A Modest Proposal: to Deport the Children of Gay Citizens, & etc: Immigration Law, the Defense of Marriage Act and the Children of Same-Sex Couples

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The Defense of Marriage Act (DOMA), which defines the terms “marriage” and “spouse” for federal purposes, clearly prevents the recognition of same-sex spouses under U.S. immigration law. Unless judges and immigration officials are careful to limit it as Congress intended, DOMA might also have a tragic unintended effect on some parent-child relationships.

The Immigration and Nationality Act (INA) employs terms like “born in wedlock” and “stepparent” to define parent-child relationships for various immigration and citizenship purposes. One could argue, therefore, that DOMA prevents INA recognition of parent-child relationships stemming from a same-sex marriage. These relationships determine whether a person can legally join her family in the U.S., be deported, or even qualify as a citizen upon birth abroad. Therefore, if DOMA affected parent-child recognition under the INA, it would have profound implications for the growing number of same-sex couples raising children in U.S. and foreign jurisdictions that recognize their marriages.

This article explores the language, context, legislative history, and purposes of both DOMA and relevant sections of the INA. In the absence of reported cases on point, it reviews opinions in related areas, such as the recognition of children born to second-wives in polygamous marriages. Then it analyzes each relevant section of the INA in turn, concluding that DOMA should not be read to affect parent-child relationships resulting from same-sex marriages under most, or all, circumstances.

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“The Defense of Marriage Act (DOMA) is a modest proposal. In large measure, it merely restates current law.”

-Senator Don Nickles, introducing DOMA for consideration by the United States Senate (1996)

“... Sixthly, This would be a great inducement to marriage, which all wise nations have either encouraged by rewards, or enforced by laws and penalties.”

-Jonathan Swift, A Modest Proposal for preventing the children of poor people in Ireland, from being a burden on their parents or country, and for making them beneficial to the publick (1729)

INTRODUCTION

The Defense of Marriage Act (DOMA), which defines “marriage” under all federal law as an exclusively heterosexual institution, was introduced as a “modest” legislative response to perceived judicial overreaching. It merely exempts same-sex spouses from coverage under the terms “marriage” and “spouse,” which collectively appear in more than 3,900 sections of federal statutes and regulations. For instance, a lesbian American cannot petition for lawful residence status on behalf of her foreign spouse, which may force her to choose between her home country and life in de facto exile with the person she loves.

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1 142 Cong. Rec. S. 4871 (May 8, 1996)
2 See infra note 260 and accompanying text.
3 See infra note 345 and accompanying text.
4 See Human Rights Watch & Immigration Equality, Family, Unvalued: Discrimination, Denial and the Fate of Binational Same-Sex Couples under U.S. Law 46-135 (2006), http://www.hrw.org/sites/default/files/reports/FamilyUnvalued.pdf [hereinafter Family, Unvalued] (recounting the stories of numerous bi-national couples and describing the obstacles and choices they face in light of U.S. immigration laws that do not recognize their relationships); Andrew Jacobs, Gay Couples Split by Immigration Law; Under 1996 Act, Personal Commitments Are Not Recognized, N.Y. Times, March 23, 1999, at B-1 (describing the plight of U.S. citizens and their foreign same-sex partners, which was worsened by changes in immigration law eliminating options like humanitarian relief from deportation that were enacted in the same year as DOMA); Gay Partners in Search of Green Cards, Nat’l J. (Abstracts), March 11, 2000, at 804 (describing the distinction between same-sex couples and different sex couples whose marriages are recognized for purposes of immigration benefits and waivers); Johnny Diaz, Union Issue: Bordering on Rejection US Hardly Welcomes Partners of Same Sex But Different Nations, Boston Globe, June 16, 2002, at City Weekly-1 (describing the immigration plight of lesbian bi-national couple); Dan Allen, A New Road for Binational Couples, The Advocate, Oct. 28, 2003, at 18 (describing protest on behalf of thousands of gay and lesbian bi-national couples who face the threat of eventual deportation); Antonio Olivo, Immigration Battle has 2 Fronts for Gays, Lesbians, Chi. Trib., Dec. 25, 2007, at Metro-1 (describing movement for federal legislation to recognize same-sex bi-national couples, who are currently being split apart by U.S. immigration laws); David Crary, No Honeymoon for Gay Couples, Desert News, June 15, 2008, at A-03 (describing efforts of Lambda Legal to warn same-sex couples marrying in California about possible deportation if one of them is a foreign national); 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 (describing the story
Based on this definition of “modest,” it should surprise no one to encounter an argument that DOMA also implicitly dictates the meaning of the terms “parent” and “child,” where they are defined in terms of marriage to a “stepparent,” of birth “of parents,” or of birth “in wedlock.” Nor would it be surprising if that argument extended to recognition of “brothers” and “sisters” as well, since they – in turn – are defined in terms of “parent” and “child.” This article introduces, examines and rejects this immodest proposal.

The text of DOMA does not deal directly with parent-child relationships; the Immigration and Nationality Act (INA) does not deal directly with same-sex marriage; and the intent underlying each Act could hardly be more dissimilar. In developing U.S. immigration law, Congress has repeatedly demonstrated the clear intent to unite or reunite families whenever possible. DOMA, however, refuses recognition to same-sex couples and tears families apart.

While proponents of DOMA might argue that same-sex couples do not constitute “families,” it is difficult to extend that argument to their parental relationships with children. Therefore, it is little wonder that the extensive legislative history of DOMA reveals no indication that Congress intended to affect the recognition of children’s relationships to their gay or lesbian parents. Where neither the language nor the intent of DOMA extends to parent-child relationships, it is best to focus on the clear intent of the relevant INA provisions to unite or reunite families.

There has been widespread scholarly examination and some political attention to DOMA and the issue of same-sex spousal recognition under US immigration law. However, no one has focused on the plight of the children, whose immigration options are defined by their relationship to parents in a same-sex relationship. This article attempts to fill that void.

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5 INA § 101(b)(1)(B), 8 U.S.C. § 1101(b)(1)(B)(recognizing a “stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred”); INA § 301(c), 8 U.S.C. § 1401(c)(recognizing automatic citizenship transmission to “a person born outside of the United States ... of parents both of whom are citizens of the United States and one of whom has had a residence in the United States ... prior to the birth of such person.”); INA § 101(b)(1)(A), 8 U.S.C. § 1101(b)(1)(A)(recognizing a “child born in wedlock”).
6 See infra note 24 and accompanying text.
7 See infra notes 74-93 and accompanying text.
8 See infra notes 425-26 and accompanying text. While the issue of DOMA’s applicability to parent-child relationships spans many areas of federal law, this article focuses on the INA in light of the devastating potential consequences if it were read together with DOMA to separate children from their legal parents, brothers, sisters, and other relatives.
9 See infra notes 282-91 and accompanying text.
10 See infra notes 426-39 and accompanying text.
These issues are important in light of several major shifts in societal norms, technology and the law. Assisted reproductive technology (ART) and surrogacy arrangements have become more and more common and legally accepted as methods for building families by different-sex and same-sex couples.\textsuperscript{12} This has opened the door to parenthood for many lesbian and gay male couples, who want to conceive and have children biologically related to at least one member of the couple.\textsuperscript{13}

When DOMA was enacted in 1996, same-sex marriages were not legally recognized anywhere in the world. In 2000, the Netherlands became the first foreign jurisdiction to recognize marriage equality for gay and lesbian couples.\textsuperscript{14} Massachusetts became the first U.S. jurisdiction to recognize marriage equality in 2003, and no other state followed suit until 2008.\textsuperscript{15} However, the movement towards same-sex marriage recognition has accelerated rapidly over the last few years. Now same-sex marriages have been recognized in nine U.S. states and the District of Columbia,\textsuperscript{16} as well as eleven foreign countries.\textsuperscript{17}

\textsuperscript{12} See infra notes 58-60 and accompanying text.
\textsuperscript{13} While only one man can be the genetic father of a child at present; lesbian couples can use ART to fertilize one spouse’s egg for implantation in the other, gestational mother, giving both women a claim to biological motherhood of the same child.
\textsuperscript{15} 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”); \textit{In re Marriage Cases}, 43 Cal. 4th 757, 183 P.3d 384 (2008)(striking down discriminatory marriage laws under the California state constitution and leading to the short-lived issuance of licenses to same-sex couples in that state); Maura Dolan, \textit{Battles Brew as Gay Marriage Ban is Upheld}, L.A. Times, May 27, 2009, at A1 (describing the passage of Proposition Eight in November, 2008, after which new licenses were no longer issued in California); Kerrigan v. Comm’r of Pub. Health, 798 A.2d 407, 481-82 (Conn. 2008)(recognizing the statutory ban on same-sex marriage as unconstitutional and concluding “that gay persons are entitled to marry the otherwise qualified same sex partner of their choice.”)

New marriage licenses have not been issued in California since 2008; however, that state still recognizes the marriages of the around 18,000 same-sex couples who married during the seven months when the state issued them marriage licenses. \textit{See supra} note 15.

In addition to the states that have issued marriage licenses to same-sex couples, Rhode Island, New York, and Maryland have recognized same-sex marriages celebrated elsewhere. \textit{NCSL Marriage Report}, \textit{supra} note 16.
Once marriage becomes an option, it takes time for new laws and procedures to come into effect, and then for lesbian and gay couples to marry, have children within those legal unions, decide to move to another country and file for immigration benefits. For these reasons, it is not surprising that no one has yet addressed the question of DOMA’s applicability to the recognition of parent-child relationships under the INA. However, the question is inevitable as more and more U.S. and foreign jurisdictions recognize same-sex marriages and the presumptions of parenthood that follow, and it is best to formulate a legally correct and practical response now, rather than rush to resolve the issue when an immediate answer is required.

Part I of this article introduces the definitions of “parent-child” relationships for transmitting US citizenship and for recognizing eligibility for immigration benefits and waivers. It describes the different statutory language relating to “stepchildren,” children “born ... of parents,” and children born “in wedlock” or “out of wedlock,” illustrating the essential importance of each of these phrases throughout the INA. It also briefly addresses some relevant issues stemming from assisted reproductive technology, surrogacy and presumptions of

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18 In fact, cases have recently begun to appear, involving non-biological parents whose relationships with children are presumed on the basis of their legally recognized same-sex relationships with a biological parent. The author has personally been in communication with two immigration attorneys, who represent lesbian couples, who have been unable to obtain U.S. passports for children conceived through ART for this reason. This can leave U.S. citizens in de facto exile, unable to enter the U.S. with their children.

19 The fiasco of the U.S. Citizenship and Immigration Service’s (CIS) reaction to petitions involving transgender spouses is a good example of the value of thoughtful reflection prior to time-sensitive decision-making. In that context, CIS first issued a Memo oddly purporting to rely on DOMA for the proposition that the original birth certificate of a transsexual person was definitive regarding that person’s sex for purposes of marriage recognition under the INA. William R. Yates, Acting Assoc. Dir. For Operations, USCIS, Memorandum to Regional Directors, et. al, AFM Update AD 02-16, *Spousal Immigrant Visa Petitions* (March 20, 2003). Perhaps realizing that this bright-line “birth sex” rule would lead to the inevitable recognition of same-sex marriages between post-operative transgender persons and a spouse of the same physical and legal sex, CIS soon issued a second Memo declaring that it “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 ....” William R. Yates, Assoc. Dir. For Operations, CIS, Interoffice Memorandum HQOPRD 70/6, Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals (April 16, 2004), 81 Interpreter Releases 952 (July 19, 2004). Finally, the Board of Immigration Appeals (BIA) was forced to step in and correct the CIS in *In re Lovo-Lara*, 23 I & N Dec. 746, which relied on North Carolina state law to determine the validity under DOMA and the INA of a marriage between a transsexual woman and a foreign-born man, which the state considered a valid heterosexual marriage. See also, Titshaw, *Meaning of Marriage*, supra note 11, at 575-79.
paternity. Part II explores the language, legislative history, and purposes of relevant sections of the INA. It traces the evolving definitions and significance of the terms “legitimate” and “in wedlock,” focusing on their applicability to children born into polygamous second marriages and other marriages that would not be recognized for purposes of spousal benefits or waivers.

Part III reviews the language, legislative history and context of DOMA in great detail, showing that it was never intended to affect parent-child relationship recognition. Part IV examines the inapplicability of DOMA to recognition of parent-child relationships in other federal contexts. It also briefly describes serious issues of constitutionality raised by DOMA. Part V interprets, in turn, each INA provision that makes parent-child relationship recognition dependent on parental marriage, employing the insights from Parts II through IV. It concludes that DOMA generally should not affect the recognition of parent-child relationships. Part V also briefly focuses on children born into legally recognized relationships other than marriage, such as civil unions and domestic partnerships, and suggests how they should be treated under the relevant INA provisions.

I. DEFINING “CHILD” AND “PARENT” UNDER THE IMMIGRATION AND NATIONALITY ACT: DIFFERENT DEFINITIONS FOR DIFFERENT PURPOSES

Family unity, particularly between parents and their minor children, is the primary concern of modern U.S. immigration law. The recognition of a parent-child relationship establishes whether a person born abroad is a U.S. citizen. It also frequently determines whether a foreign national may obtain a visa, be legally admitted into the U.S., legalize unlawful status, remain in the U.S. temporarily or permanently, or even be deported.

Qualification as a “parent” or “child” under INA §101(b) is necessary in order for an adult son or daughter to petition for an immigrant visa on behalf of her foreign national “parents.” Since terms like “brother,” “sister,” “son” and “daughter” are not defined in the INA, courts and immigration authorities rely on the definition of “child” to determine the meaning of these important but undefined terms as well.
Fortunately, the INA expressly defines “child” and “parent.” However, it defines them several times, with somewhat different meanings for different purposes.\textsuperscript{25} Furthermore, even the most detailed definitions are incomplete in contexts not anticipated when the INA was first enacted in 1952, such as the growing number of children conceived through assisted reproductive technology (“ART”).\textsuperscript{26}

\section*{A. INA §101(b) and the Definitions of “Parent” and “Child” Qualifying Foreign Nationals for Immigration Benefits and Waivers}

Around eighty-four percent of lawful U.S. immigration is based on family unity.\textsuperscript{27} The primary category of immigrant visa not subject to a specific numerical quota is that of “immediate relatives” of U.S. citizens, including their minor, unmarried children.\textsuperscript{28} In addition, be extended to “legitimate half brothers and half sisters,” at least in the context of preference status for immigrant visa eligibility under INA §203(a)(4). \textit{Id.} at 408 (citing unreported BIA decisions: In re. DeF--, 6-325 (1954); Matter of D—M--, 7-441 (1957), as well as Gordon & Rosenfield, Immigration Law and Procedure, §2.28b; H. R. Rep. No. 1199, 85\textsuperscript{th} Cong., 1\textsuperscript{st} Sess., at 8); In re Van Pamelen, 12 I. & N. Dec. 11 (BIA 1966)(relying on the definition of “child” under INA §101(b) to affirm denial of a stepbrother’s immigrant visa petition on the ground that he was unable to produce evidence of his legitimate birth to the same father as his stepsister); In re Mahal, 12 I. & N. Dec. 409 (BIA 1967)(relying on INA §101(b) to recognize stepsiblings born to two different mothers in a polygamous marriage, since they were each “legitimate” children of the same father under the laws of India and Pakistan); In re Kim, 14 I. & N. Dec. 56, 562 (BIA 1974)(relying on INA §101(b) to find that the “illegitimacy” of a father’s child under Korean law disqualified him as a “brother” to his father’s legitimate daughter).

\textit{See also e.g.}, Lau v. Kiley, 563 F.2d 543 (2d. Cir. 1977)(“While neither of the terms ‘sons’ or ‘daughters’ is defined in the Act, it seems well established that in order to qualify as a ‘son’ or ‘daughter’ for the purpose of obtaining visa preference, one must once have qualified as a ‘child’ under section 101(b)(1) of the Act.”)(citing In re Coker, Interim Decision No. 2255 (BIA 1974)); In re Reyes, 17 I. & N. Dec. 512 (BIA 1980) (“To qualify as a ‘son’ for preference purposes, the beneficiary must qualify as the petitioner’s ‘child,’ as defined in section 101(b) of the Act.”).


\textsuperscript{26} \textit{See infra} notes 56-61 and accompanying text.

\textsuperscript{27} According to the Department of Homeland Security’s (DHS) Yearbook of Immigration Statistics, over 66% of the people who became lawful permanent residents in Fiscal 2009 did so on the basis of a family-based immigrant visa petition. Annual Flow Report, April 2010, located at http://www.dhs.gov/files/statistics/publications/yearbook.shtm. If the dependant family members of those immigrating in employment, asylum and other categories are included in the total, approximately 84% of the 2009 lawful permanent residents gained their residency on the basis of their recognized family relationships. \textit{Id.} and Table 7 for Fiscal Year 2009, also located at http://www.dhs.gov/files/statistics/publications/yearbook.shtm.

\textsuperscript{28} INA § 201(b)(2), 8 U.S.C. §1151(b)(2). Other than spouses, the term “immediate relative” encompasses children and parents, if their U.S. citizen child is at least twenty-one years old.
the vast majority of available immigrant visa quota numbers are also allotted to close family members of lawful permanent residents or applicants for permanent residence.\textsuperscript{29}

A parent-child relationship must qualify under INA §101(b) in order for the child to obtain dependant visa status to accompany a parent to the U.S. for a temporary work assignment.\textsuperscript{30} Relationship to a parent, child or spouse is also the prerequisite for exceptions to, or eligibility for waivers of deportability, inadmissibility, or benefit ineligibility.\textsuperscript{31}

\textsuperscript{29} Compare INA § 201(c), 8 U.S.C. §1151(c) (setting aside an annual quota of 226,000 to 480,000 spouses, children, parents, brothers and sisters) with INA § 201(d), 8 U.S.C. §1151(d) (generally limiting employment-based quota numbers to 140,000) and INA § 201(e), 8 U.S.C. §1151(e) (setting a maximum quota of 55,000 diversity-visa-lottery “green cards”). Since the spouses and minor children of employment and diversity based “green card” petitioners are entitled to “derivative” employment or diversity “green card” status under those quotas, most immigrants in the employment visa category and almost half of those in the diversity visa categories also qualify because they are the “spouses” or children of someone else. See INA § 203(d), 8 U.S.C. §1153(d).


\textsuperscript{31} See e.g., INA § 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 parent, son or daughter of a U.S. citizen or lawful permanent resident); INA § 212(a)(4)(C)(i)(l), 8 U.S.C. §1182(a)(4)(C)(i)(l)(providing an exception to general inadmissibility as a likely public charge for the child of a U.S. citizen or lawful permanent resident); INA § 212(a)(6)(E)(i), 8 U.S.C. §1182(a)(6)(E)(i)(providing an exception to inadmissibility based on alien smuggling in certain circumstances where it aided only the parent, spouse, son or daughter); INA §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 son or daughter of a U.S. citizen or lawful permanent resident); INA § 212(d)(11) & (12), 8 U.S.C. §1182(d)(11) & (12)(providing for waivers to inadmissibility for the purposes of humanitarian purposes or to assure family unity, specifically referring to assistance to a parent, son or daughter); INA § 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 certain children of a U.S. citizen or lawful permanent resident); INA § 212(h)(1)(B), 8 U.S.C. §1182(h)(1)(B)(providing a waiver to crime based inadmissibility which would result in “extreme hardship” to a U.S. citizen or lawful permanent resident parent, son or daughter); INA § 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 parent or child); INA § 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 and daughters); INA § 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 spouse, son or daughter); INA § 237(a)(1)(H)(i)(l), 8 U.S.C. §1227(a)(1)(H)(i)(l)(providing for a waiver to inadmissibility based on fraud or other material misrepresentations for the parent, son or daughter of a U.S. citizen or lawful permanent resident); INA § 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); INA § 240A(b)(1)(D), 8 U.S.C. §1229a(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 U.S. 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...
INA §101(b) establishes uniform definitions of the terms “parent” and “child” for purposes of Titles I and II of the INA, which cover immigration benefits and waivers for non-citizens. It enumerates various types of recognizable parent-child relationships that qualify a “child” under INA §101(b)(1). Then, it defines “parent” in INA §101(b)(2) “where the relationship exists by reason of any of the circumstances” defining “child” in INA §101(b)(1).

The categories of “child” listed in INA §101(b)(1) include a “child born in wedlock” and a “stepchild . . . provided the child has not reached the age of eighteen years at the time of the marriage creating the status of stepchild occurred.” However, the INA provides no definition of the terms “in wedlock” and “stepchild.” It also fails to define the terms “spouse” and “marriage,” but the Defense of Marriage Act (DOMA) expressly limits these terms to marriages “between one man and one woman.”

INA §101(b)(1) also recognizes adopted children, “legitimated” children and other children “born out of wedlock,” under specified conditions. Since INA recognition of these parent-child relationships does not depend directly on the parents’ marital relationship, they are not a focus of this article.
B. Recognition of “Parent” and “Child” for Purposes of U.S. Citizenship and Naturalization under INA §§101(c), 301, 309, 320 and 322.

Title III of the INA governs questions of citizenship and nationality, and INA §101(c)(1) defines “child” generally for Title III purposes.40 This definition is far less comprehensive than that in INA §101(b)(1). It merely specifies that the term “child” “includes a child legitimated under the law of the child’s [or its father’s] residence or domicile, whether in the United States or elsewhere” as well as certain adopted children.41 This definition covers fewer categories of adopted children and children “born out of wedlock” than INA §101(b)(1).42 Due to the omission of any express reference, section 101(c)(1) has not been read to include stepchildren as “children” under Title III.43

The definition of “parent” for purposes of Title III is even less helpful than the definition of “child.” It merely indicates that it covers situations involving a posthumous child or a deceased parent.44

Complicating things further, Congress did not use the defined term “child” in some of the most significant provisions of Title III that hinge on parent-child relationships.45 For instance, INA §301(c) and (d) recognize the transmission of derivative citizenship to persons “born outside of the United States …of parents[,]” one or both of whom are citizens of the United States.46 Another key provision is INA §309(a), which provides for transmission of U.S.

and just a handful of the 191 sovereign nations of the world allow children to be adopted by homosexuals….“); Jason N.W. Plowman, When Second-Parent Adoption is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality, 11 Scholar 57, 72 (2008)(the option of same-sex second-parent adoption remains unclear in “the vast majority of states.”); see also e.g., Lofton v. Secretary of Dept. of Family and Children Services, 377 F.3d 1275 (11th Cir. 2004), cert. denied 543 U.S. 1081 (upholding a Florida statute categorically prohibiting adoption by anyone known to engage in “current, voluntary homosexual activity”). However, the INA does not base recognition of adoptive relationships for immigration purposes on the parents’ marital status; therefore, DOMA’s federal definition of “marriage” and “spouse” are clearly inapplicable. 40 8 U.S.C. §1101(c)(1).
41 INA §101(c)(1); 8 U.S.C. §1101(c)(1)(emphasis added). Like the definition in INA §101(b)(1), this definition also specifies that a “child” is “an unmarried person under twenty-one years of age…” Id.
42 Compare id. with INA §101(b)(1)(E), (F) & (G); 8 U.S.C. §1101(b)(1)(E),(F) & (G).
43 See Martinez-Madera v. Holder, 559 F.3d 937(holding that U.S. citizenship was not transmitted from a stepfather to his child)
44 INA §101(c)(2); 8 U.S.C. §1101(c)(2) (they “include in the case of a posthumous child a deceased parent, father, and mother.”)
45 See e.g., INA §301, et seq.; 8 U.S.C. §1401, et seq. (providing that certain persons are U.S. nationals or citizens based on birth abroad “of parents,” one or both of whom is a U.S. citizen or national).
46See, INA §301(c); 8 U.S.C. §1401(c) (relating to a person “born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States ... prior to the birth of such person”)(emphasis added); INA §301(d); 8 U.S.C. §1401(d) (relating to persons born abroad “of parents” consisting of one U.S. Citizen and one U.S. national who is not a U.S. Citizen). See also INA §301(e); 8 U.S.C. §1401(e) (relating to “a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States
citizenship to “a person born out of wedlock” in certain circumstances, where there is “a blood relationship between the person and ... [her] father....” INA §309(c) clarifies that “a person born ... outside of the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person’s birth, and if the mother had previously been present in the United States ... for a continuous period of one year.” Since INA §309, covering birth “out of wedlock,” would otherwise be unnecessary, the very general language of INA §301 has been read to require birth in wedlock.

