.S. Citizenship & Immigration Serv., Spousal Immigrant Visa Petitions AD 02-16 (Mar. 20, 2003))).

170. Gender identity and sexual attraction are distinct concepts. While most transgender people, like their non-transgender counterparts, identify as heterosexual, many identify as gay or lesbian after their transition. For instance, a male-to-female transsexual may be attracted to other women. According to the reasoning of the 2003 Memorandum, after she transitioned and legally changed her sex to female, USCIS would recognize her marriage to a woman, but not a man, under DOMA. The BIA noted the “anomalous results” of this USCIS position in its opinion in *In re Lovo-Lara*. 23 I. & N. Dec. at 753 n.5.

171. Memorandum from William R. Yates, Assoc. Dir. of Operations, U.S. Citizenship & Immigration Serv., Adjudications of and Petitions Filed by or on Behalf of, or Document Requests by, Transsexual Individuals HQOPRD 70/6 (Apr. 16, 2004), available at <http://www.ilw.com/articles/2004,0817-mehta1.pdf>; see also *USCIS Instructs on Petitions, Applications Filed by or on Behalf of Transsexuals*, 81 INTERPRETER RELEASES 929 (July 19, 2004) (discussing the content of the 2004 memorandum).

her female gender and considered the relationship to be a valid heterosexual marriage.<sup>172</sup> The BIA found that:

There is also nothing in the legislative history [of DOMA] to indicate that, other than in the limited area of same-sex marriages, Congress sought to overrule our long-standing case law holding that there is no Federal definition of marriage and that the validity of a particular marriage is determined by the law of the State where the marriage was celebrated. While we recognize, of course, that the ultimate issue of the validity of a marriage for immigration purposes is one of Federal law, that law has, from the inception of our nation, recognized that the regulation of marriage is almost exclusively a State matter.<sup>173</sup>

The Board then pointed to the legislative history of DOMA, which focused solely on “homosexual marriage” and explained that the federal definition section is meant simply to proscribe recognition of those marriages.<sup>174</sup> The Board quoted the House Report on DOMA, which explained that “[o]ther than this narrow federal requirement, the federal government will continue to determine marital status in the same manner it does under current law.”<sup>175</sup> The BIA added that it was persuaded that Congress did not mean to address opposite-sex marriages involving transgender spouses through its silence on this issue, pointing out that at least one state court decision had previously recognized the validity of such marriages.<sup>176</sup> In the end, *In re Lovo-Lara* held valid the marriages of transgender individuals who wed within jurisdictions that give legal effect to sex reassignments and recognize the marriages as heterosexual.<sup>177</sup>

While very helpful, *In re Lovo-Lara* does leave several unresolved issues regarding the recognition of transgender spouses.<sup>178</sup> For example, by requiring that the state recognize a transgender person’s relationship as a “heterosexual marriage,” the Board raises a difficult question when it is overlaid upon the marriage laws of the growing

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172. *In re Lovo-Lara*, 23 I. & N. Dec. at 746-47.

173. *Id.* at 751 (citations omitted).

174. *Id.* at 749-51.

175. *Id.* at 751-52 (citing H.R. REP. No. 104-664, at 31 (1996)) (emphasis in original).

176. *Id.* at 749-50 (referring to *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976)).

177. *Id.* at 751.

178. This article briefly addresses two of these outstanding issues: (1) what constitutes a “heterosexual marriage” in a state that does not discriminate against same-sex couples, and (2) what does “postoperative” mean? There are, however, a number of others, such as: What if the transition occurs after marriage? What if a court recognizes the gender change but the transgender person cannot obtain an amended birth certificate?

number of states that do not discriminate between “heterosexual marriages” and other marriages. Namely, how will immigration officials know whether such a state views a given marriage as “heterosexual”?

Although the BIA’s conclusion in *In re Lovo-Lara* focuses on the traditional deference to states in determining the issue of marriage, the Board noted repeatedly that the petitioning transgender spouse in *In re Lovo-Lara* was “postoperative.”<sup>179</sup> In amending its Adjudicator’s Field Manual (AFM) in January 2009, the USCIS focused on this fact and made “sex reassignment surgery” a prerequisite for recognizing a transgender person’s corrected sex.<sup>180</sup> Perhaps this was a characteristic attempt to simplify the question for immigration examiners with yet another bright-line federal test. The terms “sex reassignment surgery” and “postoperative,” however, are neither simple nor unambiguous.<sup>181</sup> In fact, this ambiguity has already led to multiple BIA appeals and remands in at least one unreported case in which the USCIS eventually recognized the marriage of a woman to a transsexual man who had a mastectomy but no genital surgery.<sup>182</sup>

While *In re Lovo-Lara* is the only officially reported BIA case regarding the marriages of transgender individuals, the Board has been consistent in its approach, employing similar analysis in unreported cases before and after *In re Lovo-Lara* was published.<sup>183</sup>

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179. *In re Lovo-Lara*, 23 I. & N. Dec. at 747, 749-51.

180. U.S. CITIZENSHIP & IMMIGRATION SERV., ADJUDICATOR’S FIELD MANUAL § 21.3(a) (2)(J) (2009) (redacted public version) [hereinafter 2009 FIELD MANUAL], available at <http://www.uscis.gov> (follow “Laws” hyperlink; then follow “Immigration Handbooks, Manuals, and Policy Guidance” hyperlink on left side of page; then follow “Adjudicator’s Field Manual” hyperlink; then follow “21.3” hyperlink).

181. Sexual transition is a complex process that can involve different procedures ranging from hormone therapy to various types of surgical procedures. See, e.g., Kristin Schilt & Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, 8 BERKELEY ELECTRONIC J. ECON. ANALYSIS & POL’Y art. 39, \*6 (2008). “Gender reassignment surgery,” therefore, may imply genital surgery, but it is not the only clear meaning of “postoperative” in this context.

182. *In re Oren*, No. A79-761-848, 2004 WL 1167318 (B.I.A. Jan. 21, 2004), *rev’d*, No. A79-761-848, 2006 WL 448282 (B.I.A. Jan 25, 2006); see also VICTORIA NEILSON & KRISTINA WERTZ, IMMIGRATION LAW AND THE TRANSGENDER CLIENT § 4.5.2 (2009), available at <http://www.immigrationequality.org/template3.php?pageid=1135> (discussing *In re Oren*).

183. See, e.g., *In re P.B.*, No. A087-002-967, 2009 WL 523126 (B.I.A. Feb. 18, 2009) (remanding the case for fact finding regarding *inter alia* proof the marriage was recognized as a valid heterosexual union in Nevada where it was celebrated, but oddly remaining silent regarding the law of the couple’s state of domicile, or intended domicile); *In re Ahmad*, No. A96-609-556, 2007 WL 3301748 (B.I.A. Sept. 26, 2007) (following *In re Lovo-Lara* to recognize the marriage of a man and a postoperative male-to-female transsexual as a “heterosexual marriage” under the laws of the state of New York although his wife could not produce a revised birth certificate from Singapore); *In re Widener*, No. A95-347-685, 2004 WL 2375065 (B.I.A. Sept. 21, 2004) (restating the traditional general rule of universal recognition for marriages that are valid where celebrated, while finding that there is no strongly held federal public policy regarding the marriage of a postoperative

Together, *In re Lovo-Lara* and its progeny reiterate the continuing focus on state laws in determining whether a couple is, in fact, married (or opposite sex) for immigration purposes. The Board clearly does not buy the argument that Congress intended to silently create new federal definitions of “marriage” and “spouse” in the INA as the Ninth Circuit assumed in *Adams v. Howerton*.<sup>184</sup> It is no more likely that the common meaning of “marriage” or the specific intent of Congress included transsexual spouses than same-sex spouses when those terms were used in the INA.<sup>185</sup>

### *C. Federal Public Policy Exceptions to Marriage Recognition Under the INA*

Although immigration officials and courts have generally looked to state law to define marriage for immigration purposes, they also agree that Congress has the power to override that state definition as it is used in the federal INA. With the exception of the Ninth Circuit decisions *Adams v. Howerton* and *Kahn v. INS*, immigration officials and courts have uniformly understood Congress’s intent to use the terms “marriage” and “spouse” as defined by state law, unless an exception is clearly warranted based on relevant, express statutory language, or unless the marriage was entered solely for the purpose of committing immigration fraud.<sup>186</sup>

This subsection focuses on the rare, recognized exceptions to marriage recognition under the INA, based on strongly held specific federal public policy. These federal public policy exceptions are currently limited to four categories: “marriage fraud,”<sup>187</sup> unconsummated

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male-to-female transsexual since DOMA and INA are both silent on this issue); *Oren*, 2004 WL 1167318 (restating the traditional rules regarding marital recognition under the INA before remanding the case for factual findings regarding the sex and marriage under Oregon state law of the petitioner, a female to male transsexual who had not undergone genital surgery).

184. 673 F.2d 1036, 1040 (9th Cir. 1982).

185. *In re Lovo-Lara* relied, in part, on the fact that a reported case recognized a transgendered spouse’s marriage under the law of at least one state at the time when DOMA was enacted. *In re Lovo-Lara*, 23 I. & N. Dec. 746, 749-50 (B.I.A. 2005) (citing *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976)). However, it is highly unlikely that Congress intended to specifically recognize marriages involving transgender spouses when it enacted the INA any more than it intended to recognize same-sex marriages. As the *In re Lovo-Lara* decision recognizes, congressional silence often really means silence, not some hidden positive regulatory agenda. *Id.* at 750. Its footnote distinguishing *Adams v. Howerton* does not comment one way or the other on the correctness of that decision. *Id.* at 752 n.4.

186. *See supra* Part II (laying out the test for marriage validity under the INA and exceptions to marriage validity).

187. The requirement of marital *bona fides* can be conceptualized as either a federal public policy exception to marriage recognition under the INA or a limit to the definition of the terms “marriage” and “spouse” as demonstrated by Congress in the INA.

proxy marriage, polygamy, and same sex marriage. All four categories can be justified by express statutory language either specifically delineating the exception (proxy marriage and marriage fraud) or establishing a ban to U.S. admission for those who participate in the specified relationship (polygamy and, originally, homosexuality). Today, the ban on homosexual admissibility has been repealed, but DOMA expressly demonstrates the continuing federal public policy against recognition of same-sex marriage.

### 1. A Note on "Marriage Fraud" and Federal Public Policy

As described above, marital *bona fides* is the subject of the third step in the practice-oriented three-step test of marriage validity for U.S. immigration purposes. Conceptually, this test can also be viewed as one of the exceptions to the rule of marriage recognition based on strongly held federal public policy.<sup>188</sup> This exception is clearly supported by express language throughout the INA. The INA expressly sets out marriage *bona fides* as an evidentiary requirement for conditional permanent residence.<sup>189</sup> It also provides for deportation on the basis of "marriage fraud,"<sup>190</sup> and it criminalizes "knowingly enter[ing] into a marriage for the purpose of evading any provision of the immigration laws" with possible prison sentences of up to five years.<sup>191</sup>

Since marriage is the easiest way to obtain many immigration benefits, and the only way to obtain some, immigration officials rightfully fear that foreign nationals will abuse the U.S. immigration system by contracting "sham marriages," marriages entered into for the primary purpose of procuring a benefit under U.S. immigration law.<sup>192</sup> Therefore, they police the legitimacy of marital relations very

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188. See *supra* note 47 and accompanying text (discussing congressional intent to not recognize "sham" marriages).

