Lenox Institute of Water Technology

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Statute of Liberty?

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Statute of Liberty?:
“Give me your tired, your poor…the homeless, [just not gays]…”

V. Introduction

Historically, homosexuals were prohibited from obtaining sponsorship benefits in this country because they were viewed as psychopaths. The fact that this reasoning is not morally and socially appropriate today has led Congress to instead legitimize excluding homosexuals from immigration sponsorship benefits with the implied power it has over external affairs and its express enactment of the Federal Defense of Marriage Act (DOMA).

This is unfortunate, as gay and lesbian bi-national partners face discrimination in many ways far exceeding the discrimination felt by those whose lives are not complicated by a desire to live in the same country as one’s loved one. Seeking permanent unification with one’s same same-sex foreign partner is made virtually impossible by the enactment of DOMA, which defines “marriage” for all federal purposes.

This particular area of the law is even more complicated by judicial deference to Congress’s “almost plenary power” in the field of immigration.

In order to illustrate the difficulty and angst of gays and lesbians’ struggle with the United States immigration system, while at the same time fearful of sexual orientation discrimination, it will be helpful to consider a hypothetical. In our hypothetical, assume that Juan, a Mexican national, came to the United States with a student visa in 1997. After graduating from high school, he was able to stay in this country as a temporary guest worker,
working in the logging industry in Massachusetts. He worked seventy hour weeks to support his mother, father, and younger siblings in rural Oaxaca, México. While working strenuous hours cutting and hauling trees, he met Jason. Juan and Jason fell in love with one another. As a temporary guest worker, Juan was only able to spend the summers with Jason. After six years of a committed semi-long distance relationship, Juan and Jason were legally married in Jason’s home state of Massachusetts. However, Jason was not able to sponsor Juan for immigration purposes. Thus, Juan could not stay here permanently even though they were legally married. Juan was confronted with the harsh realities of a country that discriminated against him not only for his attempt to better the life of his family, but also for falling in love with someone of the “wrong sex.”

This essay will present a brief overview of the United States’ immigration policy with respect to sponsorship laws, as well as a brief introduction to the Federal Defense of Marriage Act (DOMA) and how it has affected these laws. This essay will also illustrate the extent of judicial deference toward Congress in the realm of immigration. Following this introductory material, there will be a discussion of the traditional and modern view of homosexuals as pertains to immigration law. Aside from an analysis of the sponsorship laws, this essay will also glance at the exigent circumstances that create loopholes for homosexuals in immigration law, such as “extreme hardship,” fear of persecution, and obtaining a B-2 tourist visa. However, this discussion will not stop at these technical loopholes, but will also take a look at any non-conventional ways to gain permanent entry into the United States. This essay will conclude with a proposal of how one should attempt to challenge the federal definition of ‘marriage’ for immigration purposes.

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6 However, if Juan happened to have fallen in love with a woman rather than a man, he could legally be sponsored to stay in this country.
VI. Background

a. Overview of US Immigration Policy with Respect to Sponsorship Laws

In the sphere of immigration law, Juan is overpowered by Congress in any attempt to make the inherently personal choice of who he wants to spend the rest of his life with. The general rule (for straight people) is that a spouse may sponsor his or her partner for purposes of immigration. This may be done in two ways.

The first way a spouse may sponsor their loved one is via the family-sponsored preference categories. The order of preference is as follows: unmarried sons and daughters of U.S. citizens, spouses and unmarried sons and daughters of permanent resident aliens, married sons and daughters of U.S. citizens, and brothers and sisters of U.S. adult citizens. However, only a certain number of sponsored aliens are permitted annually with the family-sponsored preference categories.

The second way a spouse may sponsor their loved one is via an allowance for sponsorship of immediate relatives, which is defined to include “spouses” of U.S. citizens. This manner of sponsorship in a sense trumps those sponsored by way of family-sponsored preference categories. This group is exempt from being counted towards a quota and is able to acquire permanent residence more quickly than the applicants in the family-sponsored preference categories.

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9 There are several exceptions and loopholes to these forms of sponsorship, which will be discussed further on in this essay.
10 Stanley Mailman & Daniel Kowalski, IMMIGRATION LAW AND PROCEDURE 11.01 (Lexis Nexis Desk ed. 2006).
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
Although the general rule is that a spouse may sponsor his or her partner for purposes of immigration,\textsuperscript{16} Congress has preempted any attempt for someone to sponsor his or her same-sex partner.\textsuperscript{17} Even where states have permitted marriage or some sort of civil union between same-sex partners, Congress has trumped that with its enactment of DOMA.\textsuperscript{18} The United States Citizenship and Immigration Service generally uses balancing tests.\textsuperscript{19} Therefore, this is a more flexible area of law than others. For that reason, immigration seems to be the perfect sphere to challenge DOMA.