Two important provisions of Title III, which actually employ the terms “child” and “parent” are INA §§320 and 322. INA §320 provides automatic derivative U.S. citizenship to a minor “child,” who “is residing in the United States in the legal and physical custody of ...[a U.S.] citizen parent pursuant to a lawful admission for permanent residence.” INA §322 authorizes naturalization upon application on behalf of a minor “child,” who has or had been in the primary custody of a citizen parent, who met specified U.S. residency requirements. Both INA §§320 and 322 expressly apply to adopted children if they satisfy the requirements of INA §101(b)(1) (the definition of “child” that normally applies to Titles I and II of the INA.) Again, the recognition of adopted and legitimated children is beyond the focus of this article on DOMA.

...”)(emphasis added); INA §301(g); 8 U.S.C. §1401(g) (“The following shall be nationals and citizens of the United States at birth ... a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least one of which were after attaining the age of fourteen years...”)(emphasis added).

47 INA §309(a); 8 U.S.C. §1409(a).
48 INA §309(c); 8 U.S.C. §1409(c).
49 See Scales v. INS, 232 F.3d 1159, 1164 (9th Cir. 2000). As discussed below, this assumption of a silent requirement under §301 equating “not out of wedlock” to “in wedlock” may be overly rigid in the context of civil unions, registered partnerships or other relationships, which – although legal and carrying presumptions of parentage – are not designated officially as “marriages.” See infra notes 461-62 and accompanying text.
51 INA §320(a), 8 U.S.C. §1431(a).
53 INA §320(b), 8 U.S.C. §1431(b); INA §322(c), 8 U.S.C. §1433(c ).
C. Where Babies Come From: Issues related to Assisted Reproductive Technology and Surrogacy Arrangements

U.S. immigration law recognizes legally adopted children without regard to the marital status of their parents.\(^\text{54}\) It has also generally come to recognize bona fide relationships between parents and their biological children, regardless of whether a child’s parents were ever married to each other.\(^\text{55}\) However, a growing number of children are being conceived through assisted reproductive technology (ART) and born to parents who are not their biological parents.\(^\text{56}\) In some cases, such as those involving an egg donor and a gestational carrier, it is not obvious who is a biological parent.\(^\text{57}\) In these cases, presumptions of parentage based on marriage are often essential to establish legally recognizable parent-child relationships.

Over the past thirty years, use of ART and surrogacy arrangements has become increasingly common for both same and different-sex couples.\(^\text{58}\) In particular, there has been a “gaby boom,” a dramatic increase in planned conception and parenting of children by lesbian and gay male couples.\(^\text{59}\) As more jurisdictions recognize same-sex marriage, civil unions, and

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\(^{54}\) See e.g., INA §101(b)(1)(E)-(G); 8 U.S.C. § 1101(b)(1)(E)-(G); INA §320(b)(setting forth detailed criteria determining valid parent-child relationships under Titles I and II of the INA resulting from adoptions without reference to the parent’s marital status); 8 U.S.C. § 1431(b); INA §322(c)(referencing the definition in INA §101(b)(1) in providing for automatic transmission of U.S. citizenship to certain children born abroad); 8 U.S.C. § 1433(c)(referencing the definition in INA §101(b)(1) in providing for U.S. citizenship eligibility to certain children born abroad).

\(^{55}\) See infra notes 110-252 and accompanying text.

\(^{56}\) See Scott Titshaw, Sorry Ma’am, Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology, 11 Fla. Coastal L. Rev. ___ (Symposium ed. 2010)(forthcoming)[hereinafter Titshaw, Your Baby is an Alien].

\(^{57}\) Id.

\(^{58}\) According to the United States Center for Disease Control and Prevention (CDC), complex forms of ART involving medical handling of eggs as well as sperm, have been used in the U.S. since 1981, growing to account for over 57,000 births per year, more than one percent of all births in the U.S. CDC, U.S. Department of Health and Human Services, Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports 1, 15 (2007), available at http://www.cdc.gov/art/. It is reasonable to assume that many more children were conceived through simpler forms of ART, such as artificial insemination.

\(^{59}\) William Eskridge and Nan Hunter credit Marla Hollandsworth with coining this term for children of gay male couples who have children through surrogacy arrangements. William N. Eskridge, Jr. & Nan D. Hunter, Sexuality, Gender and the Law 1140 (2d. ed. 2004). However, it has now come to be widely used to include other types of ART by lesbian couples as well. This phenomenon has been remarked on regularly. See e.g., See e.g., Jim Dickey, Gay Baby Boom Parents, ‘Just like Ozzie and Harriet,’ San Jose Mercury News, Oct. 13, 1989, at A-1 (“Researchers and gay leaders say a gay baby boom is under way.”); Jean Latz Griffin, The Gay Baby Boom: Homosexual Couples Challenge Traditions as they Create New Families, Chi. Trib., Sept. 3, 1992, at Tempo-1 (“Increasing numbers of gay men and lesbians are creating their own families, through adoption, artificial insemination and surrogate motherhood. What amounted to a 1980s baby boom among lesbians ... is now spreading to men....”); Chuck Colbert, Gay Catholics Refuse to Go Away or Be Quiet, Boston Globe, Dec. 31, 2000, at City Weekly – 3 (“Yet another, perhaps even more hopeful development has sprung up from a most unlikely place: the Catholic lesbian and gay baby boom.”); Valarie Honeycutt Spears, Components of a Family: Two Lexington Men Await a Unique Birth, Lexington Herald Leader, June 23, 2002, at A-1 (“Nobody's keeping track of actual numbers, but
other lesbian and gay relationships, they also inevitably recognize parent-child relationships stemming from these unions, including stepparent relationships and presumed parenthood of non-biological children born in wedlock.\(^{60}\)

Enacted in the 1950s, the relevant INA provisions do not provide clear guidance regarding who will be recognized as parents of children conceived through ART or carried and delivered by surrogates, rather than intended mothers.\(^{61}\) There is published guidance on that point only in the context of citizenship transmission upon birth abroad, and that guidance is contradictory.

The US Department of State (DOS) refuses to recognize citizenship transmission at birth from a U.S. citizen to his non-biological child, even in the context of a heterosexual marriage.\(^{62}\)
Declaring that a “blood relationship” is required in order for a parent to transmit U.S. citizenship at birth to a child born abroad, the DOS Foreign Affairs Manual (FAM) focuses entirely on the nationality of the sperm and egg from which the child originated.\textsuperscript{63} If the sperm and egg do not originate from a married couple, the DOS considers the child to be “born out of wedlock.”\textsuperscript{64}

The Ninth Circuit Court of Appeals disagrees, holding that even a non-biological parent will generally be recognized if he is married to a biological parent at the time of the child’s birth.\textsuperscript{65} The court noted that the INA provision regulating transmission of citizenship to a child “born out of wedlock” expressly requires a “blood relationship” but the parallel provision regarding transmission upon birth in wedlock is silent on this point.\textsuperscript{66} It concluded, therefore, that no genetic relationship is required for a foreign-born child to derive citizenship at birth from the U.S. citizen spouse of a biological parent.\textsuperscript{67} In the process, the court considered and expressly rejected the FAM’s simple genetic-based approach to this issue.\textsuperscript{68}

The Ninth Circuit was right to reject the FAM’s misguided effort to federalize this question and shoehorn it into the oversimplified worldview of genetic essentialism.\textsuperscript{69} Since family relationships between spouses or parents and children are generally determined by state and foreign law, immigration and other federal laws turning on family relationships often defer to these state and foreign determinations.\textsuperscript{70} This deference has been approved by the United States Supreme Court\textsuperscript{71} and frequently employed by the BIA.\textsuperscript{72} There is nothing in the text, between the child and the parent on whose citizenship the child’s own claim is based, U.S. citizenship is not acquired.”

\textsuperscript{63} 7 FAM 1446.2-2 (“The key point is that the INA requires a legal and literal biological/genetic relationship. Thus, [in ART cases,] the basic rule is that citizenship should be determined based on the man who provided the sperm and the woman who provided the egg.”)

\textsuperscript{64} 7 FAM 1131.4-2 (illustrating how only the “biological parents” of a child born abroad to a surrogate mother will be considered in determining whether a child is considered “born in wedlock” for purposes of US citizenship transmission at birth).

\textsuperscript{65} Scales v. I.N.S, 232 F.3d at 1159 (9\textsuperscript{th} Cir. 2000); Solis-Espinoza v. Gonzalez, 401 F.3d 1090 (9\textsuperscript{th} Cir. 2005).

\textsuperscript{66} Scales v. I.N.S, 232 F.3d at 1164 (“the statutory provisions concerning citizenship do not address the situation presented here, where the child is ‘legitimate’ by virtue of his parents being married at the time of his birth, yet he may not be the ‘natural’ ... child of the citizen parent.”)

\textsuperscript{67} The Ninth Circuit cases dealt with the children of old-fashioned adulterous relationships, but the court expressly rejected the FAM construction of a blood relationship US citizenship transmission, and their logic applies at least as strongly in cases involving planned pregnancies using ART.

\textsuperscript{68} Scales v. I.N.S, 232 F.3d at 1165-66.

\textsuperscript{69} See Titshaw, Your Baby is an Alien, supra note 56 (analyzing these issues in detail and concluding that the INA should be read to recognize a non-biological parent-child relationship, where the child is considered “born in wedlock” to that parent under the relevant state or foreign law).

\textsuperscript{70} DeSylva v. Ballentine, 351 U.S. 570 (1956)[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] usage”; however, “at least to the extent that there are permissible variations in the ordinary concept of ‘children’ we deen [sic] state law controlling.” Id. at 581.

\textsuperscript{71} Id. at 580 (“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
context, or legislative history of INA provisions governing parent-child relationship recognition that would justify federalizing this family law question. Therefore, this article assumes the general validity of non-biological parent-child relationships, recognized under state or foreign law on the basis of the child’s birth in wedlock, and focuses instead on the question of whether DOMA prevents recognition of birth “in wedlock” in the particular case of children born into a same-sex marriage.

II. EVOLVING LANGUAGE, HISTORY AND PURPOSES OF THE DEFINITIONS OF PARENT-CHILD RELATIONSHIPS UNDER THE I.N.A.

A. The Strong Policies of Family Unity and Liberal Treatment of Children under U.S. Immigration Law

Securing or maintaining family unity has long been recognized as a central goal of the United States immigration system. Former INS Commissioner Doris Meissner testified before Congress in 1995 that the Clinton administration, like those before and since, strongly supported keeping “the reunification of U.S. citizens with their spouses and minor children as legal immigration’s top priority.” The Board of Immigration Appeals (BIA) has also recognized that “[t]here can be little doubt that the legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.”

U.S. Attorneys Generals, such as Robert Kennedy have also recognized this “well-established policy of maintaining the family unit wherever possible.” Federal courts have agreed.

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72 See e.g. infra 152-94 (demonstrating the Board’s longtime reliance on foreign law determinations of legitimacy to establish that a child was “legitimate” under INA §101(b)(1)(A)). The same deference to state law in family matters has also been applied in the area of “marriage” recognition under the INA. Titshaw, Meaning of Marriage, supra note 11 at 559-60.

73 See infra notes 123-33 and accompanying text.

74 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 testified that “[f]amily reunification has been the centerpiece of our legal immigration system for decades, and it should remain so.”), Id.


76 See e.g., In re K—W—S, 9 I. & N. Dec. 396 (A.G. 1961)(finding that the legitimation provision in INA §101(b)(1)(C) “was intended to implement” this “well-established policy)(citing H. Rep. No. 1365, 82d. Cong., 2d Sess., at 29 & 39)).

77 See e.g., Amezquita-Soto v. I.N.S., 708 F.2d 898 (3d. Cir. 1983)(The court majority found “the separation of family members from one another ... [to be] a serious matter requiring close and careful scrutiny,” while dissenting Judge Gibbons agreed on that point, citing Moore v. City of East Cleveland, 431 U.S. 494 (1977), for the general notion that “family and relationships between family members occupy a place of central importance in our nation’s history and are a fundamental part of the values that underlie our society.”)
It would be hard to argue otherwise. The concept of facilitating family unity has almost always been considered “obviously desirable,” probably for reasons of “altruism and calculation” that it will encourage citizens and approved immigrants to remain permanent and stable members of their U.S. communities, rather than “birds of passage,” who do not put down roots in the U.S.\(^79\)

Congress began recognizing the need for family unity in legislation soon after it first began expressly excluding immigrants (felons and certain prostitutes) from the United States in 1875.\(^80\) By 1885, Congress had enacted a law that would set the pattern for most future immigration legislation.\(^81\) This act generally prohibited the immigration of foreign nationals whose transportation was prepaid in exchange for the immigrant’s agreement to perform services once he arrived in the United States.\(^82\) However, it made exceptions to the general prohibition on the bases of particularly desired employment and family based criteria.\(^83\) The family-based language provided that “nothing in this act shall be construed as prohibiting any individual from assisting any member of his family ... to migrate ... to the United States...”\(^84\)

As it created additional obstacles to immigration, Congress provided corresponding exceptions in order to keep families together. For instance, after establishing a literacy requirement for immigrants, it exempted the wife, mother, fiancée, and father over the age of fifty-five of a male resident alien.\(^85\) By 1903, Congress also provided special consideration for the wife or children of a lawfully admitted foreign national, who had applied for citizenship, in

\(^79\) See E.P. Hutchinson, Legislative History of American Immigration Policy: 1798-1966, at 505 (1981)[hereinafter Hutchinson, Legislative History]. Of course, there have also always been forces in America, which oppose family unification as well as other forms of immigration. See H. Rep. No. 1365 (1952), as printed in 1952 U.S.C.C.A.N. 2657-73 (tracing anti-immigrant political movements in the U.S. from the “Native American” movement of the 1830s and 1840s through the “Know Nothings” of the mid-nineteenth century, to the often-race based restrictions of the late-nineteenth and early twentieth-centuries); H.R. 878, 11\(^{th}\) Cong. §1 (2009)(Georgia Rep. Phil Gingrey introduced this legislation to eliminate certain family visa categories, e.g., married sons and daughters of citizens; it currently has forty-three co-sponsors in the House of Representatives.)

\(^80\) 18 stat. 477 (1875).

\(^81\) 23 stat. 332 (1885).

\(^82\) Id.

\(^83\) Id.

\(^84\) Id. at 333. The 1885 act also provided exceptions for any other “relative or personal friend[,] Id., but these categories proved too lenient, and Congress deleted them six years later. Hutchinson, Legislative History, supra note 79 at 506.

A simple, early version of employment-based immigration law is present in section five of this 1885 act as well. This provided the seminal idea for both modern labor certification and employment preference categories, including exceptions to general immigration of contract labor for a “skilled workman” in “any new industry” for which “skilled labor for that purpose cannot be otherwise obtained” and for specific, enumerated categories of workers: actors, artists, lecturers, singers, and domestic servants. 23 stat. at 333.

\(^85\) Hutchinson, Legislative History, supra note 79 at 506 (noting that the earlier version of this 1906 literacy requirement appeared in an 1896 act, which only applied to men between the ages of sixteen and sixty).
the event that the family members suffered from curable disorders for which they would otherwise be excluded.\textsuperscript{86}

Congress made its priority for family unity clear when it drafted the Immigration and Nationality Act of 1952, introducing most of the provisions that still define “child” and “parent” today.\textsuperscript{87} Since then, the text of the INA has provided for quota exempt permanent residence for the children and parents of adult U.S. citizens, immigrant visa preferences for the children of lawful permanent residents, derivative status for the children of new permanent residents and nonimmigrant visa holders, and even waivers of inadmissibility or removability based on the hardship of children and parents.\textsuperscript{88}

Just five years after enactment of the 1952 Act, a House Judiciary Committee Report found that Congress had intended “to preserve the family unit” in general and “to provide for a liberal treatment of children” in particular.\textsuperscript{89} This 1957 Report chided the Attorney General for reading an unwritten requirement of birth in wedlock into the definition of “stepchild” under INA §101(b)(1)(B).\textsuperscript{90} The Report found that statutory language throughout the INA “makes it clear that the underlying intent of the legislation was to preserve the family unit upon immigration to the United States.”\textsuperscript{91}

In 1957, the House Judiciary Committee cited its own 1952 Report on the original INA to demonstrate “the underlying intentions of our immigration laws regarding the preservation of the family unit.”\textsuperscript{92} It also cited the 1952 Senate Judiciary Committee Report on its version of the Act for the proposition that “any new immigration law should provide a better method of keeping families of immigrants together by affording a more liberal treatment of children.”\textsuperscript{93}

\textbf{B. The Early Focus on “Legitimacy” as a Requirement for Parent-Child Recognition}

Family-based categories became more and more important as Congress invented a complex quota system and other measures to increasingly limit immigration to the United States over the last century. This also required a more specific understanding of exactly who was a qualifying family member.

\textsuperscript{86} Id. at 507.
\textsuperscript{87} \textit{See infra} text accompanying note 105.
\textsuperscript{88} \textit{See infra} notes 27-31 and accompanying text. \textit{See also}, S.Rep. No. 748, 89\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. 13 (1965), reprinted in U.S.C.C.A.N. 3328, 3332 (the “seven-tier preference system [is] primarily designed to further the basic objective of reuniting families and also to attract to this country aliens with needed skills.”)
\textsuperscript{89} H.R. Rep. 85-1199, 2020-21 (1957)
\textsuperscript{90} Id. at 2020.
\textsuperscript{91} Id.
Before 1921, federal immigration law allowed most women and accompanied children under sixteen to immigrate to the U.S. so long as they were not coming as contract labor and they were not subject to one of the criminal, medical or “public charge” bases for exclusion. In this liberal environment, it is not surprising to encounter no precedent defining “child” for immigration purposes. However, as described below, federal statutes have relied on family relationships to establish the transmission of U.S. citizenship since the founding of the republic, and there were a number of reported opinions defining the term “child” under U.S. citizenship laws before the issue became prominent in the immigration context. These early courts and officials did not read the word “child” literally or on the basis of a dictionary definition. Rather, they originally borrowed the common law rule of nullius filius, which refused to recognize the parentage of “illegitimate” children. However, by the 1920s, the understanding of “child” began evolving into a more liberal view that traced the prior move toward recognition of “illegitimate” children for other purposes under state law.

The Immigration Act of 1924 clarified a negative definition of the terms “child,” “mother,” and “father,” stating that they did not include children adopted after 1923. However, there was no positive definition of “parent” or “child” until the first comprehensive Immigration and Nationality Act was enacted in 1952. In the meantime, judges and immigration officials could only resort to common law, state, and foreign definitions of these family law terms when interpreting immigration statutes, including distinctions between “legitimate” and “illegitimate” children.

C. The Definitions of “Child” and “Parent” under § 101(b) of the Immigration and Nationality Act of 1952

In light of the Senate’s current inability to pass any immigration reform without the agreement of sixty Senators to end a standing filibuster, it may be surprising to learn that the

94 Hutchinson, Legislative History, supra note 79.
95 See infra notes 209-32 and accompanying text.
96 See, Guyer v. Smith, 22 Md. 239 (1864)(interpreting “children of persons who are, or have been citizens of the United States” in the Naturalization Act of 1802, 2 Stat. 153, to mean only “legitimate” children, since “illegitimate” children are nullius filii, and therefore legally unrecognizable); Mason ex rel Chin Suey v. Tillinghast, 26 F.2d 588, 589 (1st Cir. 1928)(reading “all children” under Revised Statutes, Sec. 1993, Comp. St. 1916, Sec. 3947, to apply for citizenship transmission purposes “to legitimate children only”).
97 See infra notes 129-235 and accompanying text.
98 190 Stat. 153, 169 (1924). Of course, this may imply that adopted children had previously fallen under the conception of “child” in previous immigration laws, such as those setting forth the similar quota preferences to “children” of U.S. citizens and certain permanent residents in the 1921 immigration act and earlier legislation. 42 stat. 5, 6 (1921). This definition section also set forth the original version of the current, negative “definition” of “marriage” under the INA by specifying that the act would not recognize as “husband” and “wife,” a couple joined “by reason of a proxy or picture marriage.” 190 Stat. at 169.
99 See supra note 96 and accompanying text.
original Immigration and Nationality Act of 1952 was enacted over President Truman’s veto with only fifty-seven votes (and thirteen abstentions).\footnote{E.P. Hutchinson, Legislative History of American Immigration Policy: 1798-1965, 307 (1981). At the time, Alaska and Hawaii had not yet been admitted as states, but two-thirds (sixty-four) of the Senate’s ninety-six members were still required for cloture. See U.S. Senate: Art & History: Filibuster and Cloture, http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm (describing how the two-thirds vote cloture requirement was reduced to three-fifths (i.e., sixty senators) in 1975).} Codifying, organizing and revising numerous prior immigration statutes and policies to create one comprehensive system for the first time,\footnote{House Committee Report on INA, supra note 92 at 1677.} this was the most significant immigration bill in United States history. It still forms the structure and basic content of U.S. immigration law almost sixty years later.

Congress recognized that “one of the most important segments” of the 1952 Act was the first set of general definitions for U.S. immigration purposes.\footnote{Id. at 1683. Some immigration laws had previously offered some clarification of terms like “child,” “mother,” and “father,” but only in the negative sense of specifying certain parent-child relationships that were not covered by the statutes. See e.g., 190 stat. 153 (1924) (clarifying that the terms ‘‘child,’ ‘father,’ and ‘mother,’ do not include a child or parent by adoption unless the adoption took place before January 1, 1924[,]” and originating the current “definition” of “marriage” under the INA by specifying that the act would not recognize as “husband” and “wife,” a couple joined “by reason of a proxy or picture marriage.”)} This included definitions of “child” and “parent” in §101(b), containing “uniform considerations to be applied in determining whether that status exists in the application of the provisions of titles I and II of the bill.”\footnote{House Committee Report on INA, supra note 92 at 1685.}

The 1952 version of §101(b) read in its entirety as follows:

(1)The term “child” means an unmarried person under twenty-one years of age who is –
(A) a legitimate child; or
(B) a stepchild, provided the child had not reached the age of eighteen years at the time of the marriage creating the status of stepchild occurred; or
(C) a child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of the legitimation.

(2)The term “parent,” “father,” or “mother” means a parent, father or mother only where the relationship exists by reason of any of the circumstances set forth in (1) above.\footnote{66 stat. 163, 171 (1952).} While it has been augmented with detailed provisions adding adopted children to the definition,\footnote{66 stat. 163, 171 (1952).} the language above has survived the last six decades largely intact. In fact, it has
only been altered three times – in 1957, 1986 and 1995. All three amendments were aimed primarily at increasing family unity.

As described below, the 1957 amendments were occasioned by a failure of the Eisenhower administration to apply the Act’s understanding of a “legitimate” child in the liberal way that Congress had intended. The 1986 amendment recognized the “illegitimate” children of fathers if they established “bona fide parent-child relationship[s].” The 1995 amendment was meant to facilitate foreign adoptions by changing the words “legitimate” and “illegitimate” to “in wedlock” and “out of wedlock.”