189. Immigration and Nationality Act § 216(d)(1)(A)(i)(III), 8 U.S.C. § 1186a(d)(1)(A)(i)(III) (2006).

190. Immigration and Nationality Act § 237(a)(1)(G), 8 U.S.C. § 1227(a)(1)(G) (expressly identifying marriage fraud as a basis for deportation).

191. Immigration and Nationality Act § 275(c), 8 U.S.C. § 1325(c) (prescribing imprisonment of up to five years and fines of up to \$250,000 for the crime of marriage fraud). In *Lutwak v. United States*, the United States Supreme Court upheld this federal refusal to recognize otherwise legally valid marriages. 344 U.S. 604, 608-13 (1953). Three justices, however, were unwilling to recognize even this departure from the idea that marriage validity is determined on the basis of the law of the place where it was celebrated. *Id.* at 620-21 (Jackson, J., Black, J., & Frankfurter, J., dissenting).

192. There are a plethora of cases in which foreign nationals paid U.S. citizens to marry them so that they could secure immigration benefits. See, e.g., *Lutwak*, 344 U.S. at 609-10 (refusing to recognize the validity of three "spurious phony marriages" contracted in France); *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979) (deciding a case in which a foreign national allegedly gave a U.S. citizen \$200 to marry him); *Volianitis v. INS*, 352 F.2d 766, 767 (9th Cir. 1965) (deciding a case in which a foreign national

strictly.<sup>193</sup> In fact, determining whether to recognize a marriage as *bona fide* is the overwhelming practical concern of most U.S. immigration examiners.<sup>194</sup>

Immigration officials have developed elaborate matrices of factual inquiry for substantiating the legitimacy of a legally valid marriage.<sup>195</sup> There are also express provisions in the INA for a rebuttable presumption of fraud when a new marriage is terminated within two years of the foreign national spouse becoming a lawful permanent resident<sup>196</sup> or when the marriage is entered while removal proceedings are pending.<sup>197</sup> The United States Supreme Court has upheld this refusal to recognize otherwise perfectly valid marriages under the INA on the basis that they were contracted solely for the purpose of obtaining immigration benefits.<sup>198</sup>

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apparently paid a U.S. citizen \$250 cash so she would marry him “in name only” so he could remain in the United States).

While immigration officials are willing to delve into the very personal details of a couple’s life together, they are supposedly only looking to ascertain that the couple did not marry primarily for the purpose of immigration. The author’s personal experience leads him to believe that immigration examiners are applying their own subjective standards of what determines a *bona fide* marriage. However, the published cases indicate that immigration law is not concerned with the conformity of a legal marriage arrangement to societal expectations. *See, e.g., In re Peterson*, 12 I. & N. Dec. 663, 665 (B.I.A. 1968) (finding that consummation is not required for a *bona fide* marriage based largely on housekeeping duties).

193. *Fraudulent Marriage and Fiancé Arrangements to Obtain Permanent Resident Immigration Status: Hearing Before the Subcomm. on Immigration and Refugee Pol’y of the S. Comm. on the Judiciary*, 99th Cong. 18 (1985) (statement of Alan C. Nelson, Comm’r, Immigration and Naturalization Service).

194. It is important to note that this *bona fides* requirement is apparently based solely on the prevention of marriages fraudulently entered for the purpose of obtaining immigration benefits. It is clear from the case law that the requirement is not based on the desire to ensure that foreign nationals allowed to immigrate on the basis of marriage are actually remaining in the United States with their spouses. *See Whether Present Viability of a Marriage is a Factor in Adjudicating an I-751*, Op. INS Gen. Couns. No. 91-7 (Jan. 25, 1991) (advising that an application to remove the conditional nature of a temporary lawful permanent residence status does not depend on the continuing viability of a marriage that was not entered for fraudulent reasons).

195. This includes photos of a wedding, vacations, anniversaries, or other marriage highlights; evidence of a common residence; affidavits of family and friends; love letters and gifts; evidence of children from the marriage; evidence of financial gifts or support; and financial interconnection in the form of joint bank accounts, joint credit cards, joint lease agreements, joint ownership of real property, automobiles or other personal property. *See* 8 C.F.R. § 1216.4(a)(5) (2009) (providing some examples of marriage documentation). The USCIS looks for triggers that indicate the possibility of a sham marriage, including: a large age disparity; language incompatibility; “[v]ast difference in cultural and ethnic background”; use of a matchmaker; “[d]iscrepancies in statements on questions for which a husband and wife should have common knowledge”; “[n]o cohabitation”; and family friends. 2009 FIELD MANUAL, *supra* note 180, at § 21.3(a)(2)(H).

196. Immigration and Nationality Act § 237(a)(1)(G)(i), 8 U.S.C. § 1227(a)(1)(G)(i).

197. Immigration and Nationality Act § 245(e)(1)-(2), 8 U.S.C. § 1255(e)(1)-(2).

198. *Lutwak v. United States*, 344 U.S. 604, 611-13 (1953).

The category of marriage involved is not relevant to this examination of marital *bona fides*. The existence of an otherwise legally valid marriage must normally be proven before an immigration examiner evaluates whether a marriage is a “sham” for immigration purposes.<sup>199</sup> Starting with that documented, lawful marriage, immigration officials examine the intent of the legal spouses and the nature of their relationship, often in intrusive detail that state and federal officials would not attempt outside of the immigration context.<sup>200</sup>

In addition to “sham marriages,” immigration authorities and courts have carved out three categories of marriage that are not recognized for immigration purposes on the basis of an expressly stated federal public policy: unconsummated proxy marriages, polygamous marriages, and same-sex marriages. The rest of this section examines these decisions and the next section explains why same-sex marriages should no longer fall within the federal public policy exception if DOMA is repealed or struck down.

## 2. Proxy Marriage

The INA does not define the word “marriage”; however, it does expressly state that it will not recognize “any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.”<sup>201</sup> This clear statement of the federal public policy of ignoring unconsummated proxy marriages for immigration purposes has been around since the Immigration Act of 1924.<sup>202</sup>

Prior to the express provision of the Immigration Act of 1924 dealing with proxy marriages, these marriages were treated like biracial

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199. See *supra* Part II.A for a description of a three-part test for marriage validity under the INA.

200. Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1245-46 (1986).

201. Immigration and Nationality Act § 101(a)(35), 8 U.S.C. § 1101(a)(35); see also *In re B---*, 5 I. & N. Dec. 698, 699 (B.I.A. 1954) (finding that a relationship did not qualify under this provision even though it had been consummated *prior* to the marriage, if it had not been consummated afterwards); Effect of Proxy Marriage on Entry as Unmarried Child, Op. INS Gen. Couns. No. 91-20 (Feb. 15, 1991) (finding it appropriate to enter the United States under the category for the unmarried children of a fourth preference alien, since her prior, unconsummated proxy marriage was invalid for immigration purposes).

202. See *Silva v. Tillinghast*, 36 F.2d 801, 802 (D. Mass. 1929) (describing the prohibition of proxy marriage in the Immigration Act of 1924, but finding an error in the Immigration Tribunal's reevaluating this issue that had already been decided by the Department of State in its decision to issue an immigrant visa); *In re W---*, 4 I. & N. Dec. 209, 210 (B.I.A. 1950) (finding that a valid Italian proxy marriage was not recognized by specific provision of the Immigration Act of 1924, but foreign-born child of that marriage was legitimate for immigration purposes).

marriages, uncle-niece and cousin marriages, and others.<sup>203</sup> Namely, the BIA focused on the law of the place where the marriage was celebrated and the law of the spouses' domicile, or planned domicile, in order to determine whether a marriage was valid under U.S. immigration law. Proxy marriages were recognized under pre-1924 immigration law as long as they were valid where celebrated and as long as the state of domicile did not expressly disqualify foreign proxy marriages.<sup>204</sup> Even today, in cases where a proxy marriage was later consummated, U.S. immigration authorities look to state law in order to determine its validity.<sup>205</sup>

### 3. Polygamy

In addition to unconsummated proxy marriages, federal courts and the BIA agree that polygamous marriages generally are not valid for immigration purposes as a matter of federal public policy. Of course, this is not surprising: U.S. immigration statutes have expressly prohibited the admission of "polygamists" into the United States since the enactment of the Immigration Act of 1891.<sup>206</sup> Courts

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203. The legal recognition of proxy marriages had apparently been of little practical significance from 1711 until World War I; however, the long absence of soldiers from home during that conflict apparently caused a number of jurisdictions and the U.S. Judge Advocate General to favorably discuss the possibility of valid proxy marriages. See Ernest G. Lorenzen, *Marriage by Proxy and the Conflict of Laws*, 32 HARV. L. REV. 473, 473, 487-88 (1919) (describing this history and arguing that proxy marriages should be recognized in any U.S. states that still recognized common law marriages); see also *United States ex rel. Aznar v. Comm'r of Immigration at Port of N.Y.*, 298 F. 103, 105 (S.D.N.Y. 1924) (citing opinion of Judge Advocate General).

204. *Consulich Societa Triestina di Navigazione v. Elting*, 66 F.2d 534, 536 (2d Cir. 1933) (remanding because spouse failed to establish that marriage was valid where celebrated); *Kane v. Johnson*, 13 F.2d 432, 432 (D. Mass. 1926) (apparently relying on *Ex parte Suzanna* in order to recognize a valid Portuguese proxy marriage because Massachusetts would not prohibit its domiciliaries from marrying by proxy in another jurisdiction); *United States ex rel. Modianos v. Tuttle*, 12 F.2d 927, 927-29 (E.D. La. 1925) (recognizing a valid Turkish proxy marriage in spite of Louisiana's prohibition of marriages by procuracy, because state policy did not expressly prohibit the recognition of such marriages celebrated in another jurisdiction); *Ex parte Suzanna*, 295 F. 713, 717 (D. Mass. 1924) (recognizing a valid Portuguese proxy marriage for immigration purposes because it would have been recognized under the law of Pennsylvania); *Aznar*, 298 F. at 103, 106 (purportedly relying on *United States ex rel. Markarian v. Tod*, 290 F. 198 (9th Cir. 1961), to recognize a valid Spanish proxy marriage despite apparent confusion).

205. See, e.g., *Marriage by Proxy*, Op. INS Gen. Couns. No. 93-73 (Sept. 21, 1993) (looking solely to the law of the District of Columbia, where a proxy marriage was purportedly celebrated, in order to find that the marriage was not valid for immigration purposes; of course, in light of the definition of marriage in INA § 101(a)(35), such a proxy marriage must also be consummated).

206. Immigration Act of 1891, 26 Stat. 570 (1891). Today, under Immigration and Nationality Act § 212(a)(10)(A), 8 U.S.C. § 1182(a)(10)(A) (2006), "[a]ny immigrant who is coming to the United States to practice polygamy is inadmissible."



and the BIA have understood this inadmissibility provision as a statement of clear federal public policy that prevents recognition of polygamous marriages for immigration purposes.<sup>207</sup> A different construction of “marriage” under the INA would result in internal inconsistency within the Act. Based on this understanding, the USCIS requires applicants for marriage-based immigration benefits to provide proof of the legal termination of any prior marriages of either spouse.<sup>208</sup>

In the 1927 case of *Ng Suey Hi v. Weedin*, the Ninth Circuit refused to recognize a valid Chinese polygamous marriage for U.S. immigration purposes.<sup>209</sup> The court recognized the general rule that a marriage, valid where celebrated, will be valid everywhere.<sup>210</sup> It also described “[a]n exception to the general rule . . . in the case of marriages repugnant to the public policy of the domicile of the parties, in respect of polygamy, incest, or miscegenation, or otherwise contrary to its positive laws.”<sup>211</sup>

The Ninth Circuit did not specify whether it was referring to the policy of the state or country of domicile in *Ng Suey Hi v. Weedin*. Failure to cite the polygamy ground of inadmissibility might imply that the court was referring to state law.<sup>212</sup> The court in *Weedin* also assumed the universality and natural law foundation of its position when it quoted another section of *C.J.S.* for the proposition that “[i]t is implied in the conception of marriage in all Christian countries that the relation can exist only between one man and one woman, a polygamous or polyandrous union being under the law no marriage.”<sup>213</sup>

The BIA later anchored its understanding of *Ng Suey Hi v. Weedin* and the “polygamy” exception to the rule of recognition clearly in positivist terms. In *In re H---*, the Board explained that this U.S. public policy “against polygamists and polygamy” was expressed in the INA provision proscribing the admissibility of polygamists.<sup>214</sup> As

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207. *Ng Suey Hi v. Weedin*, 21 F.2d 801, 801-02 (9th Cir. 1927); *In re Darwish*, 14 I. & N. Dec. 307, 308-09 (B.I.A. 1973); *In re H---*, 9 I. & N. Dec. 640, 641 (B.I.A. 1962).