b. Overview of the Federal Defense of Marriage Act (DOMA)

In 1996, President Bill Clinton signed the Federal Defense of Marriage Act right before his campaign for re-election.\textsuperscript{20} This was in response to Hawaii’s court decision, which recognized the possibility that same-sex marriages are permitted in its Constitution.\textsuperscript{21} 1 U.S.C.A. § 7 provides:

\begin{quote}
In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or wife.
\end{quote}

Despite several changes in U.S. immigration policy, DOMA perseveres. After September 11, 2001, the Immigration and Naturalization Service was replaced by the Department of Homeland Security, the Bureau of Citizen & Immigration Services, the Bureau of Customs & Border

\textsuperscript{16} Id.
\textsuperscript{17} See 1 U.S.C.A. § 7.
\textsuperscript{18} See Id.
\textsuperscript{19} Rachel Duffy Lorenz, Transgender Immigration: Legal Same Sex Marriages and Their Implications for the Defense of Marriage Act, 53 UCLA L. Rev. 523 (2005). For example, in determining whether there is an “extreme hardship” on an alien that involves severe and unusual harm, the trier of fact must look to facts and circumstances. See Sullivan v. Immigration and Naturalization Service, 772 F.2d 609 (1985). There are not many black and white tests in the realm of immigration.
\textsuperscript{20} Arthur S. Leonard & Patricia A. Cain, SEXUALITY LAW (Carolina Academic Press 2005).
\textsuperscript{21} See Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).
Protection, and the Bureau of Immigration and Customs Enforcement.\textsuperscript{22} However, the Immigration and Nationality Act (INA) still does not define either “marriage” or “spouse.”\textsuperscript{23} Even if it did, any requirements for sponsorship that the INA has must follow the narrow definitions of “marriage” and “spouse” set forth by DOMA. Thus, DOMA prevents recognition of same sex unions (sanctified as marriages or otherwise) for purposes of immediate relative status or any other immigration benefits.\textsuperscript{24} But other types of marriages, such as polygamous marriages and incestuous marriages, are not recognized as contrary to public policy, and thus are not specifically barred.\textsuperscript{25} It is ironic that only same-sex partners are specifically barred from sponsoring one another rather than what may be described as “morally worse” relationships.

c.  Judicial Deference toward Congress

Congress has empowered itself to exclude foreign homosexuals in any way it sees fit.\textsuperscript{26} And unfortunately, the courts have deferred to Congress in this area.\textsuperscript{27} In \textit{Adams v. Howerton}, the court stated that “congress has almost plenary power to admit or exclude aliens.”\textsuperscript{28} The Supreme Court has mentioned that the actions of Congress with respect to aliens may be a nonjusticiable political question.\textsuperscript{29} However, the Supreme Court merely mentioned this possibility in dicta. In \textit{Fiallo v. Bell}, the Court stated that “in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable

\begin{itemize}
\item \textsuperscript{22} Mailman & Kowalski, \textit{supra} note 11, 11.01.
\item \textsuperscript{23} Laura L. Lichter, \textit{Nuts and Bolts of Family-Based Immigration}, SL010 ALI-ABA 195 (2006).
\item \textsuperscript{24} The language, “[i]n determining any Act of Congress…or interpretation of the various administrative bureaus…” makes it clear that any immigration bureau may not have its own definition of “marriage” or “spouse.” \textit{See} 1 U.S.C.A. § 7 (emphasis added).
\item \textsuperscript{25} Lichter, \textit{supra} note 24, 195.
\item \textsuperscript{26} \textit{Adams}, 673 F.2d at 1041.
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.} at 1039 (emphasis added). But how can plenary power be plenary if it is "almost plenary power"? \textit{See Id.} at 1039.
\item \textsuperscript{29} \textit{Id.} at 1042 \textit{(discussing Fiallo v. Bell, 430 U.S. 787 (1977))}. It is notable to mention that the Supreme Court also mentioned in dicta that a statute could be “so baseless as to be violative of due process and therefore beyond the power of Congress.” \textit{Fiallo}, 430 U.S. at 788. At least they recognize some limits!
\end{itemize}
Yet Congress does not take into account that it is affecting citizens of this country, as they are not able to remain with their loved ones for prolonged periods of time. The Court shed some light into its policy justification for giving so much deference to Congress in the realm of immigration in Fong Yue Ting v. United States. In this case, the Court held broadly that “the power to exclude aliens is ‘inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachment and dangers - a power to be exercised exclusively by the political branches of government.” Although this case was decided over one hundred years ago, the Court has continued to sustain Congress’s “almost plenary power” to exclude from this country whoever it deems has undesirable characteristics. Unfortunately, United States immigration policy has become more stringent since the terrorist attacks on September 11th, 2001. Do the previous and current policy justifications for deference to Congress legitimize disallowing same-sex binational partners to sponsor one another? It is important to keep the doctrine of separation of powers in mind, but is it really necessary to so blindly turn the other cheek to an injustice so great?