**D. An Increasingly Liberal View of “Legitimacy” and the 1957 Amendments to INA §101(b)(1)**

The Immigration and Nationality Act of 1952 provided the first express statutory definitions of “child,” “parent,” “father,” and “mother” to guide immigration authorities and judges. The definitions incorporated, while ameliorating, the common law reliance on “legitimacy,” but they did not clarify all ambiguities. Soon, it became clear that the Eisenhower administration and Congress did not see eye to eye on the significance of “legitimacy” in recognizing parent-child relationships under the definitions in the new Act.

By 1953, issues had arisen in which the Board of Immigration Appeals (BIA) found that the terms “stepchild” and “legitimate child” were ambiguous in context. Thus, the Board focused on the legislative intent to keep families together by affording a more liberal treatment to children, reading the term “stepchild” to include a stepchild who was originally born out of wedlock, and finding that a single mother’s child was “legitimate” in relation to the mother.

The Attorney General disagreed in both cases. He found that the term “stepchild” did not cover the two year old son of a U.S. citizen’s German wife in a case involving a child

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107 See infra notes 110-22 and accompanying text.
109 See infra notes 198-203 and accompanying text.
110 See In re M, 5 I. & N. Dec. at 123-24 (pointing to varying definitions in legal and general dictionaries and in case law); In re A, 5 I. & N. Dec. at 280 (pointing to a “patent ambiguity” in the original language of INA §101(b), which uses the term “legitimate child” in paragraph (A), but refers only to “legitimation … under the law of the father’s residence or domicile” with “no reference to … legitimation under the law of the mother’s residence or domicile.”[emphasis in original])
111 See In re M, 5 I. & N. Dec. 120, 125 (BIA 1953)(citing the Senate and House reports accompanying their respective versions of the immigration act); In re A, 5 I. & N. Dec. 272, 273-74 (BIA 1953)(citing the Senate and House reports accompanying their respective versions of the immigration act). The latter decision also looked to the historical context of the 1952 Act, reacting to a landscape in which “[t]he term ‘child’ was only defined … in a negative manner by … the Immigration Act of 1924” and to DOS regulations under the prior law, which provided for the proper execution of a nonquota petition by the U.S. citizen mother of an illegitimate child. In re A, 5 I. & N. Dec. at 273 (citing the 1924 Act and 22 C.F.R. 61.209 (41.209)).
originally born out of wedlock to her and another man.\textsuperscript{112} The Attorney General also took a more restrictive view of the term “legitimate child,” concluding that a child, “conceived and born out of wedlock” is not a “legitimate child” in relation to her mother any more than she is to her father.\textsuperscript{113} In both cases, the Attorney General expressly invited Congress to draft specific provisions to clarify the issues if it found the results harsh.\textsuperscript{114}

Congress was not amused. Referring specifically to these two opinions,\textsuperscript{115} the House Report accompanying the 1957 amendments bemoaned “the fact that the [House Judiciary] Committee’s attempts to clarify legislative intent remain unsuccessful...”\textsuperscript{116} The Report cited at some length the same congressional committee reports of the 1952 Act, upon which the BIA had relied, finding that “[t]he legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united.”\textsuperscript{117}

Since its earlier intent had not been heeded, the Committee found a “need for the enactment” of amendments clarifying its intent to recognize most illegitimate children under INA §101(b).\textsuperscript{118} Specifically, the 1957 statute specified that the term “child” includes a stepchild “,whether or not born out of wedlock,” and it added new paragraphs (D), recognizing adopted children, and (C), recognizing “an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother[.]”\textsuperscript{119} As the Report reasoned, “[s]ympathetic and humane considerations dictate an interpretation which would not separate the child, whether legitimate or illegitimate, from its alien parent....”\textsuperscript{120}

\textsuperscript{112} In re M, 5 I. & N. Dec. at 120.
\textsuperscript{113} In re A, 5 I. & N. Dec. at 272.
\textsuperscript{114} In re M, 5 I. & N. Dec. at 126; In re A, 5 I. & N. Dec. at 284.
\textsuperscript{115} While it did not name the cases or give their official citations, the House Report on P.L. 85-316 did describe the holdings and specify the exact dates of the Attorney General’s opinions in each case. H.R. Rep. 85-119, at 5 (Aug. 19, 1957).
\textsuperscript{116} Id.
\textsuperscript{117} Id. See also, Nation v. Esperdy, 239 F. Supp. 531 (S.D. N.Y. 1965).
\textsuperscript{118} H.R. Rep. 85-119, at 5.
\textsuperscript{120} H.R. Rep. 85-119, 8\textsuperscript{th} Cong., 2d Sess., at 6. The Congressional agreement on this account seemed clear throughout the 1950s. See Id. at 8 (“In view of the clearly expressed legislative intention to keep together the family unit wherever possible, it would appear to be a desirable result, based on the legal and equitable considerations, to adopt a liberal construction. No harm could possibly result from such a construction, and the consequences would fulfill the humane considerations involved in keeping intact the family unit.”); H.R. Rep. No. 1365, 82d. Cong., 2d. Sess., at 39 (referring to the “well-established policy of maintaining the family unit wherever possible.”); H.R. Rep. No. 1199, 85\textsuperscript{th} Cong., 1st Sess., at 8 (referring to the “well-established policy of maintaining the family unit wherever possible); S. Rep. No. 1515, 84\textsuperscript{th} Cong., at 468)(remarking on the suggestion that “any new immigration law should provide a better method of keeping families of immigrants together by affording a more liberal treatment of children.”);
Finally, evidence that “there is extensive interest in the United States in adopting orphans and offering them the benefits and the loving care of American homes,” persuaded the House Judiciary Committee to make a temporary adoption immigration program permanent.\textsuperscript{121} Thus, the 1957 amendments also added categories of adopted “orphans” and other children to the definition of child under INA §101(b)(1).\textsuperscript{122}

E. **Reliance on State and Foreign Family Law to Determine Issues of “Legitimacy”**

Although the Immigration Act of 1952 established positive definitions of “parent” and “child” for immigration purposes, this did not affect the reliance on state and foreign family law to clarify ambiguities in the definitions or to define other undefined terms, such as “legitimate” and “illegitimate.” Even before this revision of INA §101(b), the Attorney General had declined to extend his refusal to recognize the “legitimacy” of an unmarried mother’s child to cases where relevant state or foreign law considered the child “legitimate.”\textsuperscript{123} In *In re B—S*, the Board pointed out that “legitimacy,” like other family law concepts, is governed by the relevant state or country of domicile.\textsuperscript{124} Generally, if a child’s birth is recognized as “legitimate” under the family law of the relevant jurisdiction, it will be recognized everywhere, even in jurisdictions that would not have recognized the birth as “legitimate” in their state.\textsuperscript{125}

The definition of “legitimate” in foreign jurisdictions could control its meaning under INA §101(b) in certain contexts, since the term “‘legitimate’ is not limited to merely children in the United States.”\textsuperscript{126} In fact, the BIA read the undefined, “all inclusive” term “legitimate child” in Paragraph (A) to reflect the same reliance on existing state and foreign definitions of “legitimate” actually expressed in Paragraph (B)’s coverage of a child “legitimated under the law of the child’s … or … the father’s residence or domicile, **whether in or outside the United States.**”\textsuperscript{127} Otherwise, it reasoned, “an anomalous situation would be presented, since … a legitimated child is regarded as legitimate from birth.”\textsuperscript{128} This must have been a comfortable position for the Board and Attorney General since “legitimacy” determinations for the purposes of recognizing “children” born outside the U.S. for citizenship purposes had been recognized by the U.S. Attorney General as far back as 1920.\textsuperscript{129}

\textit{see also}, In re K—W—S, 9 I. & N. Dec. 396 (AG 1961)(citing this legislative history for the same proposition); Nation v. Esperdy, 239 F. Supp. at 531(citing this legislative history).
\textsuperscript{121}H.R. Rep. No. 85-1199, 85\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. 1957, as reprinted in 1957 U.S.C.C.A.N. 2016 (Leg. Hist.).
\textsuperscript{122}Pub. L. No. 85-316, 71 stat. 639.
\textsuperscript{124}Id. at 309 (citing 1 Schouler, Domestic Relations 735 (6\textsuperscript{th} ed. 1921)).
\textsuperscript{126}Id. at 308.
\textsuperscript{127}Id. at 308-09 [emphasis in original].
\textsuperscript{128}Id. at 309 (citing 32 Op. Atty. Gen. 162 (1920)).
\textsuperscript{129}Citizenship—Children Born Abroad Out of Wedlock of American Fathers and Alien Mothers, 32 Op. Atty. Gen. 162 (U.S.A.G. 1920). The extreme to which even highly objectionable family law had been recognized by U.S. immigration authorities is clear from *In re M*, 3 I. & N. Dec. 850 (BIA 1950). (The BIA
The U.S. Supreme Court has endorsed this reliance on family law definitions to interpret federal statutes. In *DeSylva v. Ballentine*, the Court looked to state family law in determining whether a child was “legitimate,” and, therefore, covered by the term “children” under federal copyright law. In that case, the Court noted that “[t]he 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 relationships, which is primarily a matter of state concern.” This approach has also been consistently applied by the BIA with regard to the term “marriage,” another largely undefined family term used throughout the INA.

**F. “Legitimacy” and Unrecognizable Marriages: Polygamy and Other Examples**

Since its language was amended in 1995, there have been no reported cases determining whether a child born into a same-sex marriage qualifies as “born in wedlock” under INA §101(b)(1)(A). However, there was a long history of using state and foreign definitions to recognize a child under the predecessor term “legitimate,” regardless of whether his parents’ marriage was valid for immigration purposes.

In addition to cases of “illegitimacy” based on birth “out of wedlock,” questions have long been raised about the “legitimacy” of a child born to parents, who were married, but whose marriage was polygamous or otherwise invalid for immigration purposes. A *bona fide* marriage that is valid in the state or country where it was celebrated will be recognized for immigration purposes unless there is a strong public policy objection to the category of marriage in question. There are very few exceptions, but the express exclusion of same-sex marriage

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131 *Id.* at 581.
132 *Id.* at 580.
133 *See* Titshaw, *Meaning of Marriage, supra* note 11 at 550. The general rule is that a marriage is recognized for immigration purposes if it is recognized where celebrated and not subject to a sufficiently strong public policy exception under the relevant law of domicile. *Id.* Unlike the terms “legitimate” and “in-” or “out of wedlock”, there are express federal public policy exceptions to “marriage” recognition for same-sex marriages, polygamous marriages, and unconsummated proxy marriages, as well as a marriage *bona fide* requirement to avoid recognition of legally valid marriages entered solely for the purpose of obtaining immigration benefits. *Id.*
134 *See infra* notes 195-207 and accompanying text (describing the 1995 amendment). This amendment does not alter the need to rely on state or foreign family law to determine whether a child is “born in wedlock.” *See infra* notes 206-07 and accompanying text.
135 Generally, marriage validity under the INA can be understood as a three step analysis, focusing on: (1) whether the marriage was valid where celebrated; (2) whether there is a strong state or federal public policy exception to the category of marriage in question; and (3) whether the particular marriage is *bona fide* (i.e., not entered for the sole purpose of obtaining immigration benefits.) Titshaw, *Meaning of Marriage, supra* note 11 at 550.
under DOMA is one of the three recognized federal exceptions.\textsuperscript{136} The other two are unconsummated proxy marriages and polygamous marriages.\textsuperscript{137}

Since the nineteenth century, practicing polygamists have been barred from entering the U.S. or obtaining any immigration benefits, a much more consequential and specific immigration-related policy objection to polygamy than the objection to same-sex marriage expressed in DOMA’s federal definition of “marriage” and “spouse.”\textsuperscript{138} Therefore, polygamous marriages clearly violate a strongly held federal public policy and are not recognized in determining immigration benefits and waivers for spouses under the INA.\textsuperscript{139} However, this policy objection to recognition of polygamous spouses has seldom led to a refusal to recognize children of the marriage as “legitimate.”\textsuperscript{140} In fact, children of second or third wives in polygamous marriages, who are recognized as “legitimate” under foreign law, have generally been recognized as “legitimate” under the INA as well. The BIA has explained that “[t]he recognition or non-recognition of the existence of a polygamous marriage depends on the purpose for which such recognition is invoked.”\textsuperscript{141}

\textbf{i. Children of Polygamous Marriages in the 1910s and 1920s}

Several reported opinions from the early decades of the Twentieth Century refused to recognize the offspring of a father’s second polygamous marriage for immigration purposes because of their “illegitimacy” based on the invalidity of their parents’ polygamous marriages and the repugnancy of the marriages to the public policy of “all Christian countries.”\textsuperscript{142} These

\textsuperscript{136} Id. at 579-80.
\textsuperscript{137} Id. State exceptions recognized as decisive for immigration purposes have included policy objections to bi-racial marriages and consanguineous marriages. Id. at 564-79.
\textsuperscript{138} INA §212(a)(10)(A); 8 U.S.C. §1182(a)(10)(A)(Current INA provision declaring that “[a]ny immigrant who is coming to the United States to practice polygamy is inadmissible.”); Immigration Act of 1891, 26 Stat. 570.

“Sexual deviants,” including gay men and lesbian, were also inadmissible until that ground for inadmissibility was dropped in 1990. \textit{Family, Unvalued}, supra note 3 at 24, 28. Now, not even a foreign national coming to the United States to marry someone of the same sex will be excluded if she is fortunate enough to qualify for lawful permanent residence on some other basis, such as employment or asylum. \textit{See also}, Titshaw, \textit{Meaning of Marriage} at 586 (tracing the history of the homosexual exclusion throughout the twentieth century).

\textsuperscript{139} See e.g., In re H--, 9 I. & N. Dec. 640, 641 (BIA 1962)(finding a Jordanian polygamous marriage invalid for immigration purposes as “repugnant to public policy”); In re Darwish, 14 I. & N. Dec. 307, 308-09 (BIA 1973)(refusing to recognize the validity of a valid Jordanian-Muslim plural marriage because it “offend[s] the public policy of the United States”).
\textsuperscript{140} \textit{See infra} notes 151-94 and accompanying text.
\textsuperscript{141} \textit{See} In re H, 9 I. & N. Dec. 640, 640 (BIA 1962)(citing Graveson, Conflict of Laws 370, 373 (3rd ed. 1949))(refusing to recognize a spousal immigrant visa petition in the case of a marriage entered prior to termination of the previous marriage in spite of its validity in Jordan where it was celebrated, while taking note of the fact that polygamous marriages have been recognized as valid for some purposes within the United States).
\textsuperscript{142} \textit{See}, In re Look Wong, 4 Reports of U.S.D.Ct. for D. Hawaii 568 (D.HA. 1915)(hereinafter In re Look Wong); Ng Suey Hi v. Weedin, 21 F.2d 801 (9th Cir. 1927)(citing 38 C.J. 1274 & 76); Mason v. Tillinghast, 26 F.2d 588 (1st Cir. 1928). The court in \textit{In re Look Wong}, read a legitimacy requirement into the use of the
opinions rejected the argument that courts “should look no further than the immediate parties,” the spouses, in applying the anti-polygamy policy, not looking “to those [children] one degree removed, who are innocent parties.” Instead, the courts refused to distinguish between the issues of “legitimacy” and marriage validity, classifying the children as “the fruits of ... polygamous marriage[s],” which violate the public policy of any Christian country. It is apparent from the use of contract law analogies and the allusion to the fruits of a polygamous tree that these courts viewed the children’s position solely as a byproduct of the legal status of their parents’ forbidden marriage contracts.

By 1920, the U.S. Attorney General noted changing American attitudes toward “illegitimate” children in general and a rejection of the refusal to legally recognize their relationships with their parents. He pointed approvingly to the trend of states to “enlarge” the rights of “illegitimate” children, rightly abandoning common law rules “based on the supposition that by subjecting an illegitimate child to severe disabilities, illicit relations between the sexes would be discouraged.” The new statutes represent “the modern view that ... considerations of public policy no longer forbid the recognition of ... [a parent’s] relationship to the child.” While this “modern view” did not persuade federal courts dealing with the children of polygamous marriages in the 1920s, it was reflected in later opinions distinguishing between parental and spousal relationships in applying the U.S. policy against polygamy.

**ii. Children of Polygamous Marriages after 1952:**

Opinions reported since enactment of the Immigration and Nationality Act of 1952 have tended to reject the natural law objection and contractual analysis of the early decisions, instead, considering recognition of a child’s “legitimacy” with regard to his father as a separate question from the validity of his parents’ marriage.
In 1955, in *In re B—S*, the INS argued that U.S. immigration law should not recognize a single mother’s child as a “legitimate child” on the basis of the relevant Chinese law because that would also require recognition of children of polygamous Chinese marriages. The INS pointed out that Chinese law recognized the children of concubines as legitimate, just as it did the children of single mothers. However, the BIA showed no fear of that slippery slope. After noting that these were not the facts in *In re B—S*, the Board expressed doubt as to whether there would be a sufficient public policy objection to a child’s “legitimacy” because of her parents’ polygamous marriage. Later, the BIA and Attorney General would agree, deciding actual cases in favor of such children.

In 1961, the BIA recognized as “legitimate” the parent-child relationship of a man and his concubine’s son. *In re K—W—S* held that a naturalized U.S. citizen was entitled to petition under the sibling-based fourth-preference immigrant visa category on behalf of her half-brother, who was her father’s child by his concubine (his second wife in a polygamous marriage). In the process, it focused on Chinese family law in order to reach the required intermediate conclusion that the concubine’s son was the “legitimate child” of his polygamous father’s second marriage.

Prior cases clarified that U.S. citizens could only petition for immigrant visas on behalf of half-siblings with a common father if they were “legitimate.” Therefore, *In re K—W—S* turned on the “legitimacy” of the concubine’s son in relation to his father. Since the Chinese son in this case had been born in 1914, the post-revolutionary Chinese law abolishing the label of “illegitimate” for any children was not relevant. Instead, the Board looked to the older Chinese Imperial Code, which specified that the children of a concubine are not considered to be “illegitimate.” It concluded that the concubine’s progeny was his father’s “legitimate” son, and therefore eligible as the beneficiary of an immigrant visa petition by his father’s primary wife’s daughter.

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153 Id.
154 Id. at 309 (citing Recent Case, *Conflict of Laws – Legitimacy – Recognition of Issue of Polygamous Marriage*, 31 Harv. L. Rev. 892 (1918)).
156 Id.
157 Id. at 398.
158 Id. at 397 (interpreting INA §203(a)(4); 8 U.S.C. §1153(a)(4)).
160 Id. at 389-99 (citing information supplied by the Library of Congress for the proposition that the child of a concubine is “acknowledged,” not “illegitimate.”)
161 Id. at 400.
In its decision to focus on Chinese law, the Board pointed to the general legal reliance on the relevant state or country of domicile to determine questions of “legitimacy.” It also criticized and distinguished the early cases described above, largely on the ground that they were inapplicable to the express definitions of “child” and “parent” adopted in the Immigration and Nationality Act of 1952. The Board pointed to the 1920 Attorney General Opinion noting the liberalization of legal treatment of “illegitimate” children, and demonstrated how that idea had developed further and been incorporated into the text of the 1952 Act and the 1957 amendments by a Congress that clearly demonstrated a “liberal public policy with regard to illegitimacy and legitimation.” “Where the identity of the parents is established, considerations of public policy no longer forbid the recognition of their relationship to the child....” Instead, “the law looks with favor upon the status of legitimacy and will confer recognition upon such status created in accordance with the law of a child’s origin, as well as under the law of the father’s residence or domicile.”

Although the original Board decision in In re K—W—S did not draw any distinction, its response to a request for reconsideration and the Attorney General’s opinion affirming that decision both focused on the statutory “legitimation” provision in INA §101(b)(1)(C), rather than the more ambiguous “legitimate child” term employed in subparagraph (A). This was a sensibly careful approach in light of the detailed reference in subparagraph (C) to legitimation “under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in or outside the United States....” Yet the child’s “legitimacy” under the

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162 Id. at 404 (“The general rule is that the status of legitimacy is created by the law of the domicile of the parent whose relationship to the child is in question; the legitimate kinship of a child to either parent from the time of the child’s birth is determined by the law of the state of domicile of the parent at that time....”)

163 See supra notes 142-46 and accompanying text.

164 In re K—W—S, 9 I. & N. Dec. 396, 400-404. (In re Look Wong “is not in accord with later concepts, nor is it governing in view of the provisions of the 1952 Immigration Act”; Ng Suey Hi v. Weedin would have been decided differently if there had been “evidence of legitimacy or legitimation” under Chinese law; the relevant language in Mason ex rel. Chin Suey v. Tillinghast, was dicta that was later “overruled by the provisions of section 101(b)(1)(C) and 101(c)(1) of the Immigration and Nationality Act relating to legitimation subsequent to birth.”)

165 Id. at 402.

166 Id. at 404.

167 Id. at 405 (citing Matter of B—S, supra notes 151-54 and accompanying text). While this opinion assumed a biological link between children and their parents in these polygamy cases, that link is not always necessary in order to establish a parent-child relationship. See supra notes 65-73 and accompanying text.

168 Id.

169 Id. at 406 & 408-09. This focus on “legitimation” rather than “legitimacy” at birth was repeated with a clear factual basis in In re Kubicka, 14 I. & N. Dec. 303 (BIA 1972), where the Board recognized as “legitimated” a child born into a bigamous relationship in Poland, since his father later reported the birth to the Civil Registry, which legitimated the child under Polish law. Of course, no such later act of legitimation was central to the decisions in In re K—W—S.

controlling Chinese law clearly hinged on his parents’ polygamous marriage at the time of his birth, not on any later acknowledgement or other process of “legitimation.”

In 1967, the Board made no reference to “legitimation,” when it decided In re Mahal.\textsuperscript{171} In that case, it followed In re K—W—S, recognizing the brother-sister relationship of two children born of two different wives involved in a polygamous marriage in India, where such marriages and their children were recognized as “legitimate” under “Hindu Rites” up until 1956.\textsuperscript{172} In re Mahal also referenced an unreported case in which the Board had recognized “the children of a polygamous marriage which was legal under the Moslem faith … as legitimate and eligible for preference quota status as brothers ….”\textsuperscript{173} The Board made it clear that “children of these polygamous marriages, which … were legal in both India and Pakistan until the mid-1950s, under the Hindu law are legitimate in every sense of the word.”\textsuperscript{174}

By 1972, the Board was clear that it was relying on INA §101(b)(1)(A) in recognizing a U.S. citizen as his father’s “legitimate child,” in spite of the fact that he was clearly born into a bigamous second marriage.\textsuperscript{175} In In re Sandin-Nava, the Board focused again on the relevant family law provisions.\textsuperscript{176} Since the residence and domicile of both the father and child were always California, the Board focused on section 85 of the Civil Code of California, which provided that “[t]he issue of a marriage which is void … is legitimate.”\textsuperscript{177} Since a California court had already held that section 85 applied even when the marriage was void because it was bigamous,\textsuperscript{178} the BIA found that the son was his father’s “legitimate child” for purposes of both California law and U.S. immigration law.\textsuperscript{179}

As exemplified above, the Board has generally focused on the law of the jurisdiction where the children of polygamous marriages were born to determine whether they qualified as “legitimate” under the INA. For instance, in In re Kwan, the Board recognized two daughters of

\textsuperscript{171} 12 I. & N. Dec. 409 (BIA 1967).
\textsuperscript{172} 12 I. & N. Dec. 409 (BIA 1967).
\textsuperscript{173} Id. (citing In re Aref Hasan Hamdan, VPO 7-3592 (July 27, 1955).
\textsuperscript{174} Id.
\textsuperscript{175} In re Sandin-Nava, 14 I. & N. Dec. 88 (BIA 1972). In re Sandin-Nava was decided before language was added to section (D) in order to recognize a “child” born out of wedlock to a “natural father if the father has or had a bona fide parent-child relationship with” the child. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §315, 100 Stat. 3359 (1986). The Board also made it very clear throughout the decision that it was not basing its recognition of the parent-child relationship on the provisions for a “legitimated child” under subparagraph (C). 14 I. & N. Dec. 88.
\textsuperscript{176} Id. at 90.
\textsuperscript{177} Id.
\textsuperscript{178} In re Filtzer’s Estate, 33 C.2d 776 (1949).
\textsuperscript{179} 14 I. & N. Dec. at 91. One member of the Board issued a strong dissent in this case, but it was not based on a disagreement over the legitimacy holding in general. Id. at 92. Rather, it focused on the fact that In re Sandin-Nava was a deportation case in which the bigamous father, not the child, was benefiting from a waiver of deportation based on their relationship. Id. The dissent found that “[s]tatutes which provide that children of void marriages are legitimate have been enacted solely in the interest of such children who, absent such statutes, would be illegitimate. They have not been enacted for the benefit of bigamists.” Id.
a father’s third wife (concubine) in Hong Kong as “legitimate” under the Chinese Code of 1843, which recognized the equal legitimacy of children of primary and secondary wives. In *In re Fong*, the Board referred to a U.S. citizen as the “legitimate child” under INA §101(b)(1)(A) of both his father and his mother, the secondary (concubine) wife in a polygamous Chinese marriage. However, in another case, the Board delved deeply into the intricacies of Hong Kong’s family law to distinguish between two different types of concubine, a *tsip* or legal secondary wife and a mistress without lawful standing, determining that the child in that case had been born to the latter, and thus was not “legitimate” under the law of Hong Kong or the INA.