208. 8 C.F.R. § 204.2(a)(2) (2009).

209. 21 F.2d at 801-02.

210. *Id.*

211. *Id.* at 802. It is important to distinguish this idea of a universal definition of marriage in Christian countries from the sort of focus on congressional intent that was discussed in later cases such as *Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982).

212. The court likely saw this ambiguity as irrelevant since it would have understood that there was agreement on this subject among all U.S. jurisdictions.

213. *Ng Suey Hi*, 21 F.2d at 802 (quoting *Corpus Juris Secundum*, currently included at 55 C.J.S. *Marriage* § 2 (2009)).

214. 9 I. & N. Dec. 640, 641, 642 (B.I.A. 1962) (finding a valid Jordanian polygamous marriage invalid for immigration purposes as “repugnant to [United States] public policy”). The BIA may have felt forced to make this specific immigration law distinction in light of information that “[t]here have been exceptions from the nonrecognition of polygamous marriages, such as American Indian tribal marriages, which have been upheld *in the absence of a federal statute* rendering such tribal laws and customs invalid.” *Id.* at 642

the Board explained in another case, “Congress did not intend to accord preference status on the basis of [polygamous] relationships in view of the clear disfavor it expressed towards polygamy by excluding polygamists from entry into the United States under” the INA.<sup>215</sup>

As straightforward as the bar on “polygamists and polygamy” may seem, even it has not always led to a clear and universal refusal to ever recognize polygamous marriages for immigration purposes. In at least one case, the B.I.A. found that a woman was not a polygamist merely because she was married to two men at the same time.<sup>216</sup> The Board explained in *In re G---* that “‘bigamy’ and ‘polygamy’ are neither synonymous nor interchangeable,” not because polygamy might indicate that someone has more than one spouse, but apparently because “‘bigamists’ are not Mormons.”<sup>217</sup> The Board further explained that, “[a]ccording to the legislative history of the 1917 [immigration] act, the words ‘polygamists’ and ‘polygamy’ refer to the historical custom and religious practice, which the Mormons had typified in this country until the statutory abolition of polygamy in the latter part of the [nineteenth] century.”<sup>218</sup> In spite of this questionable rationalization, the Board seemed to be grasping to apply the spirit of the law by recognizing an extra-legal separation as a divorce. Of course, it might not have hurt that this case involved a woman with two living husbands rather than a man with two wives.

In 1993, the INS General Counsel’s Office determined that a Senegalese man with two wives in Senegal was no longer excludable from the United States, since the INA was amended in 1990 to exclude only “immigrant[s] coming to the United States to practice polygamy” rather than anyone “practic[ing] polygamy or advocat[ing] the practice of polygamy” as had the prior law.<sup>219</sup> In addition, it determined that he would not be practicing polygamy in the United States “if his application for 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.”<sup>220</sup>

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(citing GOODRICH, CONFLICT OF LAWS 370, 373 (3d ed., 1949)) (emphasis in *In re H---*); see also *In re Darwish*, 14 I. & N. Dec. 307, 308 (B.I.A. 1973) (refusing to recognize the validity of a Jordanian-Muslim plural marriage because it “offend[s] the public policy of the United States”).

215. *In re Man*, 16 I. & N. Dec. 543, 543, 544 (B.I.A. 1978) (dealing with polygamy in the context of the purported “stepmother” relationship of a Chinese polygamous second wife and her husband’s child by his first wife).

216. *In re G---*, 6 I. & N. Dec. 9, 11 (B.I.A. 1953).

217. *Id.* at 11 & n.5.

218. *Id.* at 10-11 (citations omitted).

219. Polygamy in Senegal, Op. INS Gen. Couns. No. 93-98 (Dec. 29, 1993).

220. *Id.* Of course, not everyone would share the idea of marriage and polygamy implicit in the General Counsel Opinion, i.e., that one is only married during the time when he and his wife are cohabitating in the same jurisdiction.

In spite of the General Counsel's apparent determination that a polygamous marriage can be recognized under the post-1990 INA so long as only two opposite-sex spouses are in the United States together, research reveals no reported case in which this opinion was followed. In fact, there have been several unreported BIA cases that rely on a continuing understanding that polygamous marriages are still contrary to federal public policy and therefore not recognized for the purpose of granting marriage-based benefits under the INA, regardless of how many spouses are actually immigrating together to the United States.<sup>221</sup>

#### 4. *Same-Sex Marriage*

The United States has a long history of overt discrimination against lesbian, gay, and bisexual immigrants from other countries. There was an outright bar on the admission of lesbians and gay men into the United States until 1990.<sup>222</sup> Although the word "homosexual" was apparently no more "fit to be named" by Congress than by federal courts,<sup>223</sup> homosexual men and women were excluded from the United States throughout the twentieth century under the labels "public charge," "mentally defective," "constitutional psychopathic inferiority," "psychopathic personality," and "sexual deviancy," depending on the fashionable pseudoscientific term or homophobic rationale of the day.<sup>224</sup>

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221. See, e.g., *In re Ali*, No. A88-129-989, 2007 WL 4707517 (B.I.A. Oct. 31, 2007) (finding that, even if a polygamous marriage were "valid in Yemen, it cannot be recognized as a valid marriage for immigration purposes because there is a strong federal public policy against polygamy in this United States"); *In re Adomako*, No. A99-365-109, 2006 WL 3712508 (B.I.A. Nov. 20, 2006) (refusing to recognize a Ghanaian marriage for various reasons, including the repugnance of polygamous marriage to U.S. public policy); *In re Abulrub*, No. A96-750-665, 2006 WL 3485576 (B.I.A. Oct. 31, 2006) (refusing to recognize a valid Yemeni polygamous marriage because of U.S. public policy, even after the death of the husband's first wife).

222. FAMILY, UNVALUED, *supra* note 2, at 24, 28.

223. *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*215).

224. Although these pseudoscientific terms were less than clear, authorities, including the Supreme Court, found that they were not unconstitutionally vague. See *Boutilier v. INS*, 387 U.S. 118, 118-23 (1967) (holding that homosexuals are excludable under the category of "psychopathic personality," since legislative history demonstrated that Congress intended that phrase to exclude "homosexuals and other sex perverts," not those whom a professional psychiatrist would use the term to classify); see also *In re Longstaff*, 716 F.2d 1439, 1440 (5th Cir. 1983) (affirming a decision that a homosexual man may be denied naturalization on grounds of "psychopathic personality"); *Quiroz v. Neely*, 291 F.2d 906, 907 (5th Cir. 1961) (holding that, in light of congressional intent to exclude "homosexuals and sex perverts," the psychological meaning of the term "psychopathic personality" is not controlling); *United States v. Flores-Rodriguez*, 237 F.2d 405, 410 (2d Cir. 1956) (concluding that a gay man could have been excluded from admission to the United States

Throughout most of this period, Congress and the INS employed doctors with the U.S. Public Health Service (PHS) to rubber stamp the diagnosis of these pseudoscientific “afflictions.”<sup>225</sup> Whatever the term, the result was generally the same: if discovered, foreign lesbians, gay men, and bisexuals were not allowed to enter the United States for any reason.<sup>226</sup>

While a few judges expressed doubts about a law that would have excluded Leonardo DaVinci, Oscar Wilde, or even William

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as a person “of constitutional psychopathic inferiority”); *In re Hill*, 18 I. & N. Dec. 81, 84 (B.I.A. 1981), *rev'd*, *Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983) (allowing exclusion of a “self-admitted homosexual” even though the Public Health Service refused to issue certification that he had a “psychopathic personality”); *In re Lavoie*, 12 I. & N. Dec. 821, 823 (B.I.A. 1968) (finding a gay man deportable because he was a homosexual, and therefore “afflicted with psychopathic personality” under the INA); *In re Steele*, 12 I. & N. Dec. 302, 302-03 (B.I.A. 1967) (citing *Boutilier* for the proposition that a gay man was deportable as “one who was a constitutional psychopathic inferior” under the law in effect at the time of his last admission into the United States in 1952); *In re Lavoie*, 11 I. & N. Dec. 224, 227 (B.I.A. 1965) (holding that a gay man is deportable as a “psychopathic personality” because they are “words of art which, whatever else they might mean, include homosexuality and sex pervers”); *In re S---*, 8 I. & N. Dec. 409, 412-14 (B.I.A. 1959) (describing some of the history of the homosexual exclusion, including the idea that “a convicted and admitted homosexual, came under the term ‘mentally defective’” under the 1917 Immigration Act (citing *Flores-Rodriguez*, 237 F.2d 405), while determining that a gay man was excludable as a “‘psychopathic personality’ [an] individual[] who manifest[s] poor judgment [and] does not follow . . . the usual moral and social code . . . although . . . he knows what he is doing and the consequences of his acts” under the INA of 1952); *In re P---*, 7 I. & N. Dec. 258, 261, 263 (B.I.A. 1956) (reviewing the same legislative history to find that Congress intended to continue excluding homosexuals when it adopted the term “afflicted with psychopathic personality” in the INA of 1952, which “merely reflected modernized medical terminology”); MARGOT CANADAY, *THE STRAIGHT STATE* 21-23 (2009) (discussing the “public charge” ground of exclusion and its early employment against lesbians and gay men). *But see* *Fleuti v. Rosenberg*, 302 F.2d 652, 658 (9th Cir. 1962), *vacated and remanded on other grounds*, *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (holding that the term “psychopathic personality is void for vagueness”); *Flores-Rodriguez*, 237 F.2d at 412 (Frank, J., concurring) (questioning the majority’s willingness “needlessly to embark — without a pilot, rudder, compass or radar — on an amateur’s voyage on the fog-enshrouded sea of psychiatry”).

225. *See, e.g., In re Lavoie*, 11 I. & N. Dec. at 225 (PHS staff psychiatrist testified that, although not the best diagnosis “from a psychiatric point of view . . . he was compelled by the directives of the United States Public Health Service Manual to classify” a man with a “history of homosexuality as a psychopathic personality”); *In re P---*, 7 I. & N. at 259-60 (describing a PHS doctor’s testimony that he certified that the foreign national “was afflicted with a psychopathic personality” based on a five-minute interview); *see also* Richard Green, “Give Me Your Tired, Your Poor, Your Huddled Masses” (*Of Heterosexuals*): *An Analysis of American and Canadian Immigration Policy*, 16 *ANGLO-AM. L. REV.* 139, 140-44 (1987) (describing the role of the PHS in certifying homosexuals for exclusion from the United States between 1917 and the 1980s). *But see Longstaff*, 716 F.2d at 1443-44, 1451 (stating that the Attorney General determined that the PHS would no longer declare homosexuals to be *per se* mentally disabled, but that Longstaff could still be excluded based on his own admission of homosexuality); *Quiroz*, 291 F.2d at 907 (finding a lesbian inadmissible as a “psychopathic personality” in spite of the testimony of two doctors, with no indication that a PHS doctor actually certified her with this affliction).