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30 Id. at 1041 (quoting Matthews v. Diaz, 426 U.S. 67 (1976)).
31 Generally, when this happens, one may imagine that their loved one is locked away. How paradoxical that this is supposedly the land of freedom when the government forces separation and emigration on those who have lifelong partners here?
32 Fong Yue Ting v. United States, 149 U.S. 698 (1893).
33 Adams, 673 F.2d at 1041 (quoting Fong Yue Ting, 149 U.S. at 706).
34 Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967). Boutilier was expressly excluded from the U.S. because of the fact he was gay, since homosexuality was considered a “psychopathic personality” at this time. Id.
35 The policy behind allowing asylum, which will be discussed later in this essay, is not only because these foreign nationals are threatened in their home country, but also because they do not constitute a threat to the United States. Austin T. Fragomen, Jr., Alfred J. Del Rey, Jr., & Steven C. Bell, IMMIGRATION PROCEDURES HANDBOOK, 1.11 (2006). If it has been established that homosexuals can obtain asylum and thus are not a threat to national security, why does the judiciary still defer to Congress when it says otherwise?
36 When looking at the political question doctrine, the Court is concerned with its integrity as a government actor. But it also looks to see whether the judgment of the political branch should go un-reviewed. Plaut v. Spendthrift Farm, Inc, 514 U.S. 211 (1995).
VII. Analysis

a. Historical View of Homosexuals as Psychopaths

Congress has historically been given deference to exclude or permit aliens’ naturalization in this country. It has typically excluded classes of people based on underlying social perceptions of them. In 1952, Congress modified the language of the INA, to add that individuals with a “psychopathic personality” should be excluded from this country. At that time, the INS deemed homosexuals to be “psychopaths.” Also at that time, Congress and other branches of government thought that homosexuality was a mental deficiency.

In 1963, the Supreme Court decided Rosenberg v. Fleuti, in which the INS had stressed that Fleuti should be excluded from entry because he was “afflicted with psychopathic personality.” Although the Court’s decision was adverse to the position taken by the INS, the Supreme Court never actually decided whether the language “psychopathic personality” was considered unconstitutionally vague.

In 1965, the INA was amended to expressly exclude homosexual persons from entering this country because they were “afflicted with psychopathic personality, or with sexual deviation.” Thus, even if they were eligible for sponsorship because they had immediate family here, they would not have been entitled to sponsorship merely because of their sexual orientation.

37 Boutilier, 387 U.S. at 122.
38 Wygonik, supra note 2, at 500-501 (discussing judicial deference toward Congress).
39 See Joyce Mudoch & Deb Price, Courting Justice: Gay Men and Lesbians v. the Supreme Court 90-91 (2001). This modification was due to a United States Public Health Service advisement that “the exclusion of aliens afflicted with psychopathic personality or a mental defect...is sufficiently broad to provide for the exclusion of homosexuals and sex perverts.” Boutilier, 387 U.S. at 121. It is surprising that this advisement did not use the phrase ‘homosexuals and other sex perverts,’ since at that time homosexuals were likely to be thought of as sex perverts. Unfortunately, they are likely still viewed that way by some people today.
40 Wygonik, supra note 2, at 501 (discussing historical view of homosexual immigrants).
41 Id. at 501.
43 Id.
44 Boutilier, 387 U.S. at 135 n.6.
One year after the 1965 amendment to the INA, the Supreme Court acquiesced to Congress’s placement of homosexuals into a “psychopathic” category in the *Boutilier v. Immigration and Naturalization Service* decision.\(^{45}\) Justice Tom Clark, writing for the majority, ruled that homosexuality was a “psychopathic personality” with respect to United States immigration law.\(^{46}\) Particularly, he wrote that, “when petitioner first presented himself at our border for entrance, he was already afflicted with homosexuality…and under it he was not admissible.”\(^ {47}\) Under Justice Clark’s reasoning, it seems that Boutilier could have remained in the United States had he only decided to become gay once he already crossed the border.

In 1990, Congress repealed the 1965 INA gay and lesbian exclusionary provision.\(^ {48}\) However, the American Psychiatric Association had officially decided that homosexuality was not a psychiatric disorder as early as 1973.\(^ {49}\) Although Congress lagged behind the American Psychiatric Association by seventeen years, its decision was nonetheless influenced by the official position of the American Psychiatric Association.

Today, rather than specifically relying on the notion that homosexuals are psychopaths, Congress has explicitly excluded this class from possible sponsorship by defining marriage narrowly, in terms of an opposite sex couple.\(^ {50}\) Although it may not appear on its face to be such an egregious reason, Congress nonetheless is expressly excluding classes of people from sponsorship due to underlying social perceptions of them.