Of course, it is important to remember that the Board’s opinions in these cases did not recognize a federal definition of the offspring of all polygamous marriages as “legitimate,” but it deferred to that recognition under the family law of the relevant jurisdiction. This is clear from cases refusing to recognize the “legitimacy” of children, who would not be recognized as “legitimate” under the relevant foreign or state law, whether due to polygamy or some other reason. For instance, in *In re Kim*, the Board refused to recognize a child of his father and his father’s concubine as a “legitimate child,” since Korean law considered the child to be “illegitimate.” In another case, the Board first held that a concubine’s child as the father’s “legitimate” child under the law of Hong Kong, and then later reversed its holding on that point upon further clarification of a point under the relevant law in Hong Kong. Significantly, these decisions relied exclusively on the Korean and Hong Kong law of “legitimacy,” not on the validity under U.S. immigration law of the parents’ marriage.

### iii. Children of Other Unrecognizable Marriages

In addition to non-spousal relationships stemming from polygamous marriages, U.S. immigration law has also occasionally been read so liberally as to recognize children as “legitimate” based on marriages that were not even valid where celebrated. For example, in *In re K*, the BIA recognized a child as “legitimate” based on his parents’ religious marriage ceremony, even though the marriage apparently was not legally valid in Italy, where it was celebrated. The Board recognized its leniency when examining parent-child relationships, explaining that “If a person has always believed that his parents were lawfully married and that

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181. 17 I. & N. Dec. 212, 214 (BIA 1980). In addition to his finding that the U.S. citizen son had earlier filed a valid petition as the “legitimate child” of his parents in a polygamous marriage, the Board went on to find that he could properly file an additional petition as a “stepson” under INA §101(b)(1)(B) on behalf of his father’s first wife, whose marriage was celebrated before his birth. *Id.* at 213.
183. 14 I. & N. Dec. 561, 562 (BIA 1974) (citing Article 859 of the Korean Civil Code, the Board also determined that the relationship did not qualify as legitimation prior to the child’s eighteenth birthday).
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.”

This reasoning goes a step too far for the BIA in most cases. The Board generally does not recognize children as “legitimate” where the law of the relevant jurisdiction neither recognized the validity of their parent’s marriage, nor their “legitimacy” as a separate issue. However, it does recognize common law marriages, where the relevant jurisdiction does, and it has recognized “legitimacy” on that basis as well.

G. “Legitimacy,” Polygamy and Stepchildren under INA §101(b)(1)(B)

Although the BIA has long recognized the children of polygamous marriages as “legitimate” in relation to their biological fathers and mothers, regardless of the mother’s status as primary or secondary wives, it has not always been willing to recognize the stepchild-stepparent relationship between these children and their father’s other wives. In the two reported cases on point, the BIA’s focus on the parents’ marriage in this context has lead to highly technical results: The child of a secondary wife has been recognized as the “stepchild” of a father’s earlier primary marriage, but the child of a primary wife was not recognized as the “stepchild” of his father’s later wife.

The BIA’s reasoning here is logical, if far removed from the actual nature and depth of the relationships involved. The sole relationships between the wives and children in these cases are based on marriages rather than biology, and the Board is willing to recognize a “stepparent” relationship based on a primary marriage that existed prior to the child’s birth, but it is not willing to recognize such a relationship based on a polygamous secondary “marriage”

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186 Id.
187 See e.g., In re Hernandez, 14 I. & N. Dec. 608 (A.G. 1974)(recognizing legitimacy of child born into a relationship that was recognized as a common law marriage under the law of the relevant Mexican state, Tamaulipas); In re Leon, 15 I. & N. Dec. 248 (BIA 1975)(distinguished In re Hernandez, focusing on the different family law of the state of Michoacan in Mexico to determine that child of only a religious marriage was not father’s “legitimate child”)
188 See e.g., In re A—E, 4 I. & N. Dec. 405 (BIA 1951)(recognizing a child’s legitimacy based on his birth in a common law marriage that was valid in Texas).
189 See In re Man, 16 I. & N. Dec. 543 (BIA 1978). While one could conclude from the comparison of these rare stepparent cases that the polygamous cases discussed above actually hinge primarily on the biological relationship of a polygamous parent and his or her child, those cases were actually based on the child’s “legitimacy” under the appropriate jurisdiction, a statutorily-based category that the BIA took seriously enough to explore foreign and state law in depth.
190 In re Fong, 17 I.& N. Dec. 212 (BIA 1980).
191 In re Man, 16 I. & N. Dec. at 544. The situation of a secondary wife and her stepchild might have been more sympathetic if a stepmother were petitioning for her husband’s child by his primary polygamous marriage; however, the logic in such a case would remain the same as in In re Man, where the son was petitioning on behalf of his father’s second wife.
that clearly violates U.S. policy as expressed clearly in the INA’s bar to U.S. admission for practicing polygamists.\textsuperscript{192}

In 2006, the Board continued to follow this logic with regard to the term “stepchild,” recognizing the mother-child relationship of a man’s first wife and the son of her polygamous husband’s second wife, finding that she had a right to petition for an immigrant visa on his behalf.\textsuperscript{193} In that case, the Board expressly adopted the argument that had been posed ninety years earlier in \textit{In re Look Wong}, holding that “[t]he fact that the beneficiary’s natural parents were in a relationship not recognized as a marriage under the Immigration and Nationality Act does not in any way change the relationship between the beneficiary and the petitioner.”\textsuperscript{194}

\textbf{H. The 1995 Amendment Changing “Legitimate” and “Illegitimate” to “In Wedlock” and “Out of Wedlock”}

The rule that “legitimacy” under the INA is determined under the law of the relevant state or foreign jurisdiction was well established by the early 1990s.\textsuperscript{195} This meant that any parent’s biological child would be considered “legitimate” under the INA, if her country or state of birth did not recognize any distinction between “legitimate” and “illegitimate” children.\textsuperscript{196} This rule was decisive in many cases involving communist and former communist countries, which tended to abolish the concept of “legitimacy,” expressly defining the equality of children regardless of their parents’ marital status.\textsuperscript{197}

Most communist and former communist countries were beginning to open up to the United States during the period after the fall of the Berlin wall, and Americans began adopting

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\item \textsuperscript{192}INA §212(a)(10)(A), 8 U.S.C. §1182(a)(10)(A)(providing that “[a]ny immigrant who is coming to the United States to practice polygamy is inadmissible.”) Various bars on admissibility of “polygamists” have been part of U.S. immigration law since 1891. See 26 stat. 570 (1891).
\item \textsuperscript{193}In re: Mohammed Alhz Uddin, 2006 WL 3712446 (BIA 2006). Again, the court viewed the concubine’s son as the first wife’s stepson. \textit{See infra} notes 190-92 and accompanying text.
\item \textsuperscript{194}Id. \textit{See also supra} note 143 and accompanying text (describing the plaintiff’s argument in \textit{In re Look Wong}).
\item \textsuperscript{195}\textit{See e.g.}, In re B—S, 6 I. & N. Dec. 305 (BIA 1955); In re Jancar, 11 I. & N. Dec. 365 (BIA 1965)(recognized Yugoslav child as “legitimate” based on Yugoslav law recognizing no “illegitimacy”); In re Kwan, 13 I. & N. Dec. 302,305 (BIA 1969)(determination of legitimacy is governed by the law applicable at the time and place of a child’s birth); Lau v. Kiley, 563 F.2d 543, 545 & 548 (2d. Cir. 1977) (finding that under Article 15 of the Marriage Law of the People’s Republic of China, “all children born in the PRC are legitimate at birth, in the only sense of the term ‘legitimate’ that is meaningful in the Chinese context” and, therefore, under INA §101(b)(1)).
\item \textsuperscript{196}Lau v. Kiley, 563 F.2d 543 (2d. Cir. 1977); In re Sanchez, 16 I. & N. Dec. 671 (BIA 1979); Matter of Wong, 16 I. & N. Dec. 646 (BIA 1978); Amezquita-Soto v. INS, 708 F.2d 898 (3d. Cir. 1983)(Gibbons dissent)\textit{citing these cases for this well-established proposition in order to support his finding that children born in New Jersey were also all legitimate under this same rationale, but the majority found it unnecessary to reach this issue}.
\item \textsuperscript{197}In re Jancar, 11 I. & N. Dec. at 368 n. 1 (citing BIA cases recognizing the “legitimacy” of all children born in similar “Communist or Socialist systems” to that in Yugoslavia, including those in Hungary, Poland and Rumania); \textit{see also} Lau v. Kiley, 563 F.2d at 548 (all children are now “legitimate” in the People’s Republic of China) and at 550-51 (tracing history of legal change after the Chinese revolution and civil war).
\end{itemize}
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children from Romania and other former Soviet-block countries. The INS initially allowed adoption and immigration of children who were legally “legitimate” although born out of wedlock, but that policy changed in late 1994. As a result, the INS relied on foreign “legitimacy” laws to determine that these children failed to meet the definition of “orphan” under U.S. immigration law. Since it was often impossible to obtain the required signature of unknown fathers, many children no longer qualified as “orphans,” eligible to immigrate to the U.S.

Congress solved this problem by amending the definition of “child” under INA §101(b), substituting the terms “in wedlock” and “out of wedlock” for “legitimate” and “illegitimate.” Now legally “legitimate” children born out of wedlock qualify as orphans if officially abandoned by their mothers alone.

Although not its focus, the 1995 amendment also eliminated recognition of children as “legitimate,” and, therefore, eligible for related benefits and waivers in instances where their parents were clearly not married when they were born. Thus, a child will no longer be recognized under INA §101(b)(1)(A) just because she is born in a country that does not recognize any distinction based on “legitimacy.” However, the consequences of this change for children whose biological parents were unmarried have been limited, since INA §101(b)(1)(D) now recognizes the relationship of children born out of wedlock to their “natural mothers,” or to their “natural fathers” if a “bona fide parent-child relationship” is established.

In spite of the changed status of children whose parents never married, the 1995 amendment should not change recognition under INA §101(b)(1)(A) of children born into valid foreign or state marriages that violate federal policy such as polygamous or same-sex marriages. If these children were “born in wedlock” under the laws of the relevant state or country, the express language change in the INA does not affect them. Neither the text nor the intent of the 1995 amendment indicates any change regarding deference to state law.

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198 See, U.S. to Curb Baby Adoptions from Romania, Seatle Times, July 27, 1991, at 1991 WLNR 1018289 (reporting about the “flood of adoptions” in Romania in the two years following the fall of communist dictator Nicolae Ceausescu, including over 5,000 adoptions, as well as accusations of black-market baby selling that led to the change in INS policy described below).
200 Id.
201 Id. at 2965.
203 Id.
206 8 U.S.C. §1101(b)(1)(D). See also infra note 236 and accompanying text.
207 See e.g., In re Mohammed Alhaz Uddin, 2005 WL 3712446 (BIA 2006) (recognizing the stepparent-stepchild relationship of a man’s first wife and the son of his second polygamous wife in a decision that could have been viewed to rely on a qualifying “natural father” relationship under INA §101(b)(1)(E) or a “child born in wedlock” under In re Fong, 17 I. & N. Dec. 212 (1980), a case referenced in the Mohammed Alhaz Uddin opinion).
determinations of who is or is not “born in wedlock.” If Congress had wanted to federalize the definition of “born in wedlock,” it could have done so; however, it did not.

I. The Evolving Definitions of “Parent and “Child” for U.S. Citizenship Purposes

While the recognition of parent-child relationships first became important in the immigration context with the growing limitations on immigration over the twentieth century, that recognition has been essential in the context of citizenship transmission since the founding of the republic. The Constitution expressly provides for laws regarding naturalization, and “an Act to establish an uniform Rule of Naturalization” was enacted by the first Congress. In addition to requirements for naturalization of foreign nationals, the Act also provided for derivative citizenship and automatic citizenship transmission to certain children born abroad to U.S. citizen parents.

Under the 1790 Naturalization Act, derivative citizenship was awarded to children of naturalized persons, if the children were “dwelling within the United States, [and] … under the age of twenty-one years at the time of ...[the parents’] naturalization.” Congress also designated “children of citizens of the United States[,]” who were born abroad to be “natural born citizens” so long as their fathers had resided at some point in the United States. When foreign wives were given automatic citizenship upon marriage to a U.S. citizen man in 1855, the provision for citizenship at birth was amended to clarify that birth abroad to U.S. citizen “fathers” was sufficient to transmit citizenship. Otherwise, these provisions did not change significantly until 1934 when they were revised to include the children of U.S. citizen mothers as well as fathers.

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207 See supra notes 195-206 and accompanying text.
208 See supra notes 79-88 and accompanying text.
209 U.S. Const. art. 1, §8 (providing that “Congress shall have Power to ... establish an uniform Rule of Naturalization...”)
210 1 Stat. 103 (1790)[hereinafter 1790 Naturalization Act].
211 Id. at 104. Throughout U.S. history, legislators and attorneys have distinguished between “acquired” and “derived” citizenship. “Acquisition” was used to describe citizenship gained at birth, but “derivation” was used to describe citizenship automatically gained after birth, for instance, upon the naturalization of a child’s parents. Karen S. Law, Irene Steffas & Derek Strain, A Child’s Claim to Citizenship: Birth, Surrogacy, and Adoption, in Immigration Practice Pointers: Tips for Handling Complex Cases 766, 766 n. 3 (AILA 2010-11 ed.) Since the effective date of the Child Citizenship Act of 2000 on February 27, 2001, INA §320, which covers all citizenship derived from birth through the age of eighteen, uses the term “acquires” as well. Id.
212 Id. at 104.
213 Id.
214 10 Stat. 604.
215 See 1 Stat. 414 (1795)(repealing the 1790 Act, but retaining the provision regarding children’s derivative citizenship and citizenship acquired upon birth abroad); 2 Stat. 153, 155 (1802)(repealing prior naturalization acts and making only minor changes to these definitions, including adoption of the “children of persons” language with regard to citizenship acquisition at birth as well as derivative citizenship). Although they did not directly alter these general definitions, the most profound changes in federal naturalization law during the nineteenth century were the various racist exclusion laws, including
i. **Parent-Child Relationships Transmitting U.S. Citizenship upon Birth Abroad under INA §301, et seq.**

The Fourteenth Amendment of the U.S. Constitution states that “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”216 This provision expressly guarantees the rule of *jus soli*, citizenship by birth on U.S. soil.217 However, the Constitution is silent regarding any other forms of citizenship recognition, except to delegate authority in that realm to Congress.218 Therefore, citizenship is available to persons born abroad only as Congress provides.219

Although not guaranteed under the Constitution, the concept of *jus sanguinis*, transmitting citizenship at birth based on parent-child ties rather than birthplace, has been recognized under English law since at least the fourteenth century.220 As described above, the U.S. Congress followed suit, recognizing *jus sanguinis* alongside *jus soli* citizenship since the founding of the republic.221 However it has also always implemented requirements for citizenship transmission beyond parent-child relationships. For example, the 1790 Naturalization Act recognized citizenship transmission upon birth to U.S. citizens abroad “[p]rovided, [t]hat the right of citizenship shall not descend to persons whose fathers have never been resident in the United States.”222 This residence requirement was apparently based on the

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216 U.S. Const. amend. XIV, §1.
217 United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898) (“[T]he Fourteenth Amendment of the Constitution guarantees that every person 'born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization.'”).
218 U.S. Const. art. 1, §8.
220 Polly J. Price, Natural Law and Birthright Citizenship in Calvin’s Case (1608), 9 Yale J. L. & Human. 74 & 83 (1997)(describing Calvin’s Case, the 400-year-old English decision that was adopted by early U.S. courts as the legal basis of U.S. common law *jus soli* citizenship, and citing the English statute De Natis Ultra Mare, 1351, 25 edw. 3, ch.2 (Eng.)).
221 See supra notes 210-13 and accompanying text.
222 1 Stat. 103, 104 (emphasis in original).
need for young citizens to develop sufficient contacts with American culture and values, and
that concern still underlies citizenship transmission requirements today. The current INA
pursues this goal by requiring specific periods of parental residency in the U.S. prior to
citizenship transmission.

Twelve years before enactment of the Immigration and Nationality Act of 1952, Congress revised, organized and codified many divergent citizenship laws in the Nationality Act of 1940, including a citizenship transmission regime conceptually similar to the one we have today, with enumerated categories for transmission based on how many and which parents are U.S. Citizens and corresponding U.S. physical residence requirements. The 1940 Act also introduced the current language providing transmission of citizenship to “person[s] born … of parents[,]” rather than to “children,” “mothers” or “fathers.”

The Nationality Act of 1940 included a separate section, providing for transmission of citizenship to the children of unwed U.S. citizen mothers who met U.S. residence requirements, as well as certain children “born out of wedlock” to U.S. citizen fathers if paternity is established during minority, by legitimation, or adjudication by a competent court.”

Since 1940, Congress has continued to define citizenship transmission in terms of birth “of parents,” without using the term “child.” In 1940, this choice excepted adopted children through omission. Although the INA now provides for automatic citizen transmission to certain adopted children, that transmission occurs later and not under INA §301, et seq., which is limited to citizenship transmission at the time of birth.

ii. The 1986 Amendments and the Continuing Significance of Birth in Wedlock

224 See e.g., INA § 301(c), 8 U.S.C. §1401(c)(providing transmission of citizenship to a child born abroad if both parents are U.S. citizens, “one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person”); INA § 301(e), 8 U.S.C. §1401(e)(providing transmission of citizenship to a child born abroad of one U.S. citizen parent, “who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person”).
227 54 stat. at 1139-40, sec. 201, et al.
228 8 U.S.C. §1409(a).
229 See Id. at 1138; I.N.A. § 101(c)(1), 8 U.S.C. § 1101(c)(1).
230 Compare section 101(h)(defining “child” to include children adopted before reaching the age of sixteen) with Sections 201(a), et. seq. (providing for citizenship transmission at birth to “a person born outside of the United States … of parents” who were citizens of the United States). 54 stat. at 1138-39.
In 1986, Congress amended the INA to further “simplify and facilitate determinations of acquisition of citizenship by children born out of wedlock to an American citizen father.” By 1920, a U.S. Attorney General recognized that the idea of punishing “illegitimate” children for their parents’ sins had been discredited. Immigration and citizenship law eventually caught up, largely eliminating INA distinctions on the basis of “legitimacy” in 1986.

In spite of this liberalization, some additional requirements remain for recognition of a father’s relationship with a child born “out of wedlock.” For instance, INA §101(b) only recognizes such “out of wedlock” relationships for immigration purposes in two situations: where the father has legal custody of the child and legitimates her prior to the age of eighteen, or where the “natural father ... has or had a bona fide parent-child relationship” with her. For citizenship transmission based on birth out of wedlock, a father must have “a blood relationship” with the child, must agree in writing to provide her financial support through the age of eighteen, and must “legitimate,” “acknowledge,” or establish paternity through “adjudication of a competent court.” Significantly, none of these requirements are established in the parallel provisions for children born in wedlock.

There are two reasons for adding extra requirements to father-child relationships on the basis of birth in or out of wedlock, with different consequences under modern immigration law. First, the added requirements of both INA §101(b) and INA §309 for children born “out of wedlock,” ensure the likelihood that fathers and children will establish the *bona fide* familial relationships upon which immigration or citizenship benefits are based, reinforcing the goal of legitimate family unity while diminishing the risk of fraudulent claims of paternity for the sole purpose of gaining immigration benefits.

Second, in the particular context of citizenship transmission upon birth abroad, the INA requires more extensive proof of ties between a U.S. citizen father and his child born out of wedlock by proving that a financial, legal and “blood relationship” exists. These increased ties to a U.S. citizen parent presumably create the additional connection with and loyalty to the

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237 INA §309(a); 8 U.S.C. §1409(a).
240 See Miller v. Albright, 523 U.S. 420, 437 (1998)(opinion of Stevens, J.)(the time limitation in §309 “provides assurance that the formal act [,legitimation, acknowledgement, or judgment of paternity] is based upon reliable evidence, and also deters fraud.”); id. at 438 (INA §309 also ensures that a parent has the opportunity to develop a “healthy relationship ... [with] the child while the child is a minor”).
241 Id. at 62.
United States that Congress has aimed at since first recognizing *jus sanguinis* citizenship in 1790.\textsuperscript{242}

**iii. Citizenship after Birth under INA §§320 and 322 – History and the Child Citizenship Act of 2000 (CCA)**

By 2000, the term “liberal” was apparently no longer an acceptable non-pejorative description for any legislation, and particularly any legislation dealing with immigration law. However, the purpose of the Child Citizenship Act of 2000 (CCA) was clearly to make naturalization easier for parents and their noncitizen children.\textsuperscript{243}

The CCA replaced prior provisions of the INA with the current Sections 320 and 322.\textsuperscript{244} Section 320 recognizes automatic citizenship for a foreign-born child, who resides in the U.S. before her eighteenth birthday in the legal and physical custody of a U.S. citizen parent following a lawful admission for permanent residence.\textsuperscript{245} Section 322 authorizes naturalization upon application in certain cases of children, who were born abroad in cases where automatic citizenship is not established under section 320.\textsuperscript{246}

According to the House Judiciary Committee Report on CCA, its automatic citizenship provision was intended to “eliminate the current inequities in the acquisition of citizenship by biological and adopted children,” while streamlining the process.\textsuperscript{247} It was also meant to “spare parents the delays and expense of the [previously required] process ... to procure citizenship for their children.”\textsuperscript{248} The Judiciary Committee recognized that “this was a particular hardship for parents of adopted children, who have already gone through the costly and cumbersome [foreign] adoption process.”\textsuperscript{249} It also intended to “ensure that children are not deprived of U.S. citizenship because their parents did not realize they had to go through” a specific certificate of citizenship application process.\textsuperscript{250} Reacting to “serious concerns” of the Justice and State Departments, the Committee amended the original bill to cover some non-adopted children of U.S. citizens as well.\textsuperscript{251} However, the CCA still does not apply to stepchildren of citizens or to children born out of wedlock to a U.S. citizen father, who have not been “legitimated.”\textsuperscript{252}

\textsuperscript{242} Nguyen v. I.N.S., 533 U.S. 53, 64-65 (2001).
\textsuperscript{244} Id.
\textsuperscript{245} INA §§320; 8 U.S.C. §1431.
\textsuperscript{246} INA §§322; 8 U.S.C. §1433.
\textsuperscript{247} Id. at 9.
\textsuperscript{248} See H.R. Rep. No. 852, 106\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. 2000, at 4-5 (Sept. 14, 2000).
\textsuperscript{249} Id. at 5.
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} INS Adj. Field Manual Appendix 71-7 (updated June 18, 2007)(“Stepchildren and children born out of wedlock who have not been legitimated, are not included in the definition of ‘child’ used in Title III of the INA.”); Memorandum of William R. Yates, Acting Associate Director, CIS (Sept. 26, 2003)(clarifying CIS’
III. NOTHING TO SAY ABOUT CHILDREN: THE LEGISLATIVE HISTORY OF DOMA AND CONGRESSIONAL INTENT

The express language of the Defense of Marriage Act ("DOMA") relating to federal law is simple: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”

The legislative history of DOMA clearly demonstrates that DOMA was intended to be read simply, as written. In fact, its original sponsor in the Senate, Senator Don Nickles, called DOMA a “modest proposal” that “in large measure, merely restates current law.” He repeatedly referred to it as a “simple measure, limited in scope and based on common sense,” which “does just two things.” It “defines the words ‘marriage’ and ‘spouse’ for purposes of federal law and allows each State to decide for itself with respect to same-sex marriages.”