226. *FAMILY, UNVALUED*, *supra* note 2, at 24-25.

Shakespeare,<sup>227</sup> there was little public or judicial criticism of this categorical exclusion from the United States of all those “afflicted” with homosexuality. In 1967, the same session in which the United States Supreme Court unanimously struck down anti-miscegenation laws in *Loving v. Virginia*, the Court also upheld the exclusion of homosexuals from the United States as “psychopathic personalit[ies].”<sup>228</sup> This was consistent with the treatment of lesbians and gay men in the U.S. legal system generally at that time, and for many years afterwards.<sup>229</sup>

Given this history, it is not surprising that the only same-sex couple ever to argue in a federal court of appeals that its marriage should be recognized for immigration purposes lost. That defeat occurred in the pre-DOMA Ninth Circuit case of *Adams v. Howerton*.<sup>230</sup>

#### a. Adams v. Howerton

*Adams v. Howerton* was one of the more poorly postured attempts at impact litigation in the history of American jurisprudence. Only eight years after the Supreme Court decided that Congress intended to make it impossible for any gay person ever to enter the United States, Richard Adams and Anthony Sullivan commenced a challenge to the INS's<sup>231</sup> refusal to recognize their “marriage” for the purpose of Mr. Sullivan's application for lawful permanent residence status.<sup>232</sup> Mr. Sullivan had previously been granted permanent resident status based on a marriage to a woman, but INS revoked that status after

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227. *Boutilier*, 387 U.S. at 130 (Douglas, J., dissenting) (referencing *Boutilier v. INS*, 363 F.2d 488, 497-98 (2d Cir. 1966) (Moore, J., dissenting)). Even those like Justice Douglas, who did not agree that a homosexual should have been excluded as “afflicted with psychopathic personality,” hardly recognized the equality of LGBT people in 1967. They merely felt that they should be tolerated, accepting the psychological understanding at the time that “[t]he homosexual is one, who by some freak, is the product of an arrested development.” *Id.* at 127.

228. *Id.* at 118.

229. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (finding no constitutional infirmity in a Georgia law that made same-sex sex a crime punishable by one to twenty years in prison). Notably, Chief Justice Burger was so incensed by the very suggestion that homosexual sex might not be criminal that he felt compelled to write a separate concurrence quoting Blackstone for the proposition that it was an “infamous crime against nature” of “deeper malignity’ than rape.” *Id.* at 197 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*215).

230. 673 F.2d 1036 (1982).

231. INS was the name of the immigration service when it was a part of the Department of Justice before it was broken up into the USCIS, ICE and CBP and moved to the Department of Homeland Security as a part of the response to the terrorist attacks on the World Trade Center on September 11, 2001. U.S. Citizenship and Immigration Services, Our History, *supra* note 119.

232. *Adams v. Howerton*, 486 F. Supp. 1119, 1121 (C.D. Cal. 1980).

they were convinced that the marriage was not, in fact, *bona fide*.<sup>233</sup> Later, Mr. Sullivan and Mr. Adams, who resided in Los Angeles, read in a magazine that a county clerk in Boulder, Colorado, was issuing marriage licenses to same-sex couples.<sup>234</sup> They traveled to Boulder, obtained a marriage license, and were married by a minister.<sup>235</sup>

Given the near plenary power of Congress regarding immigration issues<sup>236</sup> and the Supreme Court's recent endorsement of congressional intent to exclude all homosexuals from the United States, it is not surprising that Mssrs. Adams and Sullivan lost. However, it is surprising that INS officials, BIA members and federal judges throughout the process went out of their way to humiliate the couple and close every possible door to them and other couples in the future, even though it required a departure from both precedent and long-standing statutory construction of the INA.<sup>237</sup>

First, the INS rejected Adams's immigrant visa petition on behalf of Sullivan, stating "[y]ou have failed to establish that a bona fide marital relationship can exist between two faggots."<sup>238</sup> Then, the district court and the court of appeals both chose to go out of their way to clarify that no same-sex couple should even dream of ever being legally married.

As Chief Judge Hill concluded in his relatively empathetic district court opinion,

The time may come, far in the future, when contracts and arrangements between persons of the same sex who abide together will be recognized and enforced under state law. . . . But in my opinion, even such a substantial change in the prevailing mores would not reach the point where such relationships would be characterized as "marriages." At most, they would become personal relationships having some, but not all, of the legal attributes of marriage. And even when and if that day arrives, two persons of the same

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233. *Id.* at 1120.

234. John Caldwell, *Legally Wed in Colorado, 1975: Pioneering Gay Couple Anthony Sullivan and Richard Adams Didn't Just Get Legally Married 29 Years Ago: They Stood Up and Demanded to be Recognized*, THE ADVOCATE, Mar. 30, 2004, available at <http://www.thefreelibrary.com/Legally+wed+in+Colorado%2c+1975%3a+pioneering+gay+couple+Anthony+Sullivan...-a0114630941>.

235. *Adams*, 486 F. Supp. at 1120.

236. See *supra* note 15 (discussing congressional plenary power in immigration).

237. This was a sign of the times and a preview of Chief Justice Burger's concurrence in *Bowers v. Hardwick*. See *supra* note 229 and accompanying text (quoting from Burger's concurrence in *Bowers*).

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

sex, like those before the Court today, will not be thought of as being “spouses” to each other within the meaning of the immigration laws.<sup>239</sup>

Holding that the Adams-Howerton “marriage” was not cognizable under the INA did not require Chief Judge Hill to predict that their relationship would never be recognized anywhere as a marriage.<sup>240</sup> Nor did it require both the court of appeals and the district court to rule on every possible step of the test for marriage validity under immigration law.

The courts could have relied on the invalidity of the Boulder same-sex “marriage” under the law of Colorado where it was celebrated. The Colorado Attorney General had already stated his opinion that such same-sex marriages were of no legal effect in Colorado.<sup>241</sup> The court also could have followed the established idea that marriage-based federal immigration benefits could not be granted on the basis of a relationship that would not be recognized as a marriage in any state.<sup>242</sup> Instead, the courts went on to decide the case on the broader and more exceptional ground of federal public policy/definition.

The Ninth Circuit formulated a two-part test for marriage recognition under the INA: (1) “whether the marriage is valid under state law”; and (2) “whether that state-approved marriage qualifies under the [INA].”<sup>243</sup> Although it first referred to the Colorado Attorney General’s opinion that Adams and Sullivan were not married in that state, the court chose not to “make an educated guess as to how the Colorado courts would decide this issue.”<sup>244</sup> Instead, it skipped to the second issue and decided the case “solely upon construction of section 201(b)” of the INA and the court’s educated guess as to what Congress intended.<sup>245</sup>

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239. *Adams*, 486 F. Supp. at 1125. Chief Judge Hill proceeded to predict that any recognition of these non-marital relationships under the INA would require federal legislation, presumably in the nature of the UFAFA currently pending in Congress. See *infra* Part VI.A for a discussion of UFAFA.

240. In fact, Adams and Sullivan not only lived to see the day when their relationship could be recognized as a “marriage” in California, but their relationship survived those three decades of life together as immigration outlaws. Caldwell, *supra* note 234.

241. *Adams*, 486 F. Supp. at 1122. Chief Judge Hill characterized the Attorney General’s opinion as “an informal unpublished opinion,” but it was addressed to a member of the Colorado legislature, and it was cited as a part of the Administrative Record of the case. *Id.* In addition, as Chief Judge Hill explained in his opinion, at that time “no court ha[d] yet recognized a union between persons of the same sex as being a legal marriage.” *Id.* at 1122-23.

242. See *supra* notes 145-48 and accompanying text (discussing an opinion focusing on the importance of legal recognition in at least one state).

243. *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982).

244. *Id.* at 1039.

245. *Id.*

The court covered all the bases with regard to its construction of section 201(b), grounding its holding against INA recognition of same-sex marriages on three different forms of judicial deference. Citing the recent Supreme Court decision in *Boutilier v. INS*, the court deferred to Congress's desire to exclude all foreign homosexuals from the United States as "psychopathic personalities" under the INA.<sup>246</sup> Of course, this was a valid reason for finding a strong public policy for refusing to allow a gay man to immigrate or remain in the United States on the basis of his same-sex marriage. After all, the INA would be internally inconsistent if it barred gay men and lesbians from entering the United States while recognizing a right to immigrate on the basis of their same-sex relationship. This logic is similar to that underlying the federal public policy against recognition of polygamous marriages.<sup>247</sup>

The court emphasized that it was also deferring to the INS, since courts are "required to accord substantial deference to" the interpretation of a federal statute by the agency charged with its enforcement, and follow that construction "unless there are compelling indications that it is wrong."<sup>248</sup> This is a widely cited principle, but one that courts, including the Ninth Circuit, often appear to adhere to when they agree with the agency, but ignore when they do not.<sup>249</sup>

Unfortunately, the *Adams* court did not stop there. It ventured on into uncharted territory, relying on the INS's examination of marital *bona fides* under the INA to demonstrate that Congress meant to create a new federal definition of "marriage" for immigration purposes in the INA beyond "the mere validity of a marriage under state law."<sup>250</sup> Of course, Congress does have the power to define its own

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246. *Id.* at 1040.

247. For a discussion of polygamy in the context of immigration, see *supra* Part III.C.3.

248. *Adams*, 673 F.2d at 1040 (quoting *N.Y. Dep't of Soc. Serv. v. Dublino*, 413 U.S. 405, 421 (1973)).

249. See also *Kahn v. INS*, 36 F.3d 1412, 1420-22 (9th Cir. 1994) (Kozinski, C.J., dissenting) (accusing the majority of failing to defer to the BIA, explaining that "Congress entrusted the administration of the statute to the INS; the policy choices that govern are the agency's not ours."). Given the number of times federal courts have overturned facially reasonable agency interpretations, the list of possible citations in support of this proposition is endless. Compare *Adams*, 673 F.2d at 1040 (accordng "special deference" to INS's construction of the INA), with *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002) ("We . . . review de novo legal interpretations of the INA's requirements."), and *Kahn*, 36 F.3d at 1414 (per curiam) (finding that "[t]he Board erred as a matter of law in adopting state law as the conclusive measure of family ties"), and *Taing v. Chertoff*, 526 F. Supp. 2d 177, 180-81, 187 (D. Mass. 2007) (refusing to recognize BIA decision denying the surviving spouse of a deceased U.S. citizen the right to immigrant status, because "deference to an agency's interpretation of the law does not equate with blind faith. . . . [I]f the Agency's interpretation of the statute is found to be inconsistent with the statutory language, legislative history, or purpose of the statute, it must be invalidated.").

250. *Adams*, 673 F.2d at 1039.



terms in legislation within its authority, so long as it does not violate the U.S. Constitution in the process. In *Adams*, however, the court proceeded to develop an expansive view of the federal definition of marriage extending far beyond the previous precedents and its reliance on express statutory expressions of federal public policy.