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\(^{45}\) *Id.*

\(^{46}\) *Id.*

\(^{47}\) *Id.* at 123.


\(^{49}\) Wygonik, *supra* note 2, 501.

\(^{50}\) 1 U.S.C.A. § 7.
b. Recent Case Law

i. Adams v. Howerton

There are only a handful of cases that speak to the inability of same-sex partners to sponsor one another for purposes of immigration. The landmark case regarding this issue is Adams v. Howerton. Nine years before DOMA was enacted, the Adams court held that Congress intended to confer spouse status only to heterosexual spouses. Since the word spouse was not specifically defined in the Immigration and Nationality Act (INA), the court looked to the contemporary common meaning of marriage, which “ordinarily contemplates a relationship between a man and a woman.” The Adams court further discussed 1965 amendments to the INA which expressed a clear intent to exclude homosexuals from spouse status. Even before the enactment of DOMA, this court held that if a marriage is found valid under state law, it still must undergo more scrutiny - whether or not it qualifies under the INA.

Although this case remains valid, it would be hard to apply its principles with the enactment of DOMA. However, since the enactment of DOMA, there is no need to speculate as to whether Congress intends to exclude homosexuals from spouse status. Also, since DOMA trumps any agency definition of marriage, there is no need to determine whether a marriage qualifies under the INA. It may be argued that Adams v. Howerton is no longer valid precedent.

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52 See, e.g., Id. at 1042; Matthews v. Gonzalez, 171 Fed.Appx. 120 (2006).
53 See Adams, 673 F.2d at 1042.
54 Id. at 1042.
55 Id. at 1040 (discussing Webster’s Third New International Dictionary 1384 (1971) and Black’s Law Dictionary 876 (5th ed. 1979)). Surely, many people today have a much more functionalist view than this outdated definition of marriage. Yet it is still defined accordingly.
56 See Adams at 1042. Notice that this decision took place eight years before the 1965 amendment to the INA was repealed by Congress. Despite this change, this case is still considered valid precedent today.
57 Adams, 673 F.2d at 1038. Thus, even without DOMA, a court must undergo the same analysis. Since “spouse” was interpreted by this court to signify only a heterosexual spouse, this case would have had the same result had DOMA already been enacted.
but it has only been overruled in a sense by the exact same rule articulated in a different manner.\(^{60}\)

ii. *Matthews v. Gonzalez*\(^{61}\)

*Matthews v. Gonzalez* is a 2006 case that addresses the specific issue of whether same-sex partners may sponsor one another for immigration purposes. This case demonstrates the use of *Adams* as precedent alongside DOMA. Due to the strong precedent of *Adams* as well as the strength of DOMA, *Matthews* was decided without oral argument.\(^{62}\)

*Matthews* involved a citizen of the United Kingdom who entered the United States as an exchange visitor in May, 1992.\(^{63}\) Matthews was only authorized to stay in this country until November, 1992, but stayed here until June, 2002.\(^{64}\) Matthews then challenged her removal on the basis of it constituting an “exceptional and extremely unusual hardship to her same-sex partner.”\(^{65}\) Matthews argued that the INA’s definition of “spouse” should be held invalid because “the failure of federal law to recognize same-sex relationships violates principles of substantive due process and equal protection.”\(^{66}\) It is noteworthy that she argued the failure to recognize same-sex *relationships* violated due process and equal protection rather than arguing the failure to recognize same-sex *marriages* violated due process and equal protection. Matthews never contended that she and her partner were married because they were not. However, she did contend that she was eligible for cancellation of removal because she was in a

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\(^{60}\) See 1 U.S.C.A. § 7.


\(^{62}\) *Id.*

\(^{63}\) *Id.*

\(^{64}\) *Id.*

\(^{65}\) *Id.* at 121. “Hardship” will be discussed at length later in this essay.

\(^{66}\) *Id.* at 121.
“meretricious relationship” with a United States citizen. Not surprisingly, the court ruled that Matthews did not have standing to raise these arguments because she was not in any sort of a “legal union.”

In order to comply with the constitutional requirement of “case or controversy,” one must be the proper party to litigate an issue. If the plaintiff has sufficient interest in the litigation, she is considered a proper party, and thus has standing. In Matthews, the plaintiff complained of DOMA and its restrictions it imposed on immigration law. Yet she was not directly affected by DOMA. Courts will not entertain a “generalized grievance against allegedly illegal or unconstitutional government conduct.”

Unfortunately these are relatively bad facts to attempt to challenge DOMA as it is applied to immigration law. Matthews did not even contest DOMA in general. Rather, she argued that the definition of “spouse” in immigration law violated due process and equal protection. At least this case did not make it to the Supreme Court, since it may have negatively impacted the possibility of having the Court rule in favor of future same-sex partners attempting to sponsor one another for immigration.