The author of DOMA, Representative Bob Barr of Georgia concurred. In the House debate, he asserted that “[t]he only other thing that it does[,]” in addition to allowing states to refuse to recognize same-sex marriages from other jurisdictions, “is to define the reach of Federal statutes that concur [sic] legitimate Federal benefits on its citizens, to define it for purposes of determining spouses and marriage.” In signing it into law, President Clinton agreed that DOMA “does not reach beyond those two provisions[,]” and section three merely “clarifies for purposes of federal law the operative meaning of the terms ‘marriage’ and adherence to DOJ Office of Legal Counsel (OLC) opinion dated July 24, 2003, that the CCA covers a child born out of wedlock to a mother who becomes a naturalized citizen).

255 Id. at 4869 (originally introducing DOMA as Senate Bill 1740); 142 Cong. Rec. S. 9073 (July 29, 1996)(reintroducing DOMA as Senate Bill 1999 after the House passed its identical version of the Bill); 142 Cong. Rec. S. 10100, 10116 (Sept. 10, 1996)(introducing DOMA in the Senate’s floor debate on the bill); 142 Cong. Rec. S. 10100, 10116 (Sept. 10, 1996)(Sen. Burns said that DOMA “does just two things[,]” protecting states rights and defining “the word [sic] ‘marriage’ and ‘spouse’ for purposes of Federal law.”)
257 142 Cong. Rec. H. 7441, 7444 (July 11, 1996). Later in the House debate, Rep. Barr explained that DOMA “simply guarantees the status quo in terms of marriage for Federal purposes[,]” it is not “taking something away from somebody.” 142 Cong. Rec. H. 7480, 7481 (July 12, 1996). As Rep. Canady explained “all we are doing ... is affirming what everyone has always understood by marriage, what everyone has always understood by the term ‘spouse’...” Id. at 7488.
Not even the scholars testifying in favor of DOMA argued to Congress that it should extend beyond the words “marriage” and “spouse” and their effect on same sex couples.

During the sometimes heated House and Senate debates with regard to DOMA, its sponsors and other supporters repeated over and over again that this act was “modest,” “narrow,” “straightforward,” “simple,” “clear,” “limited in scope,” and “very specific.”

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258 President on Signing Same Gender Marriage Ban, 1996 WL 533626 (White House Sept. 22, 1996) [hereinafter DOMA Signing Statement].

259 See e.g., Lynn D. Wardle, Concerning S. 1740: A More Perfect Union – Federalism in American Marriage Law, 1996 WL 390295 at 4 (F.D.C.H) (“It is beyond question that Congress has never actually intended to include same-sex unions when it used the terms marriage’ and ‘spouses.’ [sic] Section 3 appears to embody quite accurately the actual historical intent and expectations of Congress ... when these marriage terms are used in federal laws, same-sex couples were not intended to be included.”) (emphasis added)


261 Committee Report on DOMA, supra note 260 at 30 (“Other than this narrow federal requirement, the federal government will continue to determine marital status in the same manner it does under current law.”)

262 142 Cong. Rec. H. 7441, 7441 (July 11, 1996) (Rep. Canady began the House debate with an explanation of how “Section 3 of the bill is even more straightforward [than Section 2]. It proves that, for purposes of federal law only, [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... [N]ow, it is necessary to make explicit in the federal code Congress’ well-established and unquestionable intention that ‘marriage’ is limited to unions between one man and one woman. Section 3 changes nothing; it simply reaffirms existing law.”); 142 Cong. Rec. S. 10100, 10100 (Sept. 10, 1996)(Sen. Coats called DOMA “a straightforward bill” to “define ‘marriage’ and ‘spouse’ for the purposes of Federal law,” before explaining that “it is the reserve and the simplicity of the bill that ... ought to be commended. It does not overreach. It does not bring to bear the full range of authorities that Congress could invoke. Rather, it simply restates well-known and well-understood definitions...”); Id. at 10114 (Sen. Thurmond stating that “this needed legislation is a straightforward approach” to protect the rights of states and affirm “the 200-year-old Federal policy in this country concerning the use of the words ‘marriage’ and ‘spouse’...”)

263 142 Cong. Rec. H. 7270, 7279 (July 11, 1996) (Rep. McInnis in House debate); 142 Cong. Rec. H. 7480, 7487 (July 11, 1996) (Rep. Delay referred to DOMA as a “very simple” bill, which “says that for Federal purposes, marriage is the legal union of one man and one woman.”); 142 Cong. Rec. S. 10100, 10109 (Sept. 10, 1996)(Sen. Byrd, who lead the Democratic effort in favor of DOMA described DOMA’s “very simple and easy to read language,” explaining that “this bill says that a marriage is the legal union between one man and one woman as husband and wife, and that a spouse is a husband or wife of the opposite sex.”); Id. at 10115 (Sen. Mikulski states “[w]hat this bill does is really quite simple. It puts in the Federal law books what has always been the definition of a marriage—the legal union between one man and one woman.”)

264 142 Cong. Rec. H. 7270, 7276 (July 11, 1996)(“the bill is very clear in what it does” to define marriage itself, to “preserve States rights,” and to preserve “the ability of the Federal Government not to be
and it “only defined the words....” “spouse” and “marriage.” They repeated like a mantra their talking points: “There is nothing earth-shattering there. No breaking of new ground. No setting of new precedents. No revocation of rights.”

It is clear from the record that Congress did not intend to do anything beyond clarifying the specific words “marriage” and “spouse” for federal purposes. In particular, it clearly did not intend to alter the definitions of “parent” and “child” for federal immigration purposes. Although some legislators recognized that other family law terms were not defined under federal law, many Senators and Members of Congress expressly emphasized DOMA’s limited purpose, and a number of DOMA’s key supporters even enumerated their intent by reference to the number of words being defined: “[T]he word ‘marriage’ appears in more than 800 sections of the Federal statutes and regulations, and ... the word ‘spouse’ appears more than 3,100 times....” These figures did not include other familial terms like “parent,” “child,” “legitimate,” “illegitimate,” “in wedlock,” or “out of wedlock.”

obligated to a particular State that may choose to recognize same sex marriage,” according to Rep. McInnis during the House debate); 142 Cong. Rec. H. 7480, 7488 (July 12, 1996) (Rep. Barr repeatedly described DOMA as “clear and not even remotely complex” and “not complex” but “crystal clear.”); 1996 WL 256693 at 14 (F.D.C.H.) (DOMA supporter Professor Hadley Arkes praised DOMA as “an example of legislative discipline: in moving with restraint and delicacy, it makes precisely clear what it reaches, and even more clearly [sic] what it forbears from reaching.”)

See e.g., 142 Cong. Rec. S. 4869, 4869 (May 8, 1996)(Using this language upon the original introduction of S. 1740); see also e.g., 142 Cong. Rec. S. 10100, 10100 (Sept. 10, 1996)(Sen. Nickles used the same words in Senate floor debate); 142 Cong. Rec. S. 10100, 10109 (Sept. 10, 1996)(Sen. Bird used the exact same words in the Senate floor debate).

Committee Report on DOMA, supra note 260, at 104-664 (the primary purpose of the federal definition section of DOMA was to “define ... the words ‘marriage’ and ‘spouse,’ for federal law only, to reaffirm that they refer exclusively to relationships between persons of the opposite sex.”); 142 Cong. Rec. S. 9073 (July 29, 1996)(Senator Nickles statement upon reintroducing DOMA in the Senate); 142 Cong. Rec. S. 10100, 10100 (Sept. 10, 1996)(Sen. Nickles in Senate floor debate).

142 Cong. Rec. S. 10100, 10124 (Sen. Kerrey pointed out in the Senate floor debate that “Federal definitions of marriage, divorce, child custody, and other family matters have been omitted because Americans have known what it means when the Federal Government starts to legislate in new areas, ... we cannot stop.”)

142 Cong. Rec. S. 4869, 4871 (May 8, 1996)(Senator Nickles statement upon his original introduction of DOMA in the Senate); House Judiciary Committee Report on H.R. 3396, 104th Cong., 2d. Sess., at 8 (July 9, 1996)(citing these figures and noting that “the Committee believes it can be stated with certainty that none of the federal statutes or regulations that use the words ‘marriage’ or ‘spouse’ were thought by even a single Member of Congress to refer to same-sex couples.”[emphasis added]); 142 Cong. Rec. H.
A. Congressional Examples Focused on Benefits to Adult Couples

All of the numerous congressional references to the parties affected by DOMA’s definitions were to “couples … entitled to federal benefits that depend on marital status.”\textsuperscript{271} In 7480, 7484 (July 12, 1996) (Rep. Sensenbrenner cited the same figures”); 142 Cong. Rec. S. 10100, 10110 (Sen. Byrd cited the same figures in the Senate floor debate); \textit{id.} at 10116 (Sen. Kempthorne pointed out that DOMA “establishes the Federal definition for the terms ‘marriage’ and ‘spouse.’ … Combined these terms appear in nearly 4,000 places in Federal statutes and regulations.”); \textit{id.} (Sen. Burns cited the 3,100 and 800 figures).

\textsuperscript{271} Committee Report on DOMA, supra note 260, at 2; See e.g., \textit{id.} at 8 (Hawaiian recognition could make same-sex “couples eligible for a whole range of federal rights and benefits.”); 142 Cong. Rec. H. 7270, 7274 (July 11, 1996) (Rep. McInnis justified the Bill’s definition of marriage “because of the implications it has to the Federal Government on benefits that are entitled to spouses”); \textit{id.} at 7275 (Rep. Abercrombie opposed DOMA, explaining that it “is more than the defense of marriage. It also gets into the question of benefits.”); 142 Cong. Rec. H. 7441, 7442 (July 11, 1996) (Rep. Kennedy pointed out that “Families are not threatened when two adults who love each other make a lifelong commitment to one another.”); \textit{id.} at 7446 (Rep. Nadler described same-sex marriage as “two people who want … to share each other’s lives in a committed, monogamous relationship to undertake the obligations and benefits of marriage” like visiting each other in the hospital and sharing each other’s pension rights.); \textit{id.} at 7448 (Rep. Ensign explained that DOMA “says that … the federal government has a right to define who is entitled to benefit as a spouse.”); 142 Cong. Rec. H. 7480, 7481 (July 12, 1996)(Rep. Mink complained that, under DOMA, hypothetical same-sex spouses from Hawaii would lose out under “programs which allow special rights to spouses.”); 142 Cong. Rec. H. 7480, 7484 (July 12, 1996) (Rep. Sensenbrenner reminded his colleagues that “this gay activist scheme may not only affect every other State but the Federal Government as well. The Federal Government currently extends benefits, rights obligations and privileges on the basis of marital status. … When Congress voted on Federal laws that conferred benefits on married persons, I do not think that Congress ever contemplated their application to same sex couples.”); \textit{id.} at 7486 (Rep. Meehan focused on lifelong commitment by gay couples and governmental “rights and privileges” bestowed on “married couples – from tax breaks to Social Security benefits.”); \textit{id.} at 7491 (Rep. Canady explained “what is really at stake here[,] … the fundamental question that is raised by this bill[,] … is whether the law of this country should treat homosexual relationships as morally equivalent to heterosexual relationships.”); \textit{id.} at 7492 (Rep. Skaggs referred to claims of inheritance and participation in terminal health care decisions “for the life-long partner of a gay man or lesbian woman.”); \textit{id.} (Rep. Gunderson focused on unfairness to “people who happen to be in long-term relationships outside of marriage.”); \textit{id.} at 7493 (Rep. Weldon warned that “Federal policies could be dramatically affected by the Hawaii decision since the Federal Government generally recognizes State documents in granting benefits and privileges to married individuals.”); \textit{id.} at 7494 (Rep. Ensign explained that “the Federal Government has a right to define who is entitled to benefits as a spouse.”); \textit{id.} at 7495 (Rep. Lipinski explained that “[i]f the Federal Government does not act now, … [it] will be obliged to provide the same benefits that heterosexual marriages currently receive” to married gay and lesbians.); \textit{id.} at 7496 (Rep. Jackson pointed out that DOMA “would deny gay men and women hospital visitation rights, health coverage, and other forms of insurance, inheritance and taxation rights, government benefits for spouses, immigration rights for spouses, and other rights.”); \textit{id.} at 7497 (focusing on “the rights of adults to choose their life partners,” Rep. Collins pointed out that “[t]he Federal Government sorts out who is eligible to benefit from public support from … spouses and former spouses [defined by the divergent marriage and divorce requirements of states], even as people move from one State to another; and the Federal Government can and will continue to sort these issues out as they become timely.”); \textit{id.} at 7499 (Rep. Sensenbrenner encouraged the “open debate on the issue of whether Federal benefits should be expanded to couples who get involved in gay marriages.”); \textit{id.} at 7500 (Rep. Frank stressing that “we are talking about two human beings[,] … two people loving each other and committing to each other.”); \textit{id.} at 7504 (Rep. Johnson spoke of “domestic partner relationships” when discussing the need to “enable people who are
fact, Senator Faircloth extended his discussion of DOMA to indicate a general problem with spousal benefits, arguing that “marriage most certainly should not be just another means of securing government benefits.... I can think of few worse reasons for getting married. And I can think of few worse times to talk about creating yet another entitlement to government benefits.”\(^\text{272}\) As DOMA’s Senate sponsor explained, “[t]he Federal Government extends benefits, rights, and privileges to persons who are married, and generally it accepts a State’s definition of marriage.”\(^\text{273}\) DOMA will “defend the traditional and commonsense definitions .... Otherwise, if Hawaii, or any other State, gives new meaning to the words ‘marriage’ and ‘spouse,’ reverberations may be felt throughout the Federal Code.”\(^\text{274}\)

Senator John Ashcroft’s opinions may deserve particular attention since he would later serve four years as U.S. Attorney General, responsible for interpreting the meaning of DOMA as applied to many statutes including the Immigration and Nationality Act. During the Senate debate on DOMA, Senator Ashcroft wanted to “outline exactly what this bill would do and what it would not do.”\(^\text{275}\) His extensive “outline” focused on the definition of “spouse” and “marriage” for purposes of “eligibility to receive federal benefits[,]” but it never touched on the possibility that same-sex couples might raise children.\(^\text{276}\) In fact, he seemed to argue that marriages themselves are necessary to bring children into the world, before explaining that Congress should use DOMA to set a “uniform definition for ‘marriage,’” so that marriage based federal benefits would be “uniform for people no matter where they come from in this country.”\(^\text{277}\) This was a strange argument since that would not be the outcome of DOMA once gay couples could marry somewhere in the United States.\(^\text{278}\)

Not all Congressional arguments related to DOMA were specific, or even rational. However, when legislators gave specific examples, they always referred to adult spousal

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\(^{275}\) Id.

\(^{276}\) Id.

\(^{277}\) Id.

\(^{278}\) Id.

benefits, not the benefits of children or parents in a gay or lesbian headed family. This was true in regard to their illustrations including federal retirement benefits, social security, veterans benefits, burial rights, hospital visitation, health and bereavement benefits, medical decision-making authority, housing benefits, tax benefits, and privilege against testifying against a spouse in federal court.\textsuperscript{279} This was also true of the scholars who testified before Congress in support of DOMA.\textsuperscript{280}

\textsuperscript{279} Many of the examples expressly referred to adult spousal benefits, and none of them referred to children’s benefits. See, \textit{Committee Report on DOMA, supra} note 260, at 8 (citing a challenge on the issue of spousal Veteran’s educational benefits in \textit{McConnell v. Noon}, 547, F.2d 54 (8th Cir. 1976); see also, 142 Cong. Rec. H. 7270, 7277 (July 11, 1996)(Rep. Nadler discussing DOMA’s foreseeable application to “Social Security or Veterans Administration benefits or pensions or tax benefits, or anything else.”); \textit{id.} at 7277 (Rep. Hoke referencing “the rights and privileges, the obligations and responsibilities that go with a legal marriage contract as it relates to Federal law … [...] probably most important[ly], survivors benefits, both for veterans as well as for Social Security recipients, et cetera…”); \textit{id.} at 7277-78 (Rep. Studds prophetically described how his partner would not receive dependant health insurance during his life or survivor benefits after his death. In fact, after Rep. Studds’ marriage and subsequent death, his spouse became the only widower of a member of Congress to be refused those benefits. Andrew Koppelman, \textit{The Supreme Court May Agree that the Defense of Marriage Act has a Fatal Legal Flaw}, L.A. Times, July 14, 2010, at 19); 142 Cong. Rec. H. 7441, 7442 (July 11, 1996) (Rep. Pelosi listed health and bereavement benefits, hospital visitation, medical decision-making authority in the event of a spouse’s incapacity, as well as financial relationship inheritance and immigration); \textit{id.} at 7445 (Rep. Woolsey discussing how DOMA would mean that his gay son could never have “the most basic rights of marriage that my youngest son already takes for granted, such as the ability to visit his spouse in a hospital … because of his sexual orientation.”); \textit{id.} at 7446 (Rep. Nadler referred to “two people[’s]” hospital visitation and shared pension rights); \textit{id.} (Rep. Farr argued that DOMA was “not about marriage, because the Federal Government does not marry people[,] ...it is about “Social Security benefits or medical care benefits or Federal estate tax deductions); 142 Cong. Rec. H. 7480, 7481-82 (July 12, 1996)(Rep. Mink of Hawaii complained repeatedly that even if her state began recognizing same-sex marriage, section three of DOMA would not recognize the couples as “’spouses’ when deciding such things as Federal retirement benefits, health benefits under Federal programs, Federal housing benefits, burial rights, privilege against testifying against partner in Federal trials, visitation rights at hospitals by partners, rights to family and medical leave to care for a partner, and many more programs which allow special rights to spouses.”); 142 Cong. Rec. H. 7480, 7482. (Rep. Frank explained that the Federal government is overruling State marriage recognition with DOMA’s section three, since “as people understand, given today’s rule, Federal law has a lot to do with their lives, so far as Federal income tax is concerned and Social Security and pensions and other things, they will not be covered.”); \textit{id.} at 7484 (Rep. Sensenbrenner listed federal benefits granted on the basis of marital status as including “Social Security survivor and Medicare benefits, veterans’ benefits, Federal health, life insurance and pension benefits and immigration privileges.”); \textit{id.} at 7486 (Rep. Meehan referred to tax breaks, social security benefits, hospital visitation, and shared medical and pension benefits for partners in committed gay couples); \textit{id.} at 7487 (Rep. Funderburk and his constituents were “outraged that their tax money could be spent paying veteran’s benefits or Social Security based on the recognition of same-sex marriages.”); \textit{id.} at 7490 (Rep. Bryant spoke about DOMA “draw[ing] a line” to “establish what the Federal law will be in regards [sic] to what a marriage is” for “the purposes of Federal law, Social Security, tax and so forth….”); \textit{id.} at 7492 (Rep. Skaggs referred to partners’ claims of inheritance and participation in terminal health care decisions); \textit{id.} at 7492 & 7497 (out gay Republican Rep. Gunderson focused on hospital visitation rights, medical consultation rights, health insurance, and survivor benefits for people like his own partner of thirteen years); \textit{id.} at 7493 (Rep. Weldon’s list of “benefits and privileges to married individuals” included “Veterans’ benefits, labor policies, Federal health and pension benefits,” and “Social Security benefits”); 142 Cong. Rec. H. 7480, 7496 (July 12, 1996) (Rep. Jackson listed hospital
Finally, some Senators who supported DOMA would have apparently supported recognition of even same-sex relationships for limited purposes, so long as they were defined as “Domestic Partnerships,” not marriages. 281

B. Scattered References to Children Indicated No Intent to Regulate the Recognition of Parent-Child Relationships

The House Judiciary Committee Report, the only written committee report on DOMA, acknowledged that state “same-sex ‘marriages’ would almost certainly have implications on the ability of homosexuals to adopt children as well.”282 A handful of participants in the DOMA discussion on the Hill also indicated awareness that some same sex couples would raise adopted children or children of prior heterosexual relationships. 283
In spite of the recognition that married gay couples would likely raise children together in some circumstances, not even the most ardent opponents of same-sex relationships expressed a desire to refuse recognition of these parent-child relationships under federal law, let alone any desire to separate parents and children through a special restriction on otherwise available immigration benefits. Rather than imply that DOMA would affect parent-child relationship recognition, the anti-gay references to adoption seemed to be warning that states would be more likely to accept such adoptions if Congress did not act to show its disapproval of same-sex marriage through DOMA.\textsuperscript{284}

Despite some awareness that same-sex couples would be raising adopted children or the children of prior heterosexual relationships, there was no apparent awareness that state recognition of same-sex marriage might result in presumed parental relationships as they have.\textsuperscript{285} Instead, both sides of the DOMA debate seemed to agree with Senator Byrd’s

\textsuperscript{284} See supra note 383 and accompanying text.

\textsuperscript{285} A number of U.S. states now recognize two mothers in cases involving lesbian spouses or partners who began a family together using assisted reproductive technology (ART). See Nancy D. Polikoff, \textit{A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century}, 5 Stan. J. Civ. Rts. & Civ. Liberties 201, 215 (2009) (D.C. and ten states recognize same-sex marriages or unions with virtually equal consequences to marriage, including presumed parenthood for same-sex marriages and other legally recognized same-sex unions); see also e.g., Cal. Fam. Code §297 (West 2005)(“This act shall be construed liberally in order to secure to eligible couples who register as domestic partners the full range of legal rights, protection and benefits, as well as all of the responsibilities, obligations, and duties to each other, their children, to third parties and to the state, as the laws of California extend to and impose upon spouses.”); Elisa B. v. Super. Ct., 13 Cal.Rptr.3d 46 (Cal. S. Ct. 2005)(finding analogous situation of second mother to presumed paternity under the California version of the Uniform Parentage Act (UPA) even though the couple had not entered a marriage or registered as Domestic Partners in the state); Debra H. v. Janice R., 14 N.Y.3d. 576 (2010)(recognizing two mothers of child born via ART in Vermont civil union).

Parenthood is also presumed in similar contexts in some foreign countries. See e.g., Polikoff, supra at 226 (a number of Canadian provinces, Australia, and several European countries have legislation extending parental status to lesbian couples); Human Fertilisation and Embryology Act 2008, Chapter 22, section 42 (registered same-sex civil partner in the United Kingdom who consents to her partner’s use of in vitro implantation or artificial insemination is to be treated as a legal parent of the child); but see N.J.Stat. Ann. §26:8A-2(2005)(omitted parental presumption in providing that “[a]ll persons in domestic partnerships should be entitled to certain rights and benefits that are accorded to married couples under the laws of New Jersey, including: statutory protection ... against various forms of discrimination based on domestic partnership status, such as employment, housing and credit discrimination; visitation rights for a hospitalized domestic partner and the right to make medical or legal decisions for an incapacitated partner; and an additional exemption from the personal income tax and the transfer inheritance tax on the same basis as a spouse.”).
assumption that “out of same-sex relationships no children can result.” For instance, many opponents of DOMA focused on an argument that recognition of same-sex couples would not “diminish the love between a husband and a wife, nor the devotion they feel towards their children.” Proponents of DOMA made the same assumption.