The *Adams* court looked to congressional silence regarding a specific definition of “marriage” in the text of the INA.<sup>251</sup> The court assumed that legislative silence indicated, not continuing deference to state law within its traditional authority over marriage, but a specific federal meaning of “marriage” that was in the minds of members of Congress when they enacted the INA, including the words “spouse” and “marriage.”<sup>252</sup> It looked at the opposite-sex only definitions of marriage in the 1971 edition of *Webster’s Third New International Dictionary* and the 1979 edition of *Black’s Law Dictionary* to indicate what Congress must have had in mind in 1965 or earlier.<sup>253</sup> Of course, it should have added the more relevant fact that no state recognized same-sex marriage at the time when Congress drafted the INA, but that would have been an admission that *Adams* and *Sullivan* were not married in Colorado, obviating the need for this discussion.

In light of the specific exclusion of homosexuals from the United States, the court’s opinion in *Adams* should be readily distinguishable from any future cases in a world without DOMA. Fortunately, the court’s expansive language constructing a non-textually-based federal definition of marriage has not been expanded upon. However, it has given birth to at least one other Ninth Circuit opinion, *Kahn v. INS*, in which the majority found that an unmarried heterosexual partner qualified as “family” for purposes of relief from removal and that the BIA “erred as a matter of law in adopting state law as the conclusive measure of family ties.”<sup>254</sup> As discussed below, both the majority and minority opinions in *Kahn* also undermine the definitional rationale supporting *Adams v. Howerton*.

Part IV of this article is an argument that the idea of an implied federal definition of marriage under the INA was a misguided departure from many decades of constructing the terms “marriage” and “spouse” under U.S. immigration law. The other bases underlying *Adams v. Howerton* were sound. They all, however, have been

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251. *Id.* at 1040.

252. *Id.* The case is silent as to when congressional understanding of the term marriage froze in light of the many recodifications and amendments of federal immigration law and its use of the terms “marriage” and “spouse” since 1917. Given the fact that same-sex marriage had never been recognized in the United States before 1982, any date could have been chosen to justify this specific lack of intent rationale.

253. *Id.*

254. 36 F.3d 1412, 1415 (9th Cir. 1994).

superseded by intervening legislation and societal developments. Of course, this insight is not practically relevant as long as DOMA remains in force, since it expressly defines “marriage” and “spouse” as the union of one man and one woman.<sup>255</sup>

*b. The Immigration Act of 1990, DOMA and the Current Status of Same-Sex Spouses Under the INA*

Eight years after the Ninth Circuit decision in *Adams v. Howerton*, Congress substantially revised numerous areas of immigration law when it enacted the Immigration Act of 1990. Among other changes, it largely rewrote the provisions related to inadmissibility and exclusion from the United States, including repeal of the provision excluding “sexual deviants,” the last version of the homosexual bar.<sup>256</sup> As illustrated in Part IV below, this change in the INA would have undermined the logic of *Adams*, possibly leading to the recognition of same-sex marriages under the INA when they were later recognized by U.S. states. However, that was not to be.

In December 1996, a state court held that Hawaii could not discriminate against same-sex couples in issuing marriage licenses since there was no compelling state interest behind that gender-based restriction.<sup>257</sup> Hawaiians soon amended their state constitution to empower the legislature to prohibit same-sex marriages.<sup>258</sup> Congress reacted even more quickly and extremely. By September 1996, before the Hawaiian trial court issued its final decision, Congress had already enacted the Defense of Marriage Act (DOMA) to define “marriage” and “spouse” for all federal purposes and to affirm states’ power to refuse to recognize marriages entered in other states.<sup>259</sup> States followed suit with their own mini-DOMAs and amendments enshrining marriage discrimination in their state constitutions.<sup>260</sup> DOMA clarified that same-sex marriages would not be recognized under federal statutes, whether or not *Adams* has ongoing validity, so there have been no successful attempts to rethink *Adams* even

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255. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

256. FAMILY, UNVALUED, *supra* note 2, at 25, 28.

257. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*20-\*22 (Cir. Ct. Haw. Dec. 3, 1996).

258. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* 1079-80 (2d ed. 2004).

259. Defense of Marriage Act §§ 2(a), 3, 110 Stat. at 2419.

260. TRADITIONAL VALUES COALITION, *SPECIAL REPORT: 50-STATE SURVEY OF MARRIAGE PROTECTION AMENDMENTS* (Nov. 2008), <http://www.traditionalvalues.org/read/3450/special-report-50state-survey-of-marriage-protection-amendments/>.

though states have begun recognizing same-sex marriage over the last seven years.

Currently, because of DOMA, the relationships of U.S. citizens or lawful permanent residents with foreign nationals of the same-sex are generally invisible under the INA, even if the couple is legally married in a U.S. state or a foreign country.<sup>261</sup> These couples receive none of the benefits of “marriage” under the INA, including the right to remain together in the United States.<sup>262</sup> This leaves many U.S. citizens with the untenable option faced by Mayor Lown: terminate your relationship or leave your career, family, friends, and property in the United States behind to live in *de facto* exile abroad.<sup>263</sup> When a same-sex couple has children, the choices can be even more unconscionable. For instance, one highly publicized current case involves a Filipina named Shirley Tan, who is facing deportation in spite of her twenty-year relationship with a U.S. citizen and in spite of her twin twelve-year-old U.S. citizen sons, whom the couple is raising in California.<sup>264</sup>

Although same-sex relationships still are not recognized for the purpose of issuing most benefits under the INA, the USCIS and State Department now recognize non-marital life partnerships in two instances. First, if one of the partners has a visa to reside in the United States for temporary work or study, that person’s foreign partner may accompany him or her in B-2 visitor (tourist) status.<sup>265</sup> Second, the State Department recently changed its regulations to allow it discretion in granting derivative status to the partners of U.S. diplomats, consular officers and some other foreign officials if the partnership is legally recognized in the sending country.<sup>266</sup> Both categories include both same-sex and opposite sex couples as well as other household members.<sup>267</sup>

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261. Defense of Marriage Act § 3(a), 110 Stat. at 2419.

262. See Susan Young, *A Gay Mom Faces Deportation*, PEOPLE, Apr. 20, 2009, at 92 (explaining that “the federal government doesn’t allow gay spouses to sponsor partners for citizenship”).

263. See *supra* note 1 and accompanying text for a description of Mayor Lown’s story.

264. Julia Preston, *Bill Proposes Immigration Rights for Gay Couples*, N.Y. TIMES, June 3, 2009, at A19; Young, *supra* note 262, at 90-92.

265. 9 F.A.M. § 41.31 N14.4 (U.S. Dep’t of State Foreign Affairs Manual provision for granting B-2 classification to household members of nonimmigrant visa holders, including cohabitating partners).

266. 22 C.F.R. § 41.21 (2010). On July 14, 2009, the Department of State amended 22 C.F.R. § 41.21 to expand the category of “immediate relatives” recognized under Immigration and Nationality Act § 101(a)(15)(A), 8 U.S.C. § 1101(a)(15)(A) (2006), adding individuals who: (1) “[a]re not members of some other household”; (2) “[w]ill reside regularly in the household of the” nonimmigrant visa-holder; (3) “[a]re recognized as immediate family members . . . by the sending Government as demonstrated by eligibility for rights and benefits”; and (4) “[a]re individually authorized by the” U.S. Department of State.

267. FAMILY, UNVALUED, *supra* note 2, at 37 n.88.

Of course, this purely non-immigrant option does not assist the partners of lawful permanent residents or U.S. citizens, even if they are diplomats.<sup>268</sup> In fact, in a cruel irony, a marriage with a U.S. citizen or resident that is useless to help a foreign national under the INA can still hurt her. Many visas require that a successful applicant have nonimmigrant intent, i.e., the intent to return to her home country after the temporary visa expires.<sup>269</sup> A recognized relationship with a U.S. citizen or resident can evidence intent to stay in the United States, thus disqualifying the foreign national partner from non-immigrant visa categories such as tourist status, student status and some employment-based categories for which she might otherwise be eligible.<sup>270</sup>

#### IV. *ADAMS v. HOWERTON* REVISITED: WHY *ADAMS* SHOULD NOT CONTROL FUTURE QUESTIONS OF SAME-SEX MARRIAGE RECOGNITION

*Adams v. Howerton* should no longer control if a similar case is decided after DOMA is repealed or struck down.

In *Adams*, the Ninth Circuit found that Mr. Adams's "marriage" was invalid under federal immigration law for three reasons: (1) internal inconsistency of same-sex marriage recognition with the express inadmissibility of homosexuals in another section of the INA; (2) deference to the INS; and (3) the implied intent of Congress to create a federal definition of "marriage," frozen in time and independent of state definitions, when it used the term in the INA.<sup>271</sup>

The first and most convincing rationale is no longer relevant after the repeal of the homosexual exclusion in 1990.<sup>272</sup> It is impossible to say what the USCIS opinion might be in the future and what deference it may be due, so it is impossible to predict how the second reason would play in a hypothetical future case. In any case, despite frequent rhetoric about deference to USCIS officials, one does not have to be a cynic to find that courts tend to defer to immigration authorities only when they agree with the authorities' conclusion in a given case.<sup>273</sup>

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268. *Id.* at 37-39.

269. U.S. Dep't of State, Visa Denials, [http://travel.state.gov/visa/frvi/denials/denials\\_1361.html](http://travel.state.gov/visa/frvi/denials/denials_1361.html) (last visited Jan. 23, 2009).

270. FAMILY, UNVALUED, *supra* note 2, at 38-39.

271. *Adams v. Howerton*, 673 F.2d 1036, 1039-41 (9th Cir. 1982).

272. See FAMILY, UNVALUED, *supra* note 2, at 28 (discussing the Immigration Act of 1990, which removed the ban on homosexuals).

273. See *supra* note 249 and accompanying text (discussing judicial tendency to agree with agency decisions only when they want to).

There is a strong argument that the common meaning of “marriage” has changed since 1982. In fact, the most recent online edition of the *Merriam-Webster Dictionary*, the same source cited by the court in *Adams*, expressly includes same-sex couples in one of its recognized definitions of the word “marriage.”<sup>274</sup> As demonstrated below, the *Adams* court’s discovery of a specific new federal definition of marriage for immigration purposes was also a misguided and unnecessary departure from over eighty years of immigration precedent, and it should not be followed.

#### *A. The Homosexual Bar to Admissibility was Repealed in 1990*

Back in 1975, when Anthony Sullivan applied for lawful resident status on the basis of his same sex relationship with Richard Adams, Mr. Sullivan could have been barred from even entering the United States on the basis of his sexual orientation. The United States Supreme Court had ruled just eight years earlier that this homosexual exclusion was both intended by Congress and permissible under the U.S. Constitution.<sup>275</sup>

In this context, it was reasonable for the Ninth Circuit to interpret the term “marriage” so as to refuse to grant Mr. Sullivan lawful permanent residence on the basis of his same-sex relationship. In fact, that construction of the term “marriage,” based on a policy clearly expressed in the INA, fits neatly within the logic supporting the other, rare federal public policy exceptions to the general reliance on state marriage law.

The INA, however, has changed since *Adams* was decided. The homosexual bar to admission was eliminated in the 1990 rewrite of the Immigration and Nationality Act.<sup>276</sup> Absent DOMA, this removed the express textual basis for finding a federal public policy against recognition of same-sex marriage.

#### *B. The Ninth Circuit’s Two-Prong Test for “Marriage” Recognition Under the INA is Oversimplified and Misleading*

Although the final conclusion in *Adams* was correct, the court’s unnecessary over-generalization and overreaching in that case have left at least two problematic legacies. First, it has left an oversimplified two-prong test that has been cited in other contexts.<sup>277</sup> The second

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274. Merriam-Webster Dictionary, Marriage, <http://www.merriam-webster.com/dictionary/marriage> (last visited Apr. 7, 2010). The court in *Adams* cited the 1971 edition of Merriam-Webster’s Third New International Dictionary. *Adams*, 673 F.2d at 1040.