67 Id. at 121. See Connell v. Francisco, 127 Wash.2d 339, 346 (1995) (the court defined “meretricious relationship” as “a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist”).
68 Matthews, 171 Fed.Appx. at 121.
70 Id. at 556. The plaintiff must have suffered an injury in fact, there must be a causal connection between the injury and the conduct complained of, and it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision. Id. at 556.
71 Matthews, 171 Fed.Appx. at 122.
72 See Lujan, 504 U.S. at 556.
73 Id. at 568.
74 Matthews, 171 Fed.Appx. at 122.
75 Id. at 122.
c. **Loopholes for Same-Sex Couples in the Immigration System**

There are various ways to get around the general rule of same-sex partners not being able to sponsor one another for immigration. Same-sex couples still will not be able to sponsor one another in these exceptional cases, but one’s foreign partner may still be able to naturalize in the United States. The United States Citizen and Immigration Service may use its discretion to grant spousal immigration benefits to same-sex bi-national couples if there is found to be an “extreme hardship.”[^76] A homosexual could obtain refugee status if he or she shows a “well-founded fear of future persecution.”[^77] There is also an immigration anomaly: same-sex partners can obtain tourist visas and are deemed “opposite-sex couples” for this purpose. This portion of the essay will conclude by discussing the possibility of sham marriages. These ideas are not meant to be an exhaustive list of possibilities. There are various other ways to attempt to naturalize in the United States, such as procuring a visa through sponsorship by another family member or an employer.[^78] However, this discussion will focus on loopholes that are intertwined with one’s relation with their spouse or issues involving same-sex partners.

i. **Extreme Hardship**

The Attorney General may use his or her discretion to grant spousal immigration benefits to same-sex bi-national couples if there is found to be an “extreme hardship” involving severe

[^76]: See Sullivan v. Immigration and Naturalization Service, 772 F.2d 609 (1985). The Sullivan court held there was no “extreme hardship” to an Australian national in returning to his homeland, despite his alleged fear of persecution. Id.

[^77]: See Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (BIA 1990) (homosexual applicant showed that his freedom was threatened due to his membership in a particular social group in Cuba). See also Karouni v. Gonzalez, 399 F.3d 1163, 1172 (9th Cir.2005) (homosexual applicant was denied asylum).

and unusual harm. The elements to establish extreme hardship depends upon the mainstream of human conduct (on the facts and circumstances of each case).

This discretion is not required legally, so there are only a few couples that benefit from the extreme hardship argument. Sullivan v. Immigration and Naturalization Service demonstrates the difficulty of showing that there would be an extreme hardship. It is quite difficult to precisely define “extreme hardship.” Sullivan, however, reveals what is not “extreme hardship.”

Sullivan involved an Australian citizen who claimed that his deportation would cause him extreme hardship by severing his relationship with his male spouse. He also claimed that he would experience extreme hardship because homosexuals have not been well accepted in Australian society. However, the Court of Appeals for the Ninth Circuit ruled that the Board of Immigration Appeals (BIA) had discretion to interpret extreme hardship narrowly. It also ruled that the BIA did not abuse its discretion in determining that deportation would not cause the alien extreme hardship even though he would be separated from his same-sex partner with whom he was married.

In Sullivan, the decision of the BIA was affirmed. That decision had concluded there was no extreme hardship because “[s]eparation from those upon whom one has become dependent is common to most aliens who have spent a considerable amount of time in the United States…

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79 Wygonik, supra note 2, 502 (discussing expanded rights of gay and lesbian immigrants via discretion of United States Citizen and Immigration Service).
80 Sullivan, 772 F.2d at 610.
81 See 8 U.S.C.A. § 1186(c)(4)(ii). See also Wygonik, supra note 2, 502 (discussing “extreme hardship”).
83 Id.
84 Id.
85 Id.
86 Id. at 611.
87 Id. at 611. The court also noted that the “alleged marriage” was not recognized by the court.
[and] deportation rarely occurs without personal distress and emotional hurt." The BIA also mentioned that “the claimed lack of job opportunities did not amount to extreme hardship.” In the past, the BIA seems to have had no problem separating family members and even placing aliens in war-torn countries. If this is how narrow the BIA is permitted to read “extreme hardship,” I imagine that it is very difficult to attempt to foster homosexual foreigners’ entry based on these grounds.

ii. Fear of Persecution

Homosexuals have been able to obtain immigration rights if asylum is granted to them. They may be able to apply for asylum if there is a well-founded fear of persecution in their homeland based on their sexual orientation. Asylum is:

[a] discretionary benefit to certain persons inside the U.S. or at the border who are able to demonstrate that they are unable or unwilling to return to their country on account of persecution or a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.