Blindness to assisted reproductive technology, surrogacy, and the possibility that lesbians and gay men might want to form families that included children was, perhaps, an understandable product of both popular stereotypes and political calculations. The opponents of DOMA who dared address the details of same-sex relationships may have wanted to avoid the sensitive issue of child rearing by lesbians and gay men. Instead, after first clarifying their own heterosexuality and/or marital bona fides, they tended to emphasize fairness and the needs of “loving couples” to support one another “as a family.” Some proponents of DOMA, on the other hand, were so convinced that all gay people are debauched, self-centered, narcissists; that the idea of their purposefully deciding to raise children was inconceivable. Discussion of innocent children in these demonized families could have also humanized the couples and brought an unpredictable political dimension to what DOMA’s proponents perceived as a winning political issue. Whatever the cause, children seemed largely out of the question for both sides of the debate.

142 Cong. Rec. S. 10100, 10109 (Sept. 10, 1996). See 142 Cong. Rec. H. 7441, 7442 (July 11, 1996) (Rep. Kennedy pointed out that “Families are not threatened when two adults who love each other make a lifelong commitment to one another.”); id. at 7443 (Rep. Gutierrez spoke out in favor of “family values” behind same-sex relationships, which he characterized as “people who love each other [,] share each other’s lives [, and] want to make a commitment that is legal and official and is important to them.”); id. at 7444 (Rep. Lewis eloquently compared the situation of same-sex couples with that of bi-racial couples before 1967, quoting Dr. Martin Luther King, Jr.’s statement that “‘Races do not fall in love and get married. Individuals fall in love and get married.’” He went on to speak out for “people who want to get married, buy a house, and spend their lives with the one they love.”); id. at 7445 (Rep. Rivers would not deny people “a committed relationship, to be sustained by the love of another person” or “a soul mate, a partner in life’s struggle,” “to support one another through good times and bad.”); id. at 7447 (Rep. Frank wondering that people could believe that “two people loving each other somehow threatens heterosexual marriage.”); id. at 7448 (Rep. Jackson-Lee focused on dramatic changes in what constitutes a “family” over the Twentieth Century, resulting in a broader understanding that includes “grandparents caring for grandchildren, single mothers or single fathers raising their children, couples with children, foster parents and foster children, or individuals of the same-sex living together and sharing their lives as a couple…” Note the absence of children in her description of gay couples); id. (Referring to marriage being “about two people coming together to love and support each other” as “a partner for life[,]” Rep. McDermott would not dictate who a person “can love and spend their lives with in order to benefit from … the legal benefits of our laws”).

See 142 Cong. Rec. S. 10100, 10121 (Sept. 10, 1996) (Sen. Robb during Senate floor debate)

See e.g., 142 Cong. Rec. S. 10100, 10121 (Sept. 10, 1996) (Senator Ashcroft declared, “we honor the institution that brings children into the world and gives them values, by according special standing to marriage.” While most legislators were more realistic regarding the physical capabilities of the “institution” of marriage, they apparently did share Sen. Ashcroft’s blindness to assisted reproductive technology, surrogacy, and the fact that some lesbian and gay couples parent children together).

See infra notes 311-22 and accompanying text.

See infra notes 367-68 and accompanying text.
Since neither side of the Congressional debate on DOMA focused on the likelihood of same-sex couples intentionally creating families with children, the main references to children either involved the need for heterosexual indoctrination of children or illustrated a perceived justification for treating married straight couples with children differently from inevitably childless, promiscuous same-sex couples. 291

C. Language and Statutory Context of Section Three of DOMA

The primary focus of DOMA was section two, which purported to authorize states to refuse full faith and credit to sister state marriages. 292 Some legislators seemed to forget that section three was included in DOMA. For example, during the Senate debate, Senator Abraham explained that “DOMA deals only with the following issue: If State A decides to allow people of the same sex to marry, does Federal law require State B to treat these individuals as married...” 293

The only committee report on DOMA provided a section-by-section analysis, merely stated that section three of the bill “will provide the meaning of these two words [, marriage and spouse,] only insofar as they are used in federal law.” 294 It explained that the definition of “marriage” in DOMA was derived from the Washington state same-sex marriage opinion in Singer v. Hara. 295 “Section 3 will mean simply that the [same-sex] ‘marriage’ will not be recognized as a ‘marriage’ for purposes of federal law. Other than this narrow federal requirement, the federal government will continue to determine marital status in the same manner it does under current law.” 296 The BIA recently cited this provision of the committee

291 See e.g., 142 Cong. Rec. H. 7480, 7487 (July 11, 1996) (referring to anti-abortion Vice President Dan Quayle’s controversial condemnation of a television character’s choice to become a single mother, Rep. Delay asserted that “Dan Quayle was right. Children do best in a family with a mom and a dad.”); id. at 7493 (Rep. Weldon noted that “[t]he marriage relationship provides children with the best environment in which to grow and learn.”)

292 This primary goal of DOMA was arguably redundant, since the Full Faith and Credit Clause of the Constitution, has long been read to allow state refusal of sister state marriages based on strong public policy objections. See Nevada v. Hall, 440 U.S. 410, 422 (1979), citing, Pacific Ins. Co. v. Industrial Accident Comm’n, 306 U.S. 493 (1939); Wilson v. Ake, 354 F.Supp.2d 1298, 1303-04 (M.D. Fla. 2005)(finding that a same-sex Massachusetts 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, this freedom does not necessarily extend to final judgments, such as divorce degrees. Baker v. General Motors Corp. 522 U.S. 222 (1998) (there is “no roving public policy exception” to final judgments of courts of law); Loughran v. Loughran, 292 U.S. 216, 227-28 (1934)(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 of another state, the full faith and credit clause applies.”).


report when it recognized the validity under DOMA of marriages involving transgender spouses, so long as the marriages were considered valid different-sex unions under relevant state law.297

While DOMA defines “marriage,” the Committee Report points out that it does not define the word “spouse,” but merely provides that it “refers... to a person of the opposite sex.”298 The committee consciously made this distinction, because “the word ‘spouse’ is defined at several places in the United States Code to include substantive meanings ... [and] Section 3 is not meant to affect such substantive definitions.”299 In this light, it follows that DOMA was certainly not intended to redefine words like “parent” and “child,” which are also expressly defined in different ways at various points of the INA and other federal statutes.

D. Legislative Context: The Failure to Prevent Second-Parent Adoption in the District of Columbia

During the Senate debate on DOMA, Senator Kerry pointed out the increasing frequency and scope of “legislative attacks on gay people[,]” including failed efforts “to take away the children of gay parents.”300 This was likely a reference to repeated Congressional attempts to override a local decision allowing same-sex couples to adopt children in the District of Columbia (D.C.). As explained below, those unsuccessful Congressional efforts support limiting the construction of DOMA to cover only the relationships of same-sex partners, not their relationships with children.

The same Congress that passed DOMA also considered appropriations legislation in 1995 and 1996 that included amendments both to prevent implementation of D.C.’s domestic partnership ordinance and to prohibit unmarried couples from adopting children.301 While the anti-adoption provision was neutral on its face, it appeared to be aimed at overturning a 1995

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297 In re Lovo-Lara, 23 I & N Dec. 746 (reiterating the essential importance of the validity of a marriage in the jurisdiction where it was celebrated, the federal recognition of marriage as “almost exclusively as State matter”).

298 Committee Report on DOMA, supra note 260, at 22 (emphasis added). The Report provides the example of 42 U.S.C. §416(a), (b) and (f)(containing a long definition of “spouse.) Id.

299 Id. at 22. The Committee explanation continues by clarifying that “Section 3 is meant to ensure that whatever substantive definition of ‘spouse’ may be used in Federal law, the word refers only to’ a person of the opposite sex,” again focusing on the very discrete purpose of clarifying two words that appear in federal statutes and regulations. Id.


301 See H.R. 2546, 104th Cong., Sec. 153 (1995-96)(House bill would have prohibited adoption by unmarried couples, while clarifying that unmarried individuals would still have the right to adopt in the District of Columbia); see also, 145 Cong. Rec. H. 6611, 6635 (July 29, 1999)( sponsor Rep. Largent pointed out that “even though two people might be living together who are unmarried, one of them can adopt” under the 1999 version of his anti-adoption amendment, “[i]t is just saying [that]... only one of them can have that child as their child.”); Kyle C. Velte, Congress Passes Regressive D.C. Appropriations Bill (1996), http://www.now.org/nnt/01-96/dc.html (describing how the House of Representatives “rewrote and repealed local laws ... while passing its version of the .... appropriations bill for fiscal year 1996[,]” including language absent from the Senate version of the bill, which prohibited “‘joint custody' adoptions” by unmarried couples) [hereinafter Regressive D.C. Appropriations Bill]
D.C. Court of Appeals opinion recognizing the ability of a committed same-sex couple to adopt a child jointly.\footnote{See, Regressive D.C. Appropriations Bill, supra note 301, at 2 (explaining that Rep. Jay Dickey’s anti-adoption amendment would reverse a ruling by the D.C. Court of Appeals, In re. M.M.D. & B.H.M., 662 A.2d 837 (D.C. App. 1995), after quoting D.C. Representative Eleanor Homes Norton’s explanation that “homophobia is too polite a word” for the prejudice exemplified by Rep. Dickey’s amendment).}

In the end, the Senate failed to pass an appropriations bill with the anti-adoption amendment.\footnote{See Bill Summary & Status, 104th Cong. (1995-1996), H.R. 2546, All Congressional Actions with Amendments, http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR02546:@@@S (showing the four different failed attempts to invoke cloture and call a vote on the bill).} Instead, Congress enacted a series of substitute appropriations acts, which included the ban on recognition of domestic partners, but not the ban on adoptions by same-sex couples.\footnote{See e.g., 110 stat. 732 (continuing appropriations for Fiscal Year 1996).} This legislative exercise was repeated with the same results in the following Congress, i.e., refusal to allow D.C. to finance domestic partnership benefits but no prohibition on joint adoption by same-sex couples.\footnote{See, House Passes Anti-Gay Adoption Amendment to District of Columbia House Appropriations Bill; Rep. Tiahrt Amendment Passes Denying D.C. Money for Needle Exchange Programs, Human Rights Campaign: Common Dreams News Wire, http://www.commondreams.org/pressreleases/Aug98/080798 (describing the more successful push of Rep. Largent in 1998 to pass an anti-adoption amendment similar to those which had been proposed for three years); Christopher Anders, Lesbian and Gay Rights During President Clinton’s Second Term: A Working Paper Published by the Citizens’ Commission on Civil Rights (January 1999), hhttp://www.aclu.org/print/lgbt-rights_hiv-aids/lesbian-and-gay-rights-during-president-clintons-second-term-working-paper-publ (describing the defeat of a similar anti-adoption amendment in the Republican controlled 105th Congress, due – in part – to an unrealized veto threat by President Clinton).} This legislation also reflected the position of the Clinton administration, which appeared to acquiesce in the Congressional rejection of D.C. partnership rights, while opposing a restriction on joint adoption by unmarried couples, including those of the same sex.\footnote{According to materials released by the Clinton Presidential Library during Elena Kagan’s Supreme Court confirmation process, it appears that the future supreme court justice was involved in White House communications regarding the administration’s decision to oppose what one of her colleagues described as the “egregious prohibition on adoptions by unmarried couples.” See internal memoranda available at http://www.clintonlibrary.gov/textual-Kagan-COMPOSED-EMAIL.htm; http://www.clintonlibrary.gov/KAGAN%20DPC/DPC%201-4/222SDOMESTIC%20POLICY%20COUNCIL%20BOXES%201-4.pdf; http://www.clintonlibrary.gov/KAGAN%20DPC%201-4/1881DOMESTIC%20POLICY%20BOXES%201-4.pdf}

The administration’s position and Congress’ repeated rejection of language that would have prevented same-sex couples in D.C. from adopting children, while repeatedly enacting legislation opposed to domestic partnerships for those same couples is revealing. It provides political context supporting the conclusion that DOMA was intended to do only what it says, defining “spouse” and “marriages” for federal purposes, without implicitly redefining parent-child relationships under federal law as well.
E. The Fall of Rome and Judeo-Christian Prophecies of Apocalypse

The history recounted above supports Judge Tauro’s conclusion in *Gill v. Office of Personnel Management* that DOMA’s purported purposes were so tenuously related to the broad reach of section three that it appeared to be based only on disapprobation of same-sex marriage. The emotional, apocalyptic prophecies conjured up by proponents during the Congressional debate on DOMA support the judge’s further conclusion that DOMA was based on fear and irrational prejudice.

DOMA’s author, Bob Barr, compared its opponents to Nero, fiddling as Rome burned. Long before he became a born again Libertarian, Representative Barr warned in 1996 that “the very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit.” Many proponents of DOMA echoed this apocalyptic language, misconstruing Greek and Roman history to support the proposition that acceptance of homosexuality inevitably causes a fall into decadence and decay, which no civilization can survive.

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308 Id. at 11 & 16.
310 Recently, Rep. Barr saw the light and disavowed the creation he had unleashed on the world, basically reiterating many of the points made fourteen years earlier by DOMA’s opponents who underlined the federal power grab from states that section three of DOMA really was. Bob Barr, *No Defending the Defense of Marriage Act*, L.A. Times, January 5, 2009. (explaining his change of mind on the basis of his improved understanding of DOMA’s negative relationship to his concept of federalism). Cf. 142 Cong. Rec. H. 7480, 7482. (Rep. Frank arguing in 1996 that DOMAs only operative section (section three) says if ... any ... State decides to allow same-sex marriage by whatever means[,]” including legislation or a popular referendum, “the Federal Government ... will substantially overrule that because we will say that is not a marriage as far as Federal law is concerned.... I do not think there is any principle I have ever seen more frequently enunciated and less frequently followed than States’ rights from the Republicans. What they mean is that the States will do whatever they tell them to do.”)
311 Id. The irony that this paternalistic and nationalistic message was being delivered by a thrice married proponent of states’ rights did not escape some members of the Senate. See e.g., 142 Cong. Rec. S. 10065 (Sept. 6, 1996)(Sen. Boxer commenting on this point).
312 Senator Byrd recounted examples of acceptance of homosexuality in classical Greek and Roman history spanning almost a millennium from Patroclus and Achilles to Nero, asserting that “those cultures were shown to be in decline.” 142 Cong. Rec. S. 10100, 10109. (And very long decline it must have been.) This fear that any culture that ever “embraced homosexuality” would face imminent destruction was one of the arguments repeated most passionately in favor of DOMA. 142 Cong. Rec. H. 7270, 7278 (assertion by Rep. Largent); see also, Id. at 7444 (Rep. Coburn asserted that “no society that has lived through the transition to homosexuality and the perversion which it lives and what it brought forth.”); Id. at 7449 (Sen. Coats explained that “the preservation of marriage has become an issue of the self-preservation for our society.”); 142 Cong. Rec. S. 10100, 10114 (Sept. 10, 1996) (Rep. Packard stated that “throughout history, civilizations that have allowed the traditional bonds of family to be weakened ... have not survived.”). Legislators like Steve Largent had obviously spent a great deal of effort pondering the subject to extend the argument even further, explaining that an openness to homosexuality would also lead the U.S. down a road of promiscuity, bestiality, child-rape, incest, polygamy and other unsavory practices. 142 Cong. Rec.
Oddly, the historic examples cited spanned nine-hundred-years and encompassed the periods before, during and after the classical heights of societies that served as models for the founders of our own republic and even for the architecture of the buildings in which the DOMA debates were held. One might more easily argue that no society has ever survived empire, democracy, or –in the specific case of Greece and Rome – conversion to Christianity.

The same argument could have been made against recognition of women’s full citizenship rights. As noted in 1933 Senate Subcommittee Hearings on legislation recognizing women’s equality under U.S. citizenship transmission law, “at only one point prior to 1800, and that was during the later years of the Roman Empire, did …. [women] enjoy a status even approximating that of separate legal identity.” However, rather than conclude that American recognition of women’s separate identity as citizens would lead to the downfall of our civilization, more optimistic depression-era senators of both parties seemed proud of their progressive stance. As outgoing Ohio Republican Senator John Cable explained, U.S. recognition

H. 7441, 7443 (July 11, 1996); see also 142 Cong. Rec. H. 7480, 7489 (July 12, 1996) (Rep. Dornan agreed, predicting that a failure to stop recognition of same sex marriage would lead within 3 to 4 years to “discussing pedophilia only for males.”)

Despite its popularity, this much repeated attribution of the demise of Greece and Rome to homosexuality is inaccurate. See Louis Crompton, Homosexuality and Civilization 150-51 (The Belknap Press of Harvard Univ. Press 2003). Rome survived Caligula and Nero and flourished for more than 150 years under less tolerant Christian emperors before it fell. Id. It is hard to describe a fall of Greek civilization before the demise of strongly homophobic Orthodox Byzantium to the more indulgent Ottoman Turks in 1453. Id. “Certainly, it would be a stretch to attribute to same-sex attachment the fall of Athens to the Macedonians in 338 BCE, since the Macedonian emperors, Phillip and Alexander were bisexual leaders of a bisexual society.” Id. at 150.

While they were not uncritical, our founding fathers clearly focused on ancient Greece and Rome as models for the Republic they were founding. They repeatedly commented on both the strengths and weaknesses of ancient Greek and Roman societies as they formulated the U.S. Constitution. See e.g., The Federalist No. 18 (Hamilton and Madison)(focusing entirely on Greek history); The Federalist No. 38 (Madison)recounting Greek history of reliance on great lawgivers); The Federalist No. 63 (Hamilton or Madison)illustrating the need for a Senate by pointing to the examples of Sparta and Rome as the only long-lived Republics with Senates for life). Although they referenced numerous weaknesses in Roman and Greek society and character, none of the extensive Greek and Roman references in The Federalist and the records of the debates of the constitutional congress referred to any role of homosexuality in the downfall of these republics or larger civilizations.

Respected scholars have argued for centuries that the fall of Rome was actually attributable to its adoption of an intolerant form of Christianity that was out of step with most of the empire’s pagan subjects. Edward Gibbon, Decline and Fall of the Roman Empire chs. 16-18 (first published in stages from 1776 to 1789, the same period during which the young U.S. confederation struggled and our founders conceived the U.S. Constitution); Louis Crompton, Homosexuality and Civilization supra note 312, at 151.

In fact, many classical passages criticizing forms of homosexuality were based more on gender role inflexibility than homophobia, focusing exclusively on men who were sexually or socially passive. Louis Crompton, Homosexuality and Civilization supra note 312, at 1-31 & 49-110.

American Citizenship Rights for Women, Hearing Before a Subcommittee of the Committee on Immigration, U.S. Senate, 72nd Cong., 2d Sess., 9 (1933)(outgoing Republican Senator John L. Cable’s detailed Report on the development of women’s equality within U.S. immigration law, printed in the committee record for its own future use following his election loss.)
of an independent identity for women under immigration and nationality law “was a radical departure from the law existing in most of the countries of the world at that time. Regardless of how backward the laws of other nations were, the United States had the courage of its convictions and today stands foursquare on this principle.”

Sixty years later, DOMA’s proponents often combined their pseudo-historical prediction of apocalypse with citations from the Bible and references to Judeo-Christian morality. Members of Congress warned against America’s “God-fearing people” succumbing to the “depraved judgments” of “sin” and giving in to “an attack upon God’s principles.” They warned repeatedly of America’s possible shift “away from a society based on religious principles to humanistic principles.”

Whether based on religion directly or given a secular gloss, this apocalyptic argument for DOMA was generally based on the assumption that sexual orientation is a mere “lifestyle”

317 Id. at 29.
318 See e.g., 142 Cong. Rec. S. 10100, 10109 -10 (Sen. Byrd quoted at length from his King James Bible); 1996 WL 325376, 2-3 (In this Opening Statement to the Full Committee Markup of DOMA, House Judiciary Committee Chairman Charles T. Canady argued that the DOMA definition of marriage “comports with nature and with our Judeo-Christian moral tradition.”); 142 Cong. Rec. H. 7441, 7441 (July 11, 1996) (Reaching back to religiously based natural law concepts, Rep. Canady opened the House debate on DOMA by stating that “the traditional family structure – centered on a lawful union between one man and one woman – comports with nature and with our Judeo-Christian moral tradition.”); Id. at 7446 (Ironically, Rep. Talent dropped any reference to monogamy when he reached for a bigger theological tent, stressing that traditional heterosexual marriage had been “sanctified by all of the great monotheistic religions and, in particular, by the Judeo-Christian religion which is the underpinning of our culture[,]” just one minute before warning that a vote against DOMA was “essentially” an argument in favor of that very traditional monotheistic marital arrangements, polygamy.); Id. at 7449 (Rep. Packard referred to the “sacred institution of marriage.”); 142 Cong. Rec. H. 7480, 7493 (July 12, 1996)(Although he personally disagreed, out gay Republican Rep. Gunderson recognized that “[p]erhaps, more than anything else, my colleagues advancing this legislation believe they are advancing the basic Judeo-Christian ethics of our Nation.); 142 Cong. Rec. S. 10100, 10109 (Sen. Byrd on the Senate floor); Id. at 10125 (Sen. Bradley supported DOMA because marriage “is, first of all, predominantly a religious institution.”); Committee Report on DOMA, supra note 260, at 9 (July 9, 1996)(“defending traditional norms of morality” was one of the four named governmental interests for DOMA); id. at 12 (“Civil laws that permit only heterosexual marriage reflect and honor a collective ... moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian morality.”); see also, 142 Cong. Rec. H. 7270, 7277 (July 11, 1996)(Rep. Hoke’s argument in House debate); 142 Cong. Rec. H. 7441, 7442 (July 11, 1996) (Rep. Hutchinson asserted that “marriage is a covenant established by God.”); Id. at 7444 (Rep. Coburn focused on what his constituents, and clearly he himself, “believe God says about homosexuality ...[, which] is immoral, ... based on a perversion, ... based on lust.”); 142 Cong. Rec. H. 7480, 7487 (July 11, 1996) (Rep. Funderburk warned that “[i]f homosexuals achieve the power to pretend that their unions are marriages, then people of conscience will be told to ignore their God-given beliefs and support what they regard as immoral and destructive.”); but see, id. at 7448 (Rep. McDermott pointed out that same-sex marriages have been blessed by various religions in all 50 states.)
320 Id.
choice,\textsuperscript{321} and an attractive one at that. Apparently, if children saw legal acceptance of homosexuality as a “lifestyle” option, heterosexuality, procreation and American survival would be at risk.\textsuperscript{322}

Although the Congressional debate did not focus on children, the “lifestyle choice” argument, pursued to its logical conclusion, supports a distinction between the recognition of the same-sex couples disfavored by DOMA and parent-child relationships in those same families.\textsuperscript{323} These pro-DOMA arguments focus on guilt and the rejection of homosexual acts, not homosexual people.\textsuperscript{324} From that starting point, it is difficult to honestly reach a conclusion

\textsuperscript{321} See 142 Cong. Rec. S. 9990, 9999 (Sept. 6, 1996)(Sen. Ashcroft went further, declaring that he knew “that there are thousands of former homosexuals, individuals who once were engaged in a homosexual lifestyle, who have changed that lifestyle and have repudiated it and find themselves to be engaged in heterosexual lifestyles. So it is clear to me that, while there may be a genetic base for the activity in some respects, it is clear that it is an activity of choice in other respects and that it is a choice which can be made and unmade.”) Cf., 142 Cong. Rec. S. 10100, 10121 (Sen. Robb explaining that “the clear weight of serious scholarship has concluded that people do not choose to be homosexual, any more than they choose their gender or their race. Or any more than we choose to be heterosexual.”)