275. *Boutilier v. INS*, 387 U.S. 118, 122 (1967).

276. FAMILY, UNVALUED, *supra* note 2, at 28.

277. *See, e.g.*, 2 Immigr. L. Serv. 2d (West) § 7:5 (2009) (describing the *Adams* “two-step analysis” as a general rule to guide the analysis of whether any particular marriage is valid

and more troubling legacy of *Adams* was its misguided view of the second, federal, prong of its test as an invitation for courts and immigration officials to construct a new federal definition of marriage (even if Congress does not), largely independent of any particular state definition.<sup>278</sup>

As described above, the Ninth Circuit formulated a two-part test for whether a marriage will be recognized under the INA: (1) “whether the marriage is valid under state law”; and (2) “whether that state-approved marriage qualifies under the [INA].”<sup>279</sup> Although these two considerations are indeed valid, this overly simple method of conceptualizing marriage validity under the INA is rarely helpful and often confusing in other contexts. Unfortunately, although the Ninth Circuit now appears to recognize that the test is too general for many contexts,<sup>280</sup> the *Adams* test has sometimes been cited as if it were a comprehensive test of marriage validity in all cases.<sup>281</sup>

Step one of the *Adams* test focuses on state law, ignoring the important question of whether a foreign marriage is valid where it was celebrated, a criterion that Congress later set out expressly in section 216(d)(1)(A)(i)(i) of the INA.<sup>282</sup> It also fails to recognize the possibility that even a marriage celebrated in a U.S. state may be subject to the strong public policy exception of a sister state, leading to its lack of validity in that state.<sup>283</sup> In the unlikely event that the court intentionally ignored this issue in announcing the *Adams* test, it would raise serious doubt as to whether a century’s worth of cases involving conflicting state laws regarding the marriages of close relatives are still valid.

Step two of the *Adams* test is even more misleading. By combining the three unique and uncommon categories of marriage that were subject to express public policy objections under federal immigration

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under the INA); see also U.S. CITIZENSHIP & IMMIGRATION SERV., ADJUDICATOR’S FIELD MANUAL § 21.3(a)(2)(J) (2007), available at <http://www.stthomas.edu/ipc/legal/ImmigLaw/AFM%20Feb07/21.3.pdf> (citing *Adams* for the proposition that “[d]efining marriage under immigration law is a question of Federal law, not state law” in the context of reasoning that “USCIS has no legal basis on which to recognize a change of sex so that a marriage between two persons born of the same sex can be recognized”). It should be noted, however, that section 21.3(a)(2)(J) of the Adjudicator’s Field Manual was revised January 21, 2009, and no longer cites *Adams*. See 2009 FIELD MANUAL, *supra* note 180 (omitting mention of *Adams*).

278. *Adams v. Howerton*, 673 F.2d 1036, 1039-40 (9th Cir. 1982).

279. *Id.* at 1038.

280. See *infra* note 286 and accompanying text (discussing the more recent test adopted by the Ninth Circuit in assessing marriage validity).

281. 2 Immigr. L. Serv. 2d (West) § 7:5 (2009).

282. Immigration and Naturalization Act § 216(d)(1)(A)(i)(i), 8 U.S.C. § 1186a(d)(1)(A)(i)(i) (2006).

283. See *supra* note 44 and accompanying text for a discussion of the Full Faith and Credit clause and its limitations.

law and lumping these rare cases under the same heading with the issue of “marriage fraud,” the overriding concern of immigration officials in this area, the court overemphasized the importance of federal law in determining marital status outside the issue of marital *bona fides*. It implied that any new issue related to marriage recognition should be judged as a *de novo* question of federal law and specific congressional intent, regardless of state law.<sup>284</sup> This idea is contrary to more than eighty years of BIA opinions and federal case law regarding immigration and numerous other subjects.<sup>285</sup>

Fortunately, the Ninth Circuit seems to be evolving its formulation of the steps necessary for recognition of a marriage under the INA. In 2002, in a footnote in *Agyeman v. INS*, it described a three-prong test for marriage validity more similar to that described in Part II of this article: (1) “legal[] valid[ity]”; (2) “bona fide[s]”; and (3) no public policy exception.<sup>286</sup> This conceptualization remains somewhat misleading. For instance, the court seems to categorize federal objections to a marriage together with validity in the place where the marriage was celebrated rather than with the strong public policy exceptions recognized by states of domicile.<sup>287</sup> Obviously, this article finds it more accurate and useful to conceptualize DOMA’s federal exception to recognition of a marriage that was valid where celebrated, not as an all-encompassing new definition of “marriage” for federal purposes, but as a strong federal public policy exception to recognizing certain marriages even if valid under state law. This approach is consistent with that of federal courts in other contexts<sup>288</sup> and even with the opinion of at least one Ninth Circuit judge.<sup>289</sup>

### *C. The Ninth Circuit’s Search for a Broad Federal Definition of “Marriage” Under the INA Is Misguided*

For over seventy years, federal immigration law has consistently looked to state marriage law to determine marital status for

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284. *Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982).

285. See *supra* Part II.C for a discussion of federal reliance on state law to determine status in certain circumstances.

286. 296 F.3d 871, 879 n.2 (9th Cir. 2002).

287. *Id.* (citing *Adams*, rather than referring to the statutory requirement of validity where the marriage was celebrated, as the support for prong one. This implies that federal definition criteria fall under the concept of “legal[] valid[ity],” rather than policy-based exceptions).

288. See, e.g., *In re Kandu*, 315 B.R. 123, 133-34, 134 n.3 (Bankr. W.D. Wash. 2004) (applying DOMA to U.S. bankruptcy law and finding “that the federal government has announced a strong and clear countervailing policy” providing an exception to the general rule of international comity as applied to a Canadian same-sex marriage).

289. For discussion of that judge’s decision, see *infra* note 299 and accompanying text.

immigration purposes. A valid state marriage, not entered for the purpose of evading U.S. immigration law, is generally valid for immigration purposes.<sup>290</sup>

In *Adams*, the court veered sharply from this traditional path. Relying on precedent regarding the unique issue of “sham marriages” within the context of immigration, it stretched that exceptional doctrine to legitimize a federalized definition of “marriage” and “spouse” that Congress never indicated an intent to create.<sup>291</sup> It inferred that congressional silence with regard to the meaning of “marriage” was meant to freeze the idea of marriage for immigration purposes as it was commonly understood in dictionaries from the 1960s or earlier.<sup>292</sup>

Of course, the *Adams* decision was also a departure from the normal reliance of federal law on state law definitions of personal and family relationships not only in the context of immigration law,<sup>293</sup> but in federal bankruptcy law,<sup>294</sup> federal criminal law,<sup>295</sup> federal tax law,<sup>296</sup> Social Security,<sup>297</sup> copyright law, and other areas of federal law as well.<sup>298</sup>

At the time when *Adams* was decided, its departure from precedent may not have been as obvious as it is today. After all, in an era when same-sex marriage was recognized by no U.S. state or foreign country, *Adams*’s federal definition of marriage did not conflict with any state definition.

Today, however, a DOMA-free court wishing to follow *Adams* by constructing an exclusively heterosexual definition of marriage would find it difficult to rely on congressional intent. Now that some states define “marriage” to include gay and lesbian couples, upholding the federal definition established in *Adams* would require a choice between that silently implied “intent” and the long-standing

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290. Immigration and Nationality Act § 245(e)(3), 8 U.S.C. § 1255(e)(3) (2006).

291. There was language regarding a common understanding of marriage in *Lutwak v. United States*, 344 U.S. 604, 609 (1953), and in a previous Ninth Circuit case related to marriage fraud, *United States v. Sacco*, 428 F.2d 264, 270-71 (9th Cir. 1970). No other court, however, had referred to a separate federal definition of marriage under the INA outside of the context of immigration-motivated “marriage fraud.”

292. *Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982).

293. See *supra* notes 77-82 and accompanying text for a discussion of the lack of a federal definition of marriage.

294. See *supra* note 68 and accompanying text for discussion of state law involvement in bankruptcy.

295. See *supra* notes 69-70 and accompanying text for discussion of state law involvement in federal criminal law.

296. See *supra* note 71 and accompanying text for discussion of state law involvement in federal tax issues.

297. See *supra* note 72 and accompanying text for discussion of state law involvement in social security.

298. *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).



congressional and judicial assumption that states define what constitutes a marriage. This deference is a well-established federal policy, which Congress would not likely cast aside without providing so expressly, as it did with DOMA itself.

#### D. Kahn v. INS

In pursuit of a specific federal definition of family and marriage similar to that first discussed in *Adams v. Howerton*, the Ninth Circuit found twelve years later in *Kahn v. United States* that an unmarried couple constituted “family” for purposes of cancellation of deportation under INA section 212(c), even though they were clearly not married under the state law of California where they were domiciled, since that state did not recognize “common law marriage.”<sup>299</sup> Constructing an independent federal definition under the INA, the court found that the BIA had not acted rationally in relying exclusively on state law to determine whether or not the couple was “family.”<sup>300</sup>

Circuit Judge Kozinski wrote a blistering dissent. He concluded that, “[b]y purporting to establish a federal law of domestic relations, the majority boldly goes where no federal court has gone before.”<sup>301</sup> He did not approve, concluding that “[t]he majority’s freestyle adoption of a national definition of ‘family’ falls well outside [federal judicial] competence, and is bad policy to boot.”<sup>302</sup>

Clearly, the majority and Circuit Judge Kozinski disagreed strongly in *Kahn*. In fact, both sides took the unusual step of continuing their argument in a long amended opinion and a further dissent issued six months after the original opinions.<sup>303</sup> They did, however, agree on at least one point. Both sides apparently found it proper to focus on state law in determining whether a marriage exists for the purpose of obtaining immigration benefits, such as green card status.<sup>304</sup> Circuit Judge Kozinski found it entirely appropriate for the BIA to rely on state law to determine who constitutes “family” for virtually any federal purpose.<sup>305</sup> The majority narrowed its opinion to cancellation of removal under INA section 212(c) where the word “family” should not result in different results depending on a person’s state of domicile.<sup>306</sup> It distinguished that situation from “marriage”

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299. *Kahn v. INS*, 20 F.3d 960, 962 (9th Cir. 1994).

300. *Id.*

301. *Kahn v. INS*, 36 F.3d 1412, 1420 (9th Cir. 1994) (Kozinski, J., dissenting).

302. *Id.* at 1421.

303. *Id.* at 1412.

304. *Id.* at 1414 (majority opinion), 1418 (Kozinski, J., dissenting).

305. *Id.* at 1416-17 (Kozinski, J., dissenting).

306. *Id.* at 1414 (majority opinion).

recognition for purpose of gaining admission to the United States, when “the INA defines a ‘qualifying marriage’ as one which ‘was entered into in accordance with the laws of the place where the marriage took place.’”<sup>307</sup> Of course, this casts doubt on the breadth of the federal definition of “marriage” in *Adams*, since that case involved marriage-based immigration benefits, not family-based cancellation of removal.

#### V. SAME-SEX MARRIAGE RECOGNITION UNDER THE INA IF DOMA IS REPEALED OR STRUCK DOWN

Unfortunately, the absence of DOMA would not leave a clear, uniform definition of “spouse” and “marriage” under U.S. immigration law and precedent. As demonstrated above, however, that would not be unusual. It is the normal state of things that any disputed “marriage” must be evaluated for recognition under U.S. immigration law.<sup>308</sup> Immigration officials should apply the same rules and focus on state law that they have always applied in cases where marriage validity is not clear for immigration purposes.