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88 Id.
89 Id.
90 See, e.g., Amezquita-Soto v. INS, 708 F.2d 898, 902 (3d Cir.1983); Guadarrama-Rogel v. INS, 638 F.2d 1228, 1230 (9th Cir.1981); Saballo-Cortez v. INS, 749 F.2d 1354 (9th Cir.1984); Zepeda-Melendez v. INS, 741 F.2d 285 (9th Cir.1984).
91 It is noteworthy that there was a dissenting opinion to Sullivan by Circuit Court Judge Pregerson. The judge commented on a number of “unique and special circumstances.” Sullivan, 772 F.2d at 611. Also, the judge acknowledged that the couple was actually married and had lived together for twelve years. Id. at 611. Sullivan would return to his country as an outcast because his family members would ostracize him and he would not be accepted in the general community. Id. at 612. The dissent cited Ramirez-Gonzalez v. INS, “the most important single factor in determining ‘extreme hardship’ may be the separation of the alien from ‘family living’ in the United States.” Id. at 612 (citing Ramirez-Gonzalez v. INS, 695 F.2d 1208, 1211 (9th Cir.1983).
92 Zaske, supra note 77, 631.
93 Id.
94 To be considered for asylum, one must show that he or she is a refugee (which is shown by meeting this test). 8 U.S.C.A. § 1159(b).
95 Wygonik, supra note 2, 502 (emphasis added).
Gays and lesbians have been permitted to apply for asylum based on this reasoning since 1990.\(^96\) In *Matter of Toboso-Alfonso*\(^97\), the BIA granted asylum for the first time to a foreign national who was facing persecution in his homeland of Cuba because of the fact he was gay.\(^98\) Moreover, the Attorney General ordered that this BIA decision stand as precedent in all proceedings dealing with these issues.\(^99\)

In a Ninth Circuit case, *Karouni v. Gonzalez*, the court ruled that “all alien homosexuals are members of a particular social group” in determining refugee status.\(^100\) The Ninth Circuit court later stated that once past persecution has been established, there is a rebuttable presumption that the applicant has established a “well-founded fear of future persecution.”\(^101\) The government may rebut this presumption by showing that there has been a change in circumstances in one’s native land or that the applicant could reasonably relocate to another region of that nation.\(^102\) In the posed hypothetical, even if Juan could show he is fearful of future persecution, the courts would likely not grant a petition to stay in this country on the basis of

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\(^96\) See Wygonik, *supra* note 2, 502-03 (discussing *Matter of Toboso-Alfonso*, 20 I. & N. Dec. at 821, the landmark case granting asylum because of one’s sexual orientation). Also, after one year of asylum status, one may apply for lawful permanent residency in the U.S. *Id.* at 821.


\(^98\) See *Id.* The applicant in *Matter of Toboso-Alfonso* was persecuted in Cuba because of his status as a gay man. *Id.* The Cuban government keeps files on all homosexuals. *Id.* Because of this, homosexuals are subjected to physical examinations, questioning, and criminal detentions. *Id.* Also, the applicant was given an ultimatum by his employer to leave the country or be put in a penitentiary. *Id.* Moreover, Cuba tends to sentence homosexuals to “incarceration in forced labor camps, repeated detentions, and physical beatings.” Wygonik, *supra* note 2, 530 n.65.


\(^100\) *Karouni*, 399 F.3d at 1172.

\(^101\) *Vega* v. Gonzalez, 183 Fed.Appx. 627 (2006). See *Duarte* v. Attorney General of the United States, Slip Copy, 2006 WL 3724419 (where the fact that the petitioner’s homosexual partner had been murdered by a policeman and that he continued to have a fear of persecution by the police because he was homosexual was sufficient ‘well-founded future fear of persecution’). *But see Velarde* v. Gonzalez, Slip Copy, 2007 WL 43655 (C.A.9) (where the petitioner did not establish a ‘well-founded fear of future persecution’ because of several incidents in the past when he was ridiculed or harassed because he was a homosexual).

\(^102\) *Vega*, 399 Fed.Appx. at 627.
asylum, because of the recent decision allowing same-sex marriage in the State of Coahuila, México.  

iii. **B-2 Tourist Visa**

Although the United States does not federally recognize same-sex marriages for immigration purposes, it seems to overlook its grudge against homosexuals when foreigners attempt to obtain a B-2 tourist visa. For the purpose of obtaining these non-permanent visas, same-sex marriages performed in other countries are to be deemed opposite-sex marriages here.  

Ironically, these visas only aid same-sex partners of which neither are U.S. citizens rather than assist a U.S. citizen foster their relationship with their same-sex partner. This visa is particularly useful when one’s partner is here on an extended visa.  