\textsuperscript{322} 142 Cong. Rec. H. 7441, 7447 (July 11, 1996)(Rep. Canady, arguing “what is at stake here” is whether “the law [should] express its neutrality between homosexual and heterosexual relationships[, whether] we tell the children of America that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same sex[,]”); 142 Cong. Rec. H. 7480, 7487 (July 11, 1996) (Rep. Delay argued that “We should not be forced to send a message to our children that undermines the definition of marriage.”); House Judiciary Committee Report on H.R. 3396, 104\textsuperscript{th} Cong., 2d. Sess., at 11 at note 53 (July 9, 1996) (“Maintaining a preferred societal status of heterosexual marriage thus will also serve to encourage heterosexuality” which promotes society’s interest in reproducing itself.); 142 Cong. Rec. H. 7441, 7448 (July 11, 1996) (Rep. Ensign argued that DOMA would “reaffirm our commitment to ensuring that moms and dads are encouraged and strengthened in the task of raising their children.”); Id. at 7491 (Rep. Canady explained that if Congress failed to pass DOMA, it would be “tell[ing] the children of America that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same sex.”); 142 Cong. Rec. S. 9990, 9999 (Sept. 6, 1996)(Sen. Ashcroft asserted that homosexuality was a lifestyle choice, and he was “worried about youngsters in our society” who might chose it rather than “ordinary sexual orientation[,]” possibly under the influence of gay Boy Scout leaders or gym teachers, like one he described who “had been making the gay pornographic videos and was discovered to be leading a dual life” as a “west coast … gay porno star” and a gym teacher in northern Virginia.)

\textsuperscript{323} While some anti-gay crusaders might have a hard time recognizing any legal relationship that supported a same-sex couple as parents, it is difficult to imagine that many professed Christians would call for the separation of a child from the only remaining parent she has ever known merely because their relationship was originally established on the basis of her parent’s same-sex marriage. For instance, if a biological or adoptive parent dies or is no longer in a position to parent his child, it would be very difficult to contend that the remaining single-parent family was somehow so innately sinful that the parent and child should be separated.

\textsuperscript{324} See 142 Cong. Rec. H. 7441, 7444 (July 11, 1996) (Rep. Coburn asserted that “the real debate is about homosexuality,” asserting that his Christian-based position in support of DOMA was “discrimination towards the act, not towards the individuals.” “The individuals,” he emphasized again, “are [not] any less valuable or any less bright.” Asserting further that he was not saying that “the individual is any less valuable,” he focused on what he viewed as a possible legal sanction of gay sexual acts, which were based on “… a perversion” and “lust.”); 142 Cong. Rec. H. 7480, 7487 (July 11, 1996) (Rep. Delay gave a more secular and libertarian take on this idea, arguing that DOMA is a “very simple” bill, which “says that for Federal purposes, marriage is the legal union of one man and one woman,” neither “tell[ing] people what
calling for the punishment of innocent children by refusing them immigration benefits on account of their parents’ sexuality. Even during the seventeenth century when both sodomy and fornication were criminal offenses, Blackstone recognized that it is “odious, unjust, and cruel to the last degree” to penalize children for their parents’ crimes. As described above, this recognition has finally lead to the disappearance of most distinctions between “legitimate” and “illegitimate” children, even in the area of immigration.

F. Sodomy and “Homosexual Extremists”

Sex was as important as religion in the DOMA debate. As Virginia Senator Robb recognized, “beneath the high-minded discussions of constitutional principles and States rights lurks the true issue which confounds and divides us: the issue of how we feel about intimate conduct we neither understand nor feel comfortable discussing.”

Congressional statements on DOMA tended to either assiduously avoid or focus obsessively on gay sex. The discussion in Congress confirms an image of gay and lesbian couples that are, at best, sexless loving adult companions who deserve respect and recognition, or – at worst – sex obsessed deviants hell bent on recruiting children, destroying the institution of

to do in the privacy of their own homes” nor “ask[ing] the American people to condone it.”); id. at 7500 (On the darker side of the conduct-status distinction, Rep. Hyde found the issue’s focus to be disapprobation or acceptance of “homosexual conduct[,]” presumably meaning gay sex, as he longed for the days when “homosexual conduct” had been a crime in all the states.); id. at 7495 (Rep. Lipinski seemed to think that “homosexual marriage” itself should be a federal crime, as he explained that “this bill would not outlaw homosexual marriages; although I believe it should...”).

See 478 U.S. 186, 197 (Burger, C.J., concurring)(citing 4 W. Blackstone, Commentaries, along with other English and Roman law sources to illustrate condemnation of “homosexual sodomy” throughout the history of Western civilization in order to underscore the majority’s opinion that the Fourteenth Amendment to the U.S. Constitution does not “confer... a fundamental right upon homosexuals to engage in sodomy”), overruled by Lawrence v. Texas, 539 U.S 558 (2003); 4 William Blackstone, Commentaries on the Laws of England 64-65 (1769)(noting the cannon law’s “feeble” punishment of fornication and the temporal court’s punishment of open and notorious “lewdness,” as well as criminal punishment specifically for parents “having bastard children” in some circumstances).

See supra notes 94-207 and accompanying text.

Given lack of comfort with gay sexuality (or possibly with any sexuality), most opponents of DOMA seemed to avoid that subject whenever possible. One almost charmingly uncomfortable example of this tendency was a speech in opposition to DOMA by California Rep. Farr, who repeatedly referred to DOMA’s unintended consequences to the asexual relationships of senior citizens. 142 Cong. Rec. H. 7441, 7446 (July 11, 1996) (“This bill ... is about taking away States’ right to enact a law that would allow an elderly man or an elderly woman, maybe a grandmother, even someone’s grandfather, from receiving the benefits or giving benefits to a caretaker of the same sex who they may marry for only the reasons of being able to inherit property.... Elderly people often live together with friends of the same sex.”)
marriage, and bringing down American society and democracy with it. For instance, Representative Hyde, the House Judiciary Committee Chairman, thought the real focus of “the issue” was disapprobation or acceptance of “homosexual conduct[,]” meaning gay sex, and he waxed nostalgic for the days when “homosexual conduct” had been a crime in all the states. Senator Helms asserted that “[b]isexual’ by definition means promiscuous, having relations with both male and female.” Rep. Coburn argued that “the real debate is about homosexuality[,]” asserting that over forty-three percent of “all people who profess homosexuality have greater than 400 partners.” Whatever the validity of his statistics, Representative Coburn’s focus—like that of Rep. Hyde and their colleagues—was clearly on promiscuous gay sex, not co-parenting by committed gay couples.

During the same House speech in which he twice referred in dehumanizing McCarthyesque tones to “a radical element,” a “homosexual agenda that wants to redefine marriage,” Representative Largent came out with one of the most radical statements in the entire DOMA debate, his assertion that “marriage is not a right in the first place. It is a privilege.” He then proceeded to channel Justice Scalia’s dissent in Romer v. Evans, warning of the slippery slope to polygamy, legalized statutory rape, and bestiality (or perhaps sex with robots or sex toys), extrapolating that “it” (presumably marriage) “does not even have to be limited to human beings, by the way.” It is not entirely clear how Rep. Largent reaches the conclusion that Congress must act immediately to pass DOMA in order to avoid the temptation to “completely erase whatever boundaries that exist on the definition of marriage and say it is a free-for-all.” However, it is clear from his sexual analogies that he does not expect married gay and lesbian couples to forgo their sex-centered lifestyles to plan, conceive, and raise children in a two-parent headed family unit.

DOMA’s original author, Rep. Barr, continued this cold-war-tinged rhetoric, warning against “homosexual extremists,” and their “deliberate, coldly calculated power move to confront the basic social institutions on which our country not only was founded but has prospered…” Rep. Barr went on to attack “extremist homosexual groups.” “To them,” asserting Rep. Barr, “marriage means just two people living together alone. Is that not sweet? In other words, it

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331 142 Cong. Rec. S. 10067 (Sept. 9, 1996).
335 142 Cong. Rec. H. 7441, 7443 (July 11, 1996) Rep. Largent could have also added “self-marriage” to his list of horribles, if he had read the House Judiciary Committee Testimony of Professor Hadley Arkes. 1996 WL 256693 at 5.
338 Id.
means absolutely nothing.” As several Senators pointed out, it may have been ironic that this vigorous champion of a transcendent concept of marriage was a man who had married three times and divorced twice before he introduced DOMA. Yet his assertion that marriage signifies something more than love between two adults, was well-founded and mainstream. However, Rep. Barr stopped with sarcasm. Rather than continue to make the traditional arguments about the importance of marriage to childrearing, private care for ill or dying spouses, establishing relationships between families, etc.; he merely concluded without further explanation that “marriage does not mean two men or two women getting married. It just does not mean that.”

G. Other Rationales for DOMA

In addition to promoting Judeo-Christian based notions about marriage and avoiding a replay of Nero’s famous fiddle concert in Rome, the Congressional debate on DOMA focused on protecting “defending and nurturing the institution of traditional heterosexual marriage,” and the reasons why it should be legally preferenced over gay relationships in the interest of “defending traditional [Judeo-Christian] notions of morality,” “preserving scarce government resources,” promoting heterosexuality and reproduction, promoting responsible

339 Id. 340 142 Cong. Rec. S. 10065 (Sept. 6, 1996)(Sen. Boxer asked whether “the author of the bill in the House, whom the press says has been married three times, truly believe[s] that the Defense of Marriage Act would have made him a better husband or his wives better wives.”)
343 *Committee Report on DOMA, supra* note 260, at 9 (this was the first of the four named governmental interests for DOMA). This seems to be a conservative argument in the truest sense of the word. As the Committee Report explains, “we should be most wary of conducting new experiments with the institution.” Id. at 11 (citing citing William J. Bennett, *But Not a Very Good Idea, Either*, The Washington Post, May 21, 1996, at A 19 [hereinafter Bennett, *Post Editorial*]).
344 See *supra* note 288.
345 *Committee Report on DOMA, supra* note 260, at 9 (“preserving scarce government resources” was one of the four named governmental interests for DOMA; see also, 142 Cong. Rec. H. 7441, 7448 (July 11, 1996) (Rep. Sensenbrenner describing his fears of increased problems with financing social security benefits and the “huge expansion of the number of people eligible to receive Medicare survivor benefits ...” because of the unprecedented effort of “gay rights groups ... scheming” to “impose one State’s marital rules on the rest of the nation.”); Id. at 7488 (Rep. Barr warned that if “one State can now define ‘spouse’ or ‘marriage’ for all Federal purposes, ... [it would] throw open the doors of the U.S. Treasury...to be raided by the homosexual movement....”); Id. at 7489 (Rep. Canady referring to the prerogative of Congress “to determine how Federal funds will be spent [or not]... to support an institution which is rejected by the vast majority of the American people.”); Id. at 7495 (Rep. Lipinski feared that without DOMA “all Americans will then be paying for benefits for homosexual marriages.”); 142 Cong. Rec. S. 10100, 10110 (Sen. Byrd was disturbed about the potential “cost to the Federal Government if the definition of ‘spouse’ is changed[,]”); Id. at 10116 (Sen. Burns pointed to the “enormous financial impact,“ if same-sex marriages were covered by the more than 3,900 federal legal references to “marriage” and “spouse.”); Cf. Id. at 10124 (Sen. Kerrey asserted that “[e]ven if the same percentage of homosexual Americans were married as heterosexual Americans, 40 percent, the threat to the Treasury would be
procreation and child rearing, the “teleology of the body,” and “complementarity of the sexes.” The official House Judiciary Committee Report on DOMA cited four government interests purportedly advanced by DOMA: “(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.” Yet refusing to recognize the relationships between same-sex couples and their children for immigration purposes actually has no substantial connection to these purported government interests, except – perhaps – the preservation of government resources, and even that interest is very weak in light of immigration support requirements.

346 See supra note 322.

347 Committee Report on DOMA, supra note 260, at 10 (citing Bennett, Post Editorial, supra note 343, for the conclusion that “At bottom, civil society has an interest in ... the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing.”); Id. at 24. Oddly, the committee argued that DOMA is constitutional because “[i]t would be incomprehensible for any court to conclude that traditional marriage laws are ... motivated by animus towards homosexuals ... primarily because they are conducive to the objectives of procreation and responsible child rearing,” obviously forgetting the Supreme Court’s decisions in Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972), which struck down anti-condom laws that would have clearly encouraged procreation, if not “responsible” child rearing. See also, 142 Cong. Rec. H. 7441, 7442 (July 11, 1996) (Rep. Hutchinson citing the reasoning in the Minnesota Supreme Court opinion in Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971)

348 Committee Report on DOMA, supra note 260, at 10 (quoting from Amherst College Professor Hadley Arkes’ focus on “the natural signs of the meaning and purpose of sexuality ... the function and purpose of begetting” and “the ‘natural teleology of the body’: namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child.”)

349 Committee Report on DOMA, supra note 260, at 10 (citing Bennett, Post Editorial, supra note 343, for the conclusion that “[m]arriage’ is ... based on the different, complementary nature of men and women – and how they refine, support, encourage and complete one another.”)


351 The first reasons is not actually promoted by DOMA; the second relates to the sexual behavior of same-sex couples, not their ability to parent children; and “protecting state sovereignty and democratic self-governance” is clearly related only to the “full faith and credit” section of DOMA, since Section 3 of DOMA actually undermines state sovereignty in regard to the traditional state area of family law. See Gill v. O.P.M., 699 F.Supp.2d 374, 388-90 (D. Mass. 2010).

Family members petitioning for lawful permanent status on behalf of their immediate relatives are generally required to sign affidavits of financial support on behalf of the beneficiaries. See 8 C.F.R. §213a; 8 C.F.R. §40.41(e); see also, Ira J. Kurzban, Immigration Law Sourcebook 44-49 (10th ed. 2006).
At least one Congressional co-sponsor of DOMA also argued that same-sex marriage was unnecessary since “gays can legally achieve the same legal ends as marriage through draft wills, medical powers of attorney, and contractual agreements in the event that the relationship should end.” 352 Therefore, asking the rest of the country to recognize such marriages does nothing that the law cannot currently do, it is simply asking for special privileges.” 353 Of course, this reasoning misses both the possibility of children with same-sex parents and any effect of DOMA on U.S. immigration law. After all, refusal to recognize “marriage” in that context often leaves gay U.S. citizens and lawful permanent residents with the untenable choice between life alone in the United States and life in de facto exile with a same-sex spouse, a choice that no contract can alter. 354

H. Immigration in the DOMA Debate

Calling DOMA a “simple” and “very specific” bill, Rep. McInnis asked himself “exactly what does this bill do,” responding that it freed the federal government from recognizing financial requirements or obligations based on a state’s choice to recognize same-sex marriage, before coming to the bizarre conclusion that DOMA “does not have anything to do with domestic relations.” 355 This statement indicates no comprehension that DOMA could force children and their parents to live apart. Of course, it also ignores other effects of DOMA on immigration law, including the ability of married gay US citizens to live in the same country with their foreign national spouses.

One common feature of the hearings and debate on DOMA was their consistent shallowness. As Judge Tauro recognized in Gill v. Office of Personnel Management, “the relevant committees did not engage in a meaningful examination of the scope or effect of” DOMA, which would affect over 1,000 federal laws. 356 For instance, there was no testimony from historians, economists, specialists in family welfare, or even agency heads relating to DOMA’s affect on federal programs. 357

The legislative history is largely silent regarding the immigration consequences of DOMA. In his written statements to Senate and House Judiciary Committees, one pro-DOMA scholar described how Congress has carved out an exception to the definition of “marriage” under the INA, where a legally valid state or foreign marriage is entered solely in order to procure immigration benefits. 358 The word “immigration” also came up a few times during the

353 Id.
357 Id.
House floor debate on DOMA. Although some speakers liked the result and others did not, these references generally seemed to foresee the consequence that DOMA would leave American same-sex spouses in the predicament of choosing between their foreign spouse and their country. Nowhere in the entire legislative record, however, does anyone predict that DOMA might affect the definition of “parent” or “child” under U.S. immigration law or any other area of federal law.

I. Extremist Attacks, Activist Judges, or Politically Motivated Bigotry

In addition to numerous references to DOMA simply defining the words “spouse” and “marriage,” the Congressional debates are filled with comments by the bill’s supporters that their hand was forced by litigation in Hawaii that would lead to recognition of same-sex marriage in that state and others. In the words of Representative Barr, DOMA “is a reaction to what is being forced on this country. It is very limited legislation. It goes no further than is absolutely essential to meet the very terms of the assault itself” by defining “the scope of marriage as with other relationships and institutions that fall into the jurisdiction of Federal law, to define ... that ... marriage means the union between a man and a woman.”

_delineated in the immigration laws the kinds of marriages to which it gives immigration benefits...” Id. Although this overstated the Congressional delineation of “marriage” in the INA, see S. Titshaw, Meaning of Marriage, supra note 11 at 541, Professor Wardle’s observation about the “marriage fraud” issue is well taken._

359 142 Cong. Rec. H. 7441, 7442 (July 11, 1996) (Rep. Pelosi referred to immigration in the context of other benefits unfairly denied to long-term same sex couples); 142 Cong. Rec. H. 7480, 7496 (July 12, 1996) (Rep. Jackson listed “immigration rights for spouses” among the list of other marriage-based benefits that DOMA would affect); 142 Cong. Rec. H. 7480, 7484 (July 12, 1996) (Rep. Sensenbrenner lists “immigration privileges” along with a half dozen other benefits awarded “on the basis of marital status.”) The word “immigration” also appeared without further consideration in a long laundry list of benefits affected by DOMA at several points in legislative record. _See e.g.,_ 142 Cong. Rec. S. 10076, 10079 (Sept. 9, 1996) (Testimony of Herma Hill Kay, Dean of the University of California, Berkley, School of Law, before the Senate Judiciary Committee on July 11, 1996 as recorded in the federal record).

359 _See supra_ note 359 and accompanying text.

360 142 Cong. Rec. H. 7441, 7448 (July 12, 1996) (Rep. Ensign described the need for DOMA as “pressing and necessary” because of the pending litigation in Hawaii); 142 Cong. Rec. H. 7480, 7489 (July 12, 1996) (Rep. Lewis of Kentucky bemoaned the situation where Hawaii was forcing Congress to actually define marriage and spouse); _Id._ at 7493 (Rep. Weldon noted that “Federal policies could be dramatically affected by the Hawaii decision); _Id._ (Rep. Ensign urged passage of DOMA as “pressing and necessary” because of the pending litigation in Hawaii); _Id._ at 7495 (Rep. Lipinski asserted that “[i]f the federal government does not act now, and Hawaii legalizes homosexual marriage,” it would have to provide benefits to same-sex married couples.); _Id._ at 7499 (Rep. Sensenbrenner called DOMA “a legitimate response to a well-publicized legal move to try to expand a decision in Hawaii to the rest of the country and to Federal law.”); 142 Cong. Rec. S. 9073 (July 29, 1996)(Sen. Nickles reintroduced DOMA in the Senate as S. 1999, explaining that it was necessary because of the Hawaiian litigation); 142 Cong. Rec. S. 10100, 10100 (Sept. 10, 1996) (Sen. Lott calling DOMA “a preemptive measure to make sure that a handful of judges, in a single State, cannot impose an agenda upon the entire Nation.”).
Representative Abercrombie of Hawaii was particularly interested in DOMA. He took umbrage at suggestions that Hawaii would “mandate its wishes on the rest of the nation,” and pointed out that full faith and credit clause authority had been invoked very few times, mainly involving the custody, protection and support of children.\(^363\) “That is the kind of thing we have dealt with, serious issues.”\(^364\) Thus, even Rep. Abercrombie apparently foresaw no effect on parent-child definition issues resulting from DOMA.\(^365\) Neither did the few other Members of Congress who even implicitly raised issues relating to children.\(^366\)

Democratic opponents of DOMA, on the other hand, pointed out that Rep. Barr’s fear was based on a three-year-old Hawaii Supreme Court opinion that would not likely result in a final opinion for two more years. To the bill’s opponents, DOMA was mainly an exercise in election-year wedge-issue politics.\(^367\) They argued that it was a cynical, election-year political

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\(^{363}\) 142 Cong. Rec. H. 7270, 7274 (July 11, 1996).

\(^{364}\) Id. at 7275.

\(^{365}\) While his comments focused mainly on section two of DOMA, he was also referring to “the question of benefits,” and it would have been remiss of him to fail to point out DOMA’s possible redefinition of parent-child relationships under all federal law if he had foreseen that possibility.

\(^{366}\) See e.g., 142 Cong. Rec. H. 7270, 7279 (July 11, 1996)(calling DOMA a “simple,” “very specific” Bill, Rep. McInnis focused on “exactly what does this bill do,” responding that it freed the federal government from recognizing financial requirements or obligations based on a state’s choice to recognize same-sex marriage, but mysteriously stating that DOMA “does not have anything to do with domestic relations.” At the very least, this statement seems to indicate that DOMA will not force children and their parents to live apart. Of course, it also ignores the fact that DOMA’s application under the INA would force married gay US citizens to choose between their spouses and life in exile abroad.

\(^{367}\) See e.g., Committee Report on DOMA, supra note 260, at 26(Hawaii will not complete this process until well into next year at the earliest, giving us plenty of time to legislate with more thought and analysis.”); Id. at 30 (complaining that DOMA was rushed through with inadequate analysis of its potential impact); 142 Cong. Rec. H. 7270, 7278 (July 11, 1996)(In the House debate, Rep. Frank pointed out that Congress was “doing this 3 months before the [1996] election,” even though the Hawaii Supreme Court’s “decision came in 1993 and the process will not end until 1997 or 1998.”); Id. at 7447 (Pointing out how unusual it was that this bill had “gone from introduction, to hearing, to subcommittee, full committee, and now the floor in a mere two months time[,] Rep. Conyers asserted that Republicans, behind in the polls, were “desperately trying to manufacture ‘wedge’ political issues” like DOMA); Id. at 7448 (Rep. Jackson-Lee believed DOMA was “rushed forward with little thought and reason.”); Id. at 7490 (Rep. McKinney accusing Republicans of using DOMA as “pure and simple ... election year politics.”); Id. at 7493 (Although he said it hurt him “deeply to say that about his own party[,]” out gay Republican Rep. Gunderson called DOMA a “mean, political-wedge issue at the expense of the gay and lesbian community in this country,” which should not be “some scapegoat for political gain.”); Id. at 7497 (Rep. Eshoo complained about the focus on DOMA “30 legislative days ... before the election and we have yet to complete our constitutionally mandated responsibility of funding the government.”); 142 Cong. Rec. S. 10065 (Sept. 9, 1996)(Sen. Boxer called DOMA a “wedge issue” and “an election-year ploy to get Senate and House members to cast a tough vote.”)
ploy by Republicans, intended to attack gay people, polarize the electorate and gain from bigotry towards this unpopular minority.368

Thanks to early support by President Clinton and influential Democrats like Senator Robert Byrd, Republicans could rightfully claim bi-partisan support for DOMA.369 Following the

368 Committee Report on DOMA, supra note 260, at 31 (dissenting views) (“this is simply an effort to capitalize on the public dislike of the notion of same sex marriages” as demonstrated by the rejection of amendments offered by Rep. Schroeder to deal more directly with threats to existing heterosexual marriage); 142 Cong. Rec. H. 7270, 7272 (July 11, 1996) (Rep. Moakley described the bill as “a political attempt to sling arrows at President Clinton”); id. at 7273 (Rep. Schroeder complaining that DOMA is “nothing but a wedge issue” and “platform for [Presidential] Candidate Dole to stand on.”); 142 Cong. Rec. H. 7270, 7278 (July 11, 1996) (In the House debate, Rep. Frank cracked that “people may understand why we do not speak here under oath. No one in the world believes that this is not political.”); 142 Cong. Rec. H. 7441, 7442 (July 11, 1996) (Rep. Kennedy argued that DOMA was “not about defending marriage. It is about finding an enemy.”); id. at 7443 (Rep. Gutierrez described the bill’s purpose as “exploiting fears and promoting prejudice.”); id. at 7444 (Civil rights legend Rep. John Lewis argued that DOMA “stinks of the same fear, hatred and intolerance” as racist legislation he fought in the past); id. at 7447 (Rep. Conyers accusing Republicans of conjuring DOMA to “demonize gay and lesbian individuals” for their own political benefit); 142 Cong. Rec. H. 7480, 7487 (July 11, 1996) (Rep. Gejdenson accused Republicans of searching for a “new scapegoat” and “pick[ing] on the powerless” in order to “salvage their political tailspin.”); id. at 7490 (Rep. McKinney accusing Republicans of “fan[ing] the flames of intolerance and bigotry right up to November.”); id. at 7493 (Gay Republican Rep. Gunderson explained this “wedge issue” as follows: “the first hope” of DOMA’s sponsors in his party “was that the President would veto this legislation – and it would be used against him. When the President announced that he would sign the bill, the focus then was directed on finding some Democrat in a marginal district that would vote against the bill on principle, only to then lose the political debate back home.”); id. at 7497 (Rep. Collins called DOMA “nothing more than blatant homophobic gay-bashing.”); 142 Cong. Rec. S. 10065 (Sept. 9, 1996) (Sen. Boxer accused DOMA supporters of trying to “scapegoat a group of people.”); 142 Cong. Rec. S. 10100, 10108 (Sept. 10, 1996) (Sen. Kerry referred to DOMA as a “thinly veiled attempt to score political debating points by scapegoating gay and lesbian Americans.”)