Of course, it is possible that Congress might provide future guidance in legislation or through legislative history if it repeals DOMA.<sup>309</sup> It is, perhaps, more likely that we will be left with no clear instruction as to how to interpret state same-sex marriages in the immigration context in the event that DOMA is repealed or struck down.<sup>310</sup> This

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307. *Id.* at 1415 (citing Immigration and Nationality Act § 216(d)(1)(A)(i)(i), 8 U.S.C. § 1186a(d)(1)(A)(i)(i) (2006)). In a subsequent, unpublished 2008 opinion, the Ninth Circuit upheld a BIA opinion refusing to recognize a same-sex partner as a qualifying relative for purposes of cancellation of removal. *Hasibuan v. Mukasey*, 305 F. App'x 372, 374 (9th Cir. 2008). Circuit Judge Kozinski referenced this difference fourteen years earlier in his dissent in *Kahn*, pointing out that the majority's construction of a new category of “family” for unmarried, cohabitating couples in a state that does not recognize common law marriage was no fairer than the INS's refusal to do so: “Isn't the case of gay and lesbian couples — many of whom have made long-term commitments and are raising children — a far more compelling one? Kahn and her boyfriend, after all, have the option of getting married; they need only get a license.” *Kahn*, 36 F.3d at 1419.

308. See *supra* Part II.A for a discussion of the steps to marriage recognition under the INA.

309. For instance, one current legislative proposal for repealing DOMA expressly includes language clarifying that marriages valid in the state where celebrated will be recognized under federal law. See *supra* note 10 and accompanying text (discussing a bill to repeal DOMA).

310. See Chris Johnson, *No DOMA Repeal Next Year*, D.C. AGENDA (Dec. 10, 2009), <http://dcagenda.com/2009/12/10/no-doma-repeal-next-year-nadler/> (singling out the “certainty provision,” that would require federal recognition of state-recognized marriages regardless of the couple's state of domicile, in the pending legislation to repeal DOMA as language that “could cause political problems for House members seeking re-election”).

Part assumes that is the case and addresses the issue based on existing precedent that may be relevant.

If DOMA were repealed today, same-sex marriages should be examined under the three-step test described in Part II and illustrated in Part III, above. As in all immigration cases, the first requirement would be the validity of the marriage under the law of the place where the marriage was celebrated. If that state or foreign country recognizes same-sex marriage and if the couple in question fulfilled all of the other procedural and substantive requirements for marriage in that jurisdiction (e.g., licensing, age of consent, residence requirements, etc.), then the marriage would presumably be valid.

Next, under step two, immigration officials or judges should look to see if the marriage runs afoul of a strong public policy objection to same-sex marriage in the couple's state of domicile or intended domicile, or under federal law.

As described in Parts II and III above, federal public policy objections to a marriage have been extremely rare and always based on some express federal disapproval in the immigration context. As demonstrated in Part IV above, *Adams v. Howerton* should no longer control. There presumably would be no strong federal public policy against same-sex marriage recognition in a world without either DOMA or the homosexual bar.

Thus, prior to undergoing the usual, strict personal examination of marital *bona fides*, only review under the state law of the couple's domicile, or intended domicile, would remain for determining whether a same-sex marriage, recognized where celebrated, is valid under federal immigration law.

This still leaves a complex set of issues related to the strong public policy objection of the couple's current or future state of domicile. Assuming that a marriage is valid in the state of its celebration, the following scenarios might occur, depending on the law of the state of domicile.

#### *A. States of Domicile Without Mini-DOMAs or Constitutional Marriage Amendments*

The easy cases would be those in which the state of domicile would recognize the same-sex marriage. Currently, the list of U.S. jurisdictions falling in this category would include the District of Columbia as well as Massachusetts, Connecticut, Iowa, Vermont and New Hampshire, the states currently issuing marriage licenses to same-sex couples.<sup>311</sup> It would also include New York, Maryland and

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311. NCSL Marriage Report, *supra* note 4.

Rhode Island, since those jurisdictions, although not licensing same-sex marriages themselves, have all recognized same-sex marriages that are celebrated in a state or nation that does license them.<sup>312</sup> There should be no federal distinction here between marriages validly celebrated in a sister state and those validly celebrated in a foreign country, so long as the state of domicile does not draw such a distinction.

A few states, such as New Mexico and New Jersey, neither recognize same-sex marriage nor have laws or constitutional amendments prohibiting it.<sup>313</sup> Since these states have expressed no strong public policy objection to same-sex marriage, their domiciliaries would not trigger a state public policy exception to the general rule of recognition if they marry elsewhere.<sup>314</sup> The marriages should be recognized under immigration law in a world without DOMA.

The cases above are relatively easy, simply answered by adherence to the consistent precedent decisions in other controversial marriage cases.

#### *B. States with Mini-DOMAs or Constitutional Marriage Amendments*

The difficult cases are those involving states of domicile that have adopted state laws and constitutional amendments disapproving of marriage recognition for gay men and lesbians.<sup>315</sup> Would U.S. immigration law recognize marriages valid where celebrated, but clearly rejected by the couple's state of domicile or intended domicile? Unfortunately, while the precedents discussed above give us some guidance in these cases, they also contain ambiguities that make the answer to this question more difficult.

If the highly demanding requirement of most consanguinity and anti-miscegenation cases is followed, a same-sex marriage, valid where celebrated, would be recognized for immigration purposes regardless of the couple's state of domicile.<sup>316</sup> Those cases recognized only criminal prohibitions of cohabitation or evasion of state law as

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312. *Id.*

313. *Id.*

314. *See supra* Part II.B (discussing when public policy is strong enough to warrant an exception to the rule in favor of marriage recognition).

315. According to the National Conference of State Legislatures, twenty-nine states have adopted state constitutional amendments defining marriage to exclude gay and lesbian couples. NCSL Marriage Report, *supra* note 4. Hawaii's constitution was amended in a manner that was neutral towards the subject of same-sex marriage; it merely clarified that the state legislature had the sole authority to make that determination. *Id.*

316. *See supra* Part III.B.1-2 (discussing immigration decisions based on anti-miscegenation and consanguinity laws).

sufficiently strong state public policy exceptions to negate recognition under federal immigration law.<sup>317</sup> Since the United States Supreme Court has held that same-sex sexual intimacy, and presumably cohabitation, cannot be constitutionally criminalized, then no state could enforce a criminal law that rises to the standard traditionally required to express a sufficiently strong state public policy.<sup>318</sup>

Certainly those states with constitutional prohibitions of same-sex marriage are likely to argue that they express a sufficiently strong state public policy to trigger an exception under United States immigration law. They have a stronger argument than did states objecting to noncriminal, but unrecognized, consanguinity and miscegenation in marriage for two reasons. First, passionate and extensive debates and public referenda were frequently involved in passing the constitutional amendments in these cases.<sup>319</sup> Second, and more important, in light of the United States Supreme Court opinion in *Lawrence v. Texas*, the states have no constitutionally permissible option to express their objections to same-sex sexual relationships in the form of criminal prohibitions.<sup>320</sup> At least where state constitutional amendments expressly determine that same-sex marriages celebrated in other states, as well as those celebrated in the state in question, are invalid, they are the most specific and extreme public policy objection constitutionally possible.

Of course, *Lawrence v. Texas* and *Romer v. Evans*<sup>321</sup> could help both sides in this case. As discussed below, courts might find that state anti-same-sex marriage amendments are based on animus against lesbians and gay men, therefore violating the Fourteenth Amendment of the U.S. Constitution.<sup>322</sup> In fact, it might take a fine scalpel to separate constitutional amendments demonstrating a sufficiently strong public policy objection to same-sex marriage from animus towards people who are only attracted to the same sex, particularly in the angry political context in which many of those amendments were enacted.

If courts find that state marriage amendments violate the Fourteenth Amendment, they would likely also find that the Due

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317. See *supra* Part III.B (discussing the criteria for “strongly held public policy” sufficient to warrant nonrecognition of marriages that were valid where celebrated).

318. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding a liberty interest in private, consensual homosexual conduct). Of course, a state law criminalizing out-of-state same-sex marriage would also be constitutionally suspect. *Id.*; *Romer v. Evans*, 517 U.S. 620, 633-34, 635-36 (1996).

319. NCSL Marriage Report, *supra* note 4.

320. *Lawrence*, 539 U.S. at 578.

321. 517 U.S. 620 (1996).

322. See *infra* notes 344-351 and accompanying text (discussing a pending challenge to the constitutionality of marriage discrimination).

Process Clause and Equal Protection Clause as incorporated into the Fifth Amendment militate in favor of a more inclusive construction of the undefined term “marriage” in the INA. However, this might not be necessary.

As the United States Supreme Court has recently reaffirmed in other immigration contexts, an ambiguous term or provision of the INA should be interpreted so as to avoid serious doubts of constitutionality when that construction is reasonable.<sup>323</sup> Therefore, courts could stop short of determining the constitutionality of state marriage amendments and still find that they raise constitutional questions serious enough to compel a refusal to recognize that they merit an exception to the presumption of marriage validity. This might be seen as a step down the same misguided path of implied definitions conceptualized in *Adams v. Howerton*. On the other hand, one might argue that the established canon of constructing ambiguous statutes in order to avoid collisions with constitutional values outweighs the traditional deference to state marriage law in the specific context of constructing “marriage” and “spouse” under the INA, just as another canon, the avoidance of internal conflict within the INA, once mitigated in favor of defining “marriage” to exclude homosexuality.

#### VI. OTHER STRATEGIES FOR RECOGNIZING SAME-SEX COUPLES UNDER U.S. IMMIGRATION LAW

As this article demonstrates, the traditional and correct understanding of marriage under the INA defers to state family law to determine marriage validity, and this procedure should control with regard to same-sex marriage too, in the event that DOMA is repealed. This consistent construction of the INA in its present and historic form, however, does not mean that states will always be able to dictate the consequences of immigration policy as it regards “marriage” and “spouses.”

State definitions may be altered by express legislation in areas within Congress’s purview, like immigration.<sup>324</sup> The court in *Adams* was correct to the extent it recognized that Congress clearly has the authority, “within constitutional constraints,” to ignore state law and expressly define the terms of U.S. immigration law, including

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323. See *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (“‘It is a cardinal principle’ of statutory interpretation, however, that when an Act of Congress raises a ‘serious doubt’ as to its constitutionality, ‘this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’” (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))).

324. *Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982).

“marriage,” as it pleases.<sup>325</sup> Its use of the term without further explanation or definition merely implies that it is recognizing the institution, as it has almost always been understood, as a creature of state law. Assuming no constitutional violation, however, Congress is free to pass legislation that redefines the words “marriage” and “spouse” as it did in DOMA or to add other categories of immediate relatives, such as the “permanent partners” in the currently pending UAFAs.<sup>326</sup>

The United States Supreme Court has also repeatedly recognized that discriminatory state marriage laws may be unconstitutional, violating the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution in other contexts.<sup>327</sup> There are high-profile cases currently moving through the federal courts that challenge the constitutionality of state marriage discrimination against same-sex couples on just these grounds.<sup>328</sup>

#### *A. The Proposed Uniting American Families Act*

Some U.S. citizens may have no option of joining their foreign same-sex spouses or partners abroad. Other married gay Americans, however, do have the option of immigrating to another country to be with their families, since at least nineteen countries around the world recognize their relationships for immigration purposes.<sup>329</sup>

The countries that recognize same-sex couples for immigration purposes do so in very different ways. For instance, Spain and South Africa have recognized marriage for same-sex couples, and thereby allow those couples to benefit from the same immigration provisions

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325. *Id.*

326. Defense of Marriage Act §§ 3, 7, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)); Uniting American Families Act of 2009 § 2, H.R. 1024, 11th Cong. (2009).

327. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987) (finding that the right to marry applies to prison inmates); *Zablocki v. Redhail*, 434 U.S. 374, 381-82 (1978) (finding a fundamental right to marry); *Boddie v. Connecticut*, 401 U.S. 371, 373-74 (1971) (finding that given the importance of marriage and the state's monopoly of the process for granting divorces, the Due Process Clause is violated when access to courts is denied to indigents who cannot pay court fees and costs in divorce cases); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding that anti-miscegenation laws violate the Fourteenth Amendment). *But see Fiallo v. Levi*, 406 F. Supp. 162, 167-68 (E.D.N.Y. 1975) (“The possibility of joining one’s closest family in the United States is a privilege granted by statute, not a right given by the Constitution.”).

328. *See, e.g.*, *Perry v. Schwarzenegger*, No. 09-17241, 2010 U.S. App. LEXIS 170, at \*3 (9th Cir. 2010) (challenging California’s Proposition 8 as unconstitutional).

329. While they do not all recognize same-sex marriage, at least nineteen countries allow their citizens to sponsor their same-sex spouses’ or partners’ immigration: Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, Israel, and South Africa. FAMILY, UNVALUED, *supra* note 2, at 151-71.

that benefit opposite-sex spouses.<sup>330</sup> On the other hand, Brazil and Israel recognize same-sex relationships specifically in the context of special immigration law provisions.<sup>331</sup>

The UAFA, a solution similar to the Brazilian and Israeli models, has been proposed in every United States Congress since 2000.<sup>332</sup> If enacted, UAFA would not change the definitions of “marriage” or “spouse” under the INA.<sup>333</sup> Rather, “[i]t would add the term ‘permanent partner’ to [most] sections of the [INA] where ‘spouse’ now appears.”<sup>334</sup> As UAFA currently stands, the one significant exception would be with regard to dependent spouses of nonimmigrant visa holders, who would still apparently have to resort to B-2 visitor visas for the duration of their nonimmigrant stays in the United States.<sup>335</sup>

UAFA defines “permanent partner” as a foreign national who is (1) at least eighteen years old; (2) in an intimate relationship with the sponsoring adult U.S. citizen or permanent resident, “in which both parties intend a lifelong commitment”; (3) “financially interdependent with that” person; (4) “not married to or in a permanent partnership with anyone” else; and (5) “unable to contract with that” sponsor a marriage that is recognized under the INA.<sup>336</sup>

Representative Jerrold Nadler (D-NY) first introduced UAFA (then known as the Permanent Partners Immigration Act) in the House of Representatives in February 2000.<sup>337</sup> He has reintroduced it in every Congress since, and Senator Patrick Leahy (D-VT) has introduced companion legislation in the Senate since 2003.<sup>338</sup> When UAFA was reintroduced in the current Congress, it had eighty original cosponsors in the House and fifteen in the Senate,<sup>339</sup> and it appears to have more momentum than in the past. This February, the American Bar Association passed a resolution calling on Congress to enact legislation like UAFA, and the Senate Judiciary Committee finally held hearings on the bill.<sup>340</sup>

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330. *Id.* at 167-68.

331. *Id.* at 154, 161.

332. *Id.* at 145.

333. *Id.*

334. *Id.*

335. Immigration Equality, Visas for Co-Habiting Partners, <http://www.immigrationequality.org/template.php?pageid=155> (last visited Apr. 7, 2010).

336. H.R. 1024, 111th Cong. (2009).

337. FAMILY, UNVALUED, *supra* note 2, at 145.

338. *Id.*

339. See Immigration Equality, Current Co-Sponsors, <http://www.immigrationequality.org/template.php?pageid=152> (last visited Apr. 7, 2010) (providing links to cosponsor lists for the House and Senate).

340. *The Uniting Families Act: Addressing Inequality in Federal Immigration Law Before the S. Comm. on the Judiciary*, 111th Cong. (2009), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3876>.



Although perhaps an even longer shot than the demise of DOMA, UAFA would alleviate many of the obstacles preventing recognition of same-sex relationships for immigration purposes.<sup>341</sup> It would probably affect more couples than a repeal of DOMA, since most states and foreign countries still do not recognize the marriages of same-sex couples. On the other hand, UAFA would provide no additional benefits for the spouses of foreign nationals who are temporarily working or studying in the United States.<sup>342</sup> It might also be of limited use for fiancés and spouses who have not been together long enough or do not have the knowledge and financial wherewithal to qualify under the higher level of scrutiny that USCIS would likely apply to couples who cannot produce a marriage license.<sup>343</sup>

Of course, the premise of this article is that the federal definition of “marriage” and “spouse” in DOMA may be repealed or struck down by a court prior to, or in lieu of, passage of UAFA.

### *B. The Federal Constitutional Challenge to Marriage Discrimination in General*

In addition to the suits challenging the federal definition of marriage in DOMA, a pending suit in a California federal court challenges the constitutionality of marriage discrimination in general.<sup>344</sup>

In May of 2009, *Perry v. Schwarzenegger* was filed to challenge the constitutionality of California’s marriage amendment under the Equal Protection and Due Process clauses of the Fourteenth Amendment to the U.S. Constitution.<sup>345</sup> This case made headlines not only because of the importance of the issues involved, but also because of the attorneys who filed it, Theodore Olsen and David Boies. Mr. Olsen was Solicitor General under the George W. Bush administration and Mr. Boies was President Clinton’s attorney during his impeachment proceedings.<sup>346</sup> Most famously, they represented the two opposing sides in *Bush v. Gore*.<sup>347</sup>

While challenges to marriage discrimination against same-sex couples have never before been successful in federal courts,<sup>348</sup> there

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341. Uniting American Families Act, H.R. 1024, 111th Cong. (2009).

342. FAMILY, UNVALUED, *supra* note 2, at 146.

343. *Id.*

344. *Perry v. Schwarzenegger*, No. 09-17241, 2010 U.S. App. Lexis 170, at \*4 (9th Cir. 2010).

345. Leslie A. Gordon, *Marriage Proposal: Prop 8 Suit Goes Federal, and that Worries Same-Sex Marriage Advocates*, A.B.A. J., Sept. 2009, at 18-20.

346. *Id.* at 18.

347. *Id.*

348. *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972). The United States Supreme Court’s decision to deny a hearing in *Baker* for

are hopes today that the courts may view the issue differently in light of *Romer v. Evans* and *Lawrence v. Texas*, two relatively recent United States Supreme Court opinions that have shown a willingness to review cases of discrimination on the basis of sexual orientation seriously and carefully, even if they did not employ traditional Fourteenth Amendment strict scrutiny analysis.<sup>349</sup> Plaintiffs in these cases can also be encouraged by the sea change in state supreme court decisions relating to marriage discrimination, particularly those that applied heightened scrutiny to state laws discriminating on the basis of sexual orientation.<sup>350</sup>

*Perry* does not directly focus on the question of federal recognition of same-sex marriage. If the United States Supreme Court, however, were to rule that discrimination in marriage against same-sex couples violates the Fourteenth Amendment, it would likely toll a death knell for discrimination at the federal level as well. The Fifth Amendment Due Process Clause applies to the federal government, and the Fourteenth Amendment Equal Protection Clause has been held incorporated through the Fifth Amendment to restrain the federal government as well.<sup>351</sup> Of course, a victory in *Perry* would likely invalidate state constitutional amendments and mini-DOMAs, as well as the federal DOMA.

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lack of subject matter jurisdiction is considered valid, binding precedent with regard to the constitutionality under the Fourteenth Amendment of the U.S. Constitution of state court judgments prohibiting two people of the same sex from marrying. *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd*, *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982); *see also* *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (noting that a Supreme Court summary affirmance “affirm[s] the judgment but not necessarily the reasoning by which it was reached”). This summary decision, however, binds lower courts only with regard to the holding of the case, not the reasoning of the affirmed opinion. *In re Kandu*, 315 B.R. 123, 136 (Bankr. W.D. Wash. 2004) (distinguishing a Fifth Amendment challenge to federal marriage discrimination in the form of DOMA from the Fourteenth Amendment challenge to a discriminatory state marriage law upheld in *Baker*, before proceeding to uphold DOMA as well).

In *In re Kandu*, a federal Bankruptcy court noted that “[t]he Supreme Court’s approach to the constitutional analysis of same-sex conduct . . . at least arguably appears to have shifted.” *Id.* at 138 (citing *Lawrence v. Texas*, 539 U.S. 558, 586-606 (2003)). This is significant because federal courts may arguably depart from cases summarily decided by the Supreme Court if interceding “doctrinal developments indicate otherwise.” *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

349. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003); *Romer v. Evans*, 517 U.S. 620, 623-24 (1996). *But see Lawrence*, 539 U.S. at 578-79 (stressing that the case did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”); *Kandu*, 315 B.R. at 138 (applying rational basis review to uphold the constitutionality of DOMA’s select federal discrimination against same-sex married couples under Fifth Amendment Due Process and incorporated Equal Protection).

350. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009).

351. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

As with UAFA, this article is premised on the assumption that DOMA may be repealed or struck down prior to a positive appellate court decision in a case like *Perry*.

### CONCLUSION

If DOMA were repealed or struck down, that would not result in a clear, uniform rule recognizing all same-sex marriages under the INA. There is, however, a wealth of guidance about how our immigration system deals with marriages that are recognized in some, but not all, U.S. states.

U.S. Attorneys General, the BIA, immigration officials, and most federal courts have consistently applied the same standards to determine marriage validity under the INA. These standards have been used in dozens of cases, including those involving biracial marriage, marriage between close relatives, marriage involving minors, marriage involving transgender spouses, proxy marriage, polygamy, and even same-sex marriage before DOMA.

If valid where celebrated, a marriage is generally presumed to be valid under U.S. immigration law as well. There are, however, exceptions based on both state and federal public policy. If a couple's state of domicile has a very strong public policy objection to a particular category of marriage, as expressed through criminal sanctions against the underlying relationship or sanctions against marriage in another state as an evasion of the domicile's marriage law, an exception will be recognized under the INA. Four federal public policy exceptions have also been recognized in the cases of unconsummated proxy marriages, polygamy, "sham marriages," and same-sex marriage, all coinciding with express provisions in relevant federal statutes indicating direct or indirect objection to a marriage or its underlying relationship.

If DOMA is repealed or struck down, same-sex marriages should be recognized under the INA so long as they are *bona fide* and valid where celebrated and the couple's state of domicile has no strong public policy objection. If state law included an enforceable criminal prohibition of cohabitation or evasion of state law to marry in another jurisdiction, it could support an exception to the presumption of recognition. Since that is probably impossible in light of the United States Supreme Court's opinion in *Lawrence v. Texas*, state constitutional amendments are the strongest and most specific constitutionally valid expressions of state objection possible. That may be enough. Such amendments, however, may also fail constitutional muster, or, at

least, raise such constitutional concerns that federal courts will recognize same-sex marriages under the INA, regardless of state public policy objections.

A world without DOMA would be a more just place for all lesbian and gay spouses. For gay Americans in binational couples, the demise of DOMA could also mean an end to the daily choice between their country and the people they love.