Although the B-2 visa is only temporary, it can be renewed an unlimited number of times.

iv. **An Unconventional Loophole**

It is worthwhile to note the unconventional possibility of a sham marriage. Although a sham marriage is considered invalid, it remains a viable alternative. Both homosexual marriages and sham marriages are invalid for purposes of immigration. Nonetheless, sham marriages can provide permanent immigration benefits for homosexual foreign nationals.

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103 This decision, which legalized same-sex unions, will be discussed further on in this essay. Adam Thomson, *Same-sex Unions come to México*, The Financial Times, Feb. 23, 2007.

104 Zaske, *supra* note 77, 630.

105 *See* Fragomen, Del Rey, & Bell, *supra* note 34, 1.11.

106 Zaske, *supra* note 77, 630.

107 *Id* at 630.

108 Although I do not personally condone a sham marriage, it is only worth mentioning as a possibility.

109 *See* Fragomen, Del Rey, & Bell, *supra* note 34, 1.11.

110 Due to the discrimination and stigmatization of being gay in China, there are “online personal advertisements which are dominated by appeals for ‘fake marriages’ or ‘marriages of convenience’”. Maureen Fan, *Closet Stifles Gays in China: New Freedom at Odds with Tradition*, The News and Observer, Feb. 25, 2007.
Petitions to sponsor one’s spouse are subject to high scrutiny and meticulous evidentiary showings compared to other family petitions. 111 Both spouses must submit evidence to support a finding of a bona fide relationship. 112 However, whether a marriage is actually bona fide is determined by looking at the intent of the parties at the time they entered into the marriage. 113 Even if a couple is on the verge of a divorce once they go to the interview to determine whether one may sponsor the other, the marriage may be sufficient to confer status upon the alien. 114 Also, once the government has determined that the marriage is valid for purposes of the “immediate relative” provision, it may not later determine that a valid marriage is “unviable.” 115

d. A Look at Our Neighboring Countries

In January, 2007, the State of Coahuila, México legalized same-sex unions. 116 México City will follow the lead in the next month. 117 Looking back at our hypothetical, Juan and Jason could go to México to get married, but that marriage would not be recognized for federal purposes due to DOMA. 118 Nor would any state in this country have to recognize their marriage. 119 28 U.S.C.A. § 1738(c) provides that

\[
\text{[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such}
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111 Lichter, supra note 24, 138.
112 Id.
114 Id.
117 Id.
119 28 U.S.C.A. § 1738(c) (1996). However, Massachusetts would recognize their marriage since it is the state in which they were married. Other states are not obligated to recognize their marriage, but may choose to do so. Id.
Likewise, Canada allows for same-sex marriage, and one does not even have to be a resident to get married there. In fact, many bi-national same-sex partners in the United States relocate to Canada because of their frustration with US immigration policy. This phenomenon is known as “gay gain” in Canada and “gay drain” in the United States.

**e. Diplomat Visa v. Tourist Visa: the Contradiction**

Some countries do not yet allow same-sex marriages or civil unions, but nonetheless have liberal immigration laws which allow for gay and lesbian sponsorship. The United States alleges to be a symbol of equality, but does not extend that notion to its own citizens, or to foreigners in many respects. It is astonishing that the United States Diplomatic Service does not issue credentials to same-sex partner diplomats. “America acknowledges them neither among their own diplomats nor in foreign officials posted to the US.”

Where a same-sex marriage or civil union is recognized, gay and lesbian diplomatic couples are receiving the same benefits as opposite-sex couples. However, they cannot come to the United States together for extended periods of time because the United States will not issue a diplomat visa for the same-sex partner. The Representative’s partner can only come to the

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120 This section effectively overrules any possible interpretation of the Full Faith and Credit Clause of the United States Constitution that is consistent with mandatorily recognizing same-sex marriages which were validly conducted in another state. Wygonik, supra note 2, 494.

121 See Id.

122 Id.

123 Zaske, supra note 77, 640. Australia provides a “Interdependent Partner” category to grant immigration benefits to same-sex partners. Id. at 645. New Zealand, the United Kingdom, Brazil, Israel and South Africa provide similar benefits. Id. at 646-47.


125 Id.

126 Id.

127 Id.
United States on short-term visits for tourist purposes with the B-2 visa. Currently, the United Nations French representative, living near the New York City headquarters, cannot sponsor his spouse, despite their French civil union. It is such a contradiction that the United States houses the United Nations’ headquarters, but does not live up to other nations’ standards of equality.

f. A Proposal of how to Challenge the Federal Definition of “Marriage” used in immigration law

Commentator Blythe Wygonik argues that the rights of gays and lesbian citizens are being expanded throughout the country and that because of this expansion, immigration law should follow. I disagree with this logic. Although immigration law may be a good place to start treating gays and lesbians equally because of its flexible approach in using balancing tests, DOMA must be challenged first. It is wonderful that individual states are beginning to embrace equal treatment for gays and lesbians, but nothing can be done in the federal arena with DOMA intact.

In order to comply with the constitutional requirement of “case or controversy,” someone would have to have standing to challenge DOMA. To have standing, one would need to have actually gotten married in a state that permits same-sex marriage or civil unions. In this scenario, since an injury has actually occurred, the Supreme Court would have power to review

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128 How ironic that gay and lesbian tourists are given equal immigration advantages, but Representatives of the United Nations are not. It sends a clear message that the U.S. does not mind foreign homosexuals in this country as long as they are planning to leave soon.

129 Marriage, Trials of Trailing Spouses, The Economist, Mar. 3, 2007, at 65 (discussing United States’ diplomat visas). It is said he is an “atlantic commuter.” Id.

129 Wygonik, supra note 2, 518-519.


132 See Lujan, 504 U.S. at 568, Smelt v. County of Orange, 374 F.Supp.2d 861 (C.D.Cal.2005) (the plaintiffs had standing to challenge DOMA’s definition of “spouse” because the plaintiffs were registered domestic partners in California). The district court in Southern California found that the definition of “spouse” in DOMA did not violate the due process or equal protection in the Constitution. Id.

133 See Lujan, 504 U.S. at 568. In this scenario, I am assuming that a writ of certiorari would be granted.
and annul an Act of Congress on the ground it is unconstitutional.\footnote{See Erwin Chemerinsky, \textit{Constitutional Law} (Aspen Publishers) (2nd ed. 2005).} The party must show that the statute is invalid and that she has sustained or is in immediate danger of sustaining some direct injury as a result of its enforcement.\footnote{Id.} Only then can the Supreme Court annul DOMA.

Not only should the definition of “marriage” in DOMA be challenged, but same-sex marriage should be legalized on a federal level. This is because it is difficult to argue that the definition of “spouse” should include same-sex partners. A definition such as that may be too vague or broad if it includes unmarried same-sex partners.\footnote{Lena Ayoub & Shin-Ming Wong, \textit{Separated and Unequal}, 32 WM. MITCHELL L. REV. 559 (2006).} Once same-sex marriages are legalized, the definition of “spouse” should include same-sex spouses. Until one has the option to marry his or her same-sex partner, he or she cannot ask for the benefits that accompany a marriage. Because of the difficulty in defining “spouse,” it seems to be too cumbersome to request benefits that accompany marriage in a country which does not yet permit same-sex marriages in all states. I am not suggesting that immigration law should not have a definition that includes same-sex spouses. To the contrary, it should, but it seems there are many battles to be fought before that can happen.

Although lower courts have upheld DOMA as constitutional, no attempt to challenge DOMA has been heard by the Supreme Court.\footnote{As previously mentioned, a potential plaintiff should have already gotten married in a state allowing same-sex marriage or civil unions in order to have standing to bring the action. It certainly seems to be injurious to be legally married to someone and not permitted to have them live in your home country.} The Supreme Court, likely to give deference to Congress on something that is a political question, may nonetheless find that DOMA violates the Equal Protection Clause and the substantive Due Process Clause of the Constitution. The sphere of immigration law appears to be a great place to challenge DOMA because one could readily show that he or she is in danger of sustaining imminent injury.\footnote{Id.} Moreover, the overall policy
of immigration law is to promote the unification of families. It would be extremely hard for Supreme Court to overlook the shattering consequences of these discriminatory laws given the policy behind immigration.

VIII. Conclusion

The statue of liberty is a symbol of freedom and open arms to immigrants. Over twenty-five million immigrants, passengers, and crew members entered the New York Harbor between 1892 and 1924. In fact, Emma Lazarus’s poem, which is safeguarded on the plaque of the statue, illustrates the character of the United States as an immigrant nation. However, after a glance at the ebb and flow of U.S. immigration policy, the plaque seems to read,

“Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless… [but not gays] to me,
I lift my lamp beside the golden door!”

In spite of our recently-founded fears of new immigrants due to the September 11th attacks, our country nonetheless continues to be a global symbol of hope for all persons struggling to improve their economic and social conditions. These immigrants dream not only of hope, but also of justice and equality. It is ironic that in a country such as ours, bi-national same-sex partners are not even given the opportunity to sponsor their loved ones for immigration purposes merely because of a “federal definition of marriage” and their sexual orientation.

139 See Matter of Lew, 11 I. & N. Dec. 148 (Dist. Dir. 1965) (holding that since law promotes family unity, spouse not entitled to immigration benefits after interlocutory divorce decree was granted).
141 Id.
142 Emma Lazarus, excerpt from The New Colossus, placed on the plaque of the Statue of Liberty (1883).