369 Early in 1996, President Clinton explained at the National Prayer Breakfast, that DOMA “has moral implications, because families are ordained by God as a way of giving children and their parents the chance to live up to the fullest of their God-given capacities,” and by “strengthen[ing] them, we overcome the notion that self-gratification is more important than our obligation to others....” Committee Report on DOMA, supra note 260, at 10 (quoting Remarks by President Bill Clinton at the National Prayer Breakfast, 32 Weekly Comp. Pres. Doc. 135 (Feb. 5, 1996)). Ironically, in light of revelations about his own personal life, President Clinton continued his thought about marriage and the denial of self-gratification by explaining that support of marriage allows us to “overcome the notion that is so prevalent in our culture that life is just a series of responses to impulses...” Id. Republican supporters of DOMA were, therefore, able to claim bi-partisan support throughout the Congressional debates on DOMA. See e.g., 142 Cong. Rec. H. 7270, 7275 (July 11, 1996) (reference by DOMA sponsor Bob Barr); id. at 7279 (Rep. McKinney pointing to President Clinton’s statements to show that DOMA was not politically motivated); Id. (Rep. Stearns found that “the President is almost saying that he agrees with what we are doing and he would like to see as soon as possible the bill brought to him for his signature.”); 142 Cong. Rec. H. 7441, 7442 (July 11, 1996) (Rep. Hutchinson drew support in his assertion during the House debate that “marriage is a covenant established by God[,]” from President Clinton’s National Prayer Breakfast speech). Some Democrats, including at least one Senator, seemed to doubt the President’s sincerity on this issue. 142 Cong. Rec. S. 10100, 10121 (Sen. Robb called on his Senate colleagues to vote against DOMA, arguing that the vote was “in a very real sense, a test of character.... If enough of us have the courage to vote against the Defense of Marriage Act, I believe we can convince the President to do what I know in his heart of hearts he knows he should do to this discriminatory legislation.”)
President’s lead, DOMA’s congressional supporters argued that the bill would not subject gay people or same-sex couples to bias.\textsuperscript{370} Thanks to Senator Kennedy, some of them also had a chance to back up this contention with action in a vote on the gay and lesbian Employment Non-Discrimination Act (ENDA) held in conjunction with the DOMA vote. They almost carried the day in the Senate with a forty-nine to fifty vote on ENDA.\textsuperscript{371}

The debate on the discrimination of DOMA resulted in some bizarre moments. In an unrepresentative moment, Representative Sensenbrenner asserted that “we are all compassionate because uncompassionate people do not get elected to Congress.”\textsuperscript{372} Notorious names from America’s segregationist past like Senators Strom Thurmond and Jesse Helms responding to Representative and Civil Rights legend John Lewis’s accusations of homophobia by explaining that their position could not be based on bigotry or intolerance since more than seventy percent of the American public, including Colin Powell and some African-American ministers, condemned same-sex marriage.\textsuperscript{373} DOMA, they argued, was a reasonable and modest federal legislative reaction forced upon it by a few “activist” Hawaiian judges.\textsuperscript{374} As Rep. Barr stated, “[t]his legislation goes no further than is absolutely essential … to meet this very specific challenge” that would result in “eradicating the [traditional] concept of marriage.”\textsuperscript{375}

\textsuperscript{370} See e.g., 142 Cong. Rec. H. 7480, 7485 (July 11, 1996) (Rep. Seastrand argued that DOMA “reinforces the traditional definition of marriage without subjecting same-sex couples to bias or harassment.”); 142 Cong. Rec. S. 10100, 10100 (Sept. 10, 1996) (Sen. Lott asserted that DOMA “is not prejudiced legislation,” but a preemptive measure forced on Congress by Hawaiian judges); id. at 10115 (Sen. Mikulski explains that, although she supports DOMA, she “is against discrimination…. Discrimination is wrong, plain and simple.”). See also DOMA Signing Statement, supra note 258 (President Clinton explained that “the enactment of this legislation should not, despite the fierce and at times divisive rhetoric surrounding it, be understood to provide an excuse for discrimination…. ”).


\textsuperscript{372} 142 Cong. Rec. H. 7480, 7499 (July 12, 1996).

\textsuperscript{373} Senator Helms recounted a recent encounter with a Baptist minister from a church “today … referred to as ‘African-American’” who gave him “a sort of sermonette” in his “booming, cheerful voice” to “Tell them that God created Adam and Eve – not Adam and Steve.” 142 Cong. Rec. S. 10067 (Sept. 9, 1996); see also, 142 Cong. Rec. H. 7480, 7487 (July 11, 1996) (Rep. Delay referencing opinion polls showing that the majority of people in the U.S. did not support legalizing same-sex marriage); id. at 7491 (Rep. Canady accusing DOMA opponents of “an insult to the American, 70 percent of whom oppose same-sex marriages. Seventy percent of the American people are not bigots … [or] prejudiced.”); id. at 7499(Rep. Conyers responded that “70 percent of the population was against ending segregation when the civil rights laws passed in the United States of America in the sixties.”); 142 Cong. Rec. S. 9990, 9999 (Sept. 6, 1996)(Like many of his colleagues, Sen. Ashcroft referred to General Powell’s public comments that sexual orientation, unlike race, was not a “benign, non-behavioral characteristic.”)

\textsuperscript{374} See e.g., Committee Report on DOMA, supra note 260, at 2-5 (“Because H.R. 3396 was motivated by the Hawaiian lawsuit, the Committee thinks it is important to discuss that situation in some detail.” Id. at 3.) It is hard to give credence to Congressional statements emphasizing DOMA as a defense of democracy against “activist” judges, since an overwhelming majority of the House Judiciary Committee and the full House of Representatives voted against Rep. Frank’s amendment that would have made DOMA inapplicable to marriage recognition based on state referenda or legislation. Id. at 15-16 & 31.

\textsuperscript{375} 142 Cong. Rec. H. 7441, 7444 (July 11, 1996).
The House Judiciary Committee Report on DOMA explained it as a reaction to the potential success of “an orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers.” Violent martial imagery of “homosexual extremists” attacking the institution of marriage was repeated over and over again by DOMA supporters throughout the debates. Given the poll numbers discussed by Members of Congress, most Americans in 1996 apparently agreed that traditional different-sex marriage needed defending from something or someone. We may also take a number of legislators at their word that they feared traditional marriage was “under assault” from activist judges and “gay rights groups.” They were apparently convinced that “homosexual activists and their lawyers” were hell bent on redefining “marriage” to extend to homosexual couples, a “truly radical proposal that would fundamentally alter” and – in fact – “deconstruct,” “demean,” “trivialize,” and “devalue” the institution of marriage.

Committee Report on DOMA, supra note 260, at 2. Members of the House and its Judiciary Committee made much of an internal Memorandum of Lambda Legal attorneys (dated March 20, 1996), which hypothesized a state by state attack on exclusively heterosexual marriage laws filed on behalf of state residents married in Hawaii. Id. at 5-6; Id. at 20 (“Gay rights lawyers are intending to try to use their victory in Hawaii to undermine the marriage laws of the other 49 states.”); 142 Cong. Rec. H. 7441, 7441 (July 11, 1996)(Rep. Canady began the House debate on DOMA by pointing out that gay rights lawyers will “attempt to ‘nationalize’ [an]… anticipated victory” in Hawaii).

See e.g., 142 Cong. Rec. H. 7270, 7275 (July 11, 1996)(DOMA’s original House sponsor, Georgia Representative Bob Barr railed that marriage is “under direct assault by homosexual extremists all across this country, not just in Hawaii.”); Id. (Rep. Barr describing further how “this issue … is being forced on us directly by assault by the homosexual extremists to attack the institution of marriage.”); Id. at 7276 (Rep. Largent stated that the Hawaii Supreme Court was engaging in “a frontal assault on the institution of marriage,” which, “if successful, will demolish the institution in and of itself with that redefinition.” 142 Cong. Rec. H. 7441, 7446 (July 11, 1996) (Rep. Talent asserted the divisiveness of “[t]he people who are trying to attack marriage, the other side…”); Id. a 7449 (Rep. Packard referred to the “assault on America’s families and the sacred institution of marriage.”); 142 Cong. Rec. H. 7480, 7499 (July 12, 1996) (Rep. Barr referred to Rep. Frank’s “killer amendment, … [which] trained its cross hairs on the heart of the bill and made no bones about it[,] while his second amendment [to recognize marriages that were not the result of judicial activism] trains its cross hairs on the heart of the bill, but it kills it with a silencer.”); Id. at 7501 (According to Rep. Hyde brutal gay thugs had turned the world upside down: “[T]he homosexual movement has been very successful in intimidating the psychiatric profession. Now people who object to sodomy, to two men penetrating each other are homophobic. They have the phobia, not the people doing this act.”); 142 Cong. Rec. S. 10100, 10110 (Sen. Byrd described “[t]he drive for same sex marriage” as “a sneak attack on society.”)

Committee Report on DOMA, supra note 260, at 9.

Ir. at 10 (citing a Washington Post editorial by William J. Bennett, which was so influential on Congressional supporters of DOMA that his metaphors were repeated over and over throughout the House and Senate debates, often without the benefit of his underlying arguments.) See William J. Bennett, But Not a Very Good Idea, Either, The Washington Post, May 21, 1996, at A 19) (reprinted at 142 Cong. Rec. H. 7480, 7494-95 (July 12, 1996)(stating that the “function of marriage is not elastic … Broadening its definition to include same-sex marriages would stretch it almost beyond recognition[,]” and that “it is exceedingly imprudent to conduct a radical, untested and inherently flawed social experiment on an institution that is the cornerstone in the arch of civilization.”) In his article, Mr. Bennett also seems to generally view the “homosexual marriage contract” as a childless, non-monogamous relationship, but he does raise the specter of an equal claim to adopting children by same-sex couples.
From whichever perspective it is viewed, the argument that DOMA was a reaction to popular fear of a Hawaii-lead judicial redefinition of marriage is consistent with a limited construction of DOMA, since the Hawaiian marriage equality challenge did not raise the issue of parent-child relationship recognition.383

If accurate, the Democratic view of a cynical, homophobic motivation for DOMA supports the conclusion reached by Judge Tauro in Gill v. Office of Personnel Management that DOMA was primarily intended as a message of disapproval of homosexuality and/or gay and lesbian people.384 Like the historic mistreatment of “illegitimate” children in order to discourage sex and procreation out of wedlock, an opponent of same-sex marriage might be willing to punish children of gay and lesbian parents in order to prevent future same-sex relationships.385 However, that sort of animus towards gay parents and their children would be highly suspect in light of constitutional decisions ranging from Plyler v. Doe386 to Romer v. Evans.387

In light of these constitutional issues, DOMA should not be read so broadly as to punish same-sex couples in every way possible. In Romer, the Supreme Court held that a law based on animus towards gay men and lesbians as a class violates the Equal Protection clause of the

who are allowed to marry – a specter which is never answered in any of the specific comments within the legislative history of DOMA.

Committee Report on DOMA, supra note 260, at 12 (“[S]ame-sex marriage, if sanctified by the law … legitimates a public union, a legal status that most people … feel ought to be illegitimate… And in so doing it trivializes the legitimate status of marriage and demeans it by putting a stamp of approval…. on a union that many people … think is immoral.”); 142 Cong. Rec. H. 7480, 7494 (July 12, 1996) (Rep. Smith asserted that “[s]ame-sex ‘marriages’ demean the fundamental institution of marriage. They legitimize unnatural and immoral behavior. And they trivialize marriage as a mere ‘lifestyle choice.’” Like his colleagues, Rep. Smith does not seem aware of any same-sex marriage “lifestyle choice” that involves children.)

142 Cong. Rec. H. 7480, 7494 (July 12, 1996) (Rep. Smith asserted that same-sex marriage recognition would “trivialize” and “demean” the institution of marriage.)

142 Cong. Rec. H. 7480, 7495 (July 12, 1996) (Rep. Lipinski explained that “gay marriage would be the final straw, … devalue[ing] the love between a man and a woman and weakening us as a Nation.”); 142 Cong. Rec. S. 10067 (Sept. 9, 1996)(Sen. Helms cited William Bennett’s “everlastingly right” contention that “we are already reaping the consequences of devaluation of marriage.”)

The House Judiciary Committee did “add” that Hawaiian marriage recognition was also likely to “have implications on the ability of homosexuals to adopt children as well.” Committee Report on DOMA, supra note 260, at 6. However, as noted above, this realization did not result in any particular recommendation, perhaps because adoption and family law have always been recognize as issues of state law.


There is some support for this construction of DOMA in the legislative record. For instance, Rep. Henry Hyde, Chair of the House Judiciary Committee Report even used the terms “legitimate” and “illegitimate” to distinguish traditional different-sex marriage from same-sex marriage. Committee Report on DOMA, supra note 260, at 12 (quoting from comments during subcommittee markup by House Judiciary Committee Chairman Henry Hyde, Markup Session: H.R. 3396, the Defense of Marriage Act, Committee on the Judiciary, Subcommittee on the Constitution, 104th Cong., 2d Sess. 87 (May 30, 1996)) (“[S]ame-sex marriage, if sanctified by the law … legitimates a public union, a legal status that most people … feel ought to be illegitimate… And in so doing it trivializes the legitimate status of marriage and demeans it…”)


A well-established cannon of statutory construction warrants adoption of plausible readings of a statute when the alternative would raise serious constitutional issues. It is particularly appropriate to apply this doctrine to DOMA, since the Committee Report on DOMA and a number of legislators in the House and Senate debates specifically described a limited view of DOMA in explaining why it would not be unconstitutional under the just-decided Romer case.

J. Conscious Construction of Legislative History and Statutory Simplicity

DOMA is a very short bill, only 330 words long. This was no accident. One of the major stated motivations for DOMA was to “eliminate legal uncertainty concerning Federal benefits, and make it clear what is meant when the words ‘marriage’ and ‘spouse’ are used.”

Given this background, it would be absurd to imagine that Congress intended to use this clarifying legislation to simultaneously alter the definitions of other important terms like “parent” and “child” in a silent and ambiguous manner.

Senator Nickles and other DOMA proponents were acutely aware of how important it is to clarify Congressional intent in both statutory language and the Congressional Record.

During the DOMA debate in the Senate, they repeatedly pointed to Senator Nickles’ prescience in introducing an amendment to the Family and Medical Leave Act of 1993 (FMLA) to define a

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388 Id.
389 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.’”)(citing Crowell v. Benson, 285 U.S. 22 (1932)).
392 142 Cong. Rec. S. 9073 (July 29, 1996)(repeated verbatim upon the reintroduction of DOMA in the Senate as S. 1999); see also 142 Cong. Rec. S. 10100, 10104 (Sept. 10, 1996) (Sen. Lott asserting that “[w]e should have no ambiguity in this area. We should not have confusion.”); Id.(Sen. Nickles reiterating his intent to “eliminate legal uncertainty concerning Federal benefits and make it clear what is meant when the words ‘marriage’ and ‘spouse’ are used in the Federal Code.”); see also, Lynn D. Wardle, Concerning S. 1740: A More Perfect Union – Federalism in American Marriage Law, 1996 WL 390295 at 2 (F.D.C.H) (In his testimony before the House Judiciary Committee, DOMA supporter Professor Wardle explained the purpose of DOMA section three as the elimination of “a potentially serious ambiguity in federal statutes, federal regulations, and federal programs regarding the meaning of ‘marriage’ in federal law, preventing the back-door importation of same-sex marriage into federal law without the approval of Congress.”); Id. at 14; (1996 WL 256695 at 1 (F.D.C.H.) (In his Written Statement to the House Judiciary Committee, Professor Wardle asserts that section three successfully “clarifies any ambiguity ... about the meaning of ‘Marriage’ in federal law should a state legalize same-sex marriage.”)).
393 Several comments during the Congressional debates on DOMA even refer to its goal as clarifying that DOMA was aimed to demonstrate the original intent of Congress when using the words “marriage” and “spouse.” 142 Cong. Rec. H. 7480, 7484 (July 12, 1996) (Rep. Sensenbrenner said that section three is “to make it clear for purposes of Federal law marriage means what Congress intended it to mean, that is, a legal union between one man and one woman...”).
“spouse” as “a husband or wife, as the case may be.” Senator Nickels proudly pointed out his clarification in the earlier floor debate on FMLA, which explained for the record that the amendment was intended to prevent the payment of unpaid leave “to care for an unmarried domestic partner.” The Secretary of Labor later rejected public comments that FMLA should apply to same-sex partners in committed relationships “given this legislative history,” thereby saving the confusion, money and time of litigation. In light of this realization, it would be odd if Senator Nickles and his colleagues intended to redefine parent-child relationships stemming from a same-sex state or foreign marriage with neither appropriate textual support nor comment in their many speeches in the legislative record of DOMA.

IV. DOMA’s LIMITS IN OTHER FEDERAL CONTEXTS:

While there are no reported opinions on whether DOMA limits the recognition of parent-child relationships under the INA, there are some useful administrative and judicial precedents interpreting DOMA in other contexts.

A. DOMA Does Not Affect Social Security Act Benefits Based on Non-Biological Parent-Child Relationships Recognized under the Vermont Civil Union Statute

In 2007, the Office of Legal Counsel (OLC) of the U.S. Department of Justice determined that DOMA “would not prevent the non-biological child of a partner in a Vermont civil union from receiving child’s insurance benefits under the Social Security Act [SSA].” The OLC limited the effect of DOMA to the words “marriage” and “spouse” as they appear in federal law, regulations, and other acts. It pointed out that eligibility for SSA child’s insurance benefits is not conditioned “on the existence of a marriage or on the federal rights of a spouse,” but on “the existence of a parent-child relationship, and specifically, the right to inherit as a child under state law.”

Since the Vermont Civil Union statute provides that “parties to a civil union shall enjoy the same rights, ‘with respect to a child of whom either becomes the natural parent during the

396 Id. (quoting 60 Federal Register 2180, 2191-91 (Jan. 6, 1995)); 142 Cong. Rec. S. 9073 (July 29, 1996) (Sen. Nickles explained the necessity of DOMA based on the precedent of his own prior amendment to the Family and Medical Leave Act of 1993, where “the legislative history” he established “precluded such a broadening of the definition of ‘spouse.’”)
399 Id.
400 Id. at 1.
term of the civil union,” as “those of a married couple[,]” the OLC determined that the non-biological parent-child relationship qualified for purposes of intestate inheritance rights in Vermont. It then concluded that this recognition was not affected by DOMA for several reasons. First, “by its terms,” DOMA does not apply to the status of “child” under the SSA, since it does not require “interpretation of the words ‘marriage’ or ‘spouse’ under the Social Security Act or any other provision of federal law.” Second, the OLC seemed to take solace in the fact that this parent-child relationship was based on a Vermont civil union, not a marriage. However, it would be odd to interpret the law less favorably for the child of another same-sex couple simply because his parents were legally married under state law. Thus, this decision has been construed by some also to cover same sex marriages in Vermont.

B. Issues Regarding the Constitutionality of DOMA and Limiting its Construction

There are serious questions regarding the constitutionality of the general federal definition of marriage in DOMA. In Perry v. Schwarzenegger, the U.S. District Court for the Northern District of California struck down Proposition Eight, California’s state law limiting the definition of marriage to different-sex couples. It held that Proposition Eight is not rationally related to a valid state interest, since it “does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples.” Therefore, it violates the Equal Protection Clause of the Fourteenth Amendment. Scholars have also argued that marriage discrimination against same-sex couples violates other constitutional guarantees, including the due process and establishment clauses.

If Perry v. Schwarzenegger is upheld on appeal, it will cast grave doubt on the constitutionality of DOMA, since DOMA’s federal definition shares similar objectives with California’s Proposition Eight. However, even if Perry v. Schwarzenegger does not survive appellate review, the constitutionality of the federal definition section in DOMA is still in doubt.

401 Id. at 2-3 (citing 15 V.S.A. §1204(f)).
402 Id. at 4.
403 Id.
404 See e.g., Social Security Disability Claims: Practice and Procedure §4:41.1 (reading the OLC legal opinion, under which the SSA is bound, to answer this question “at least as to civil unions or same sex marriages in Vermont.”)
405 704 F.Supp.2d 921 (N.D. Cal. 2010).
406 Id. at 1003.
407 Id. at 1002.
408 See e.g., Gary J. Simson, Beyond Interstate Recognition in the Same-Sex Marriage Debate, 40 U.C. Davis L. Rev. 313, 365-368 & 375-382 (2006)(arguing that same-sex marriage prohibition violates the establishment clause as well as the fundamental right to marry guaranteed under the Constitution’s due process clauses); Mark Strasser, Loving in the New Millennium: On Equal Protection and the Right to Marry, 7 U. Chi. L. Sch. Roundtable 61, 67 (2000)(DOMA “is constitutionally vulnerable on a number of grounds.”)
Several recent opinions have found the federal definition section of DOMA unconstitutional. In *Gill v. Office of Personnel Management*, the U.S. District for Massachusetts found that DOMA’s definitions violate the core constitutional principles of equal protection under the Fifth Amendment. Based on DOMA’s broad reach and its inexplicability according to proffered rationales, the court found that “Congress undertook this classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves.” In a companion case, the same court also found that DOMA’s federal definition section violates the reservations of the Tenth Amendment and the spending clause of article one. Finally, Ninth Circuit Court of Appeals Judge Reinhardt found DOMA unconstitutional under the Due Process Clause of the Fifth Amendment in *In Re Levenson*, ordering that employee benefits be provided to the same-sex spouse of a deputy federal public defender although the benefits otherwise would have been precluded by DOMA.

Even if DOMA is unconstitutional in other contexts, one might argue that it cannot be successfully challenged in the immigration context. Courts have long deferred to Congress’s “plenary” powers relating to the regulation of immigration and nationality issues. However, it is doubtful that this argument should extend to DOMA, which it is not an expression of immigration policy. Although it has significant effects on the treatment of spouses under the

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410 Id. at 396.
412 U.S. Constitution, amend. 10 (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”)
413 U.S. Constitution, Art. 1, §8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States....”)
414 560 F.3d 1145 (9th Cir. 2009).
415 Stephen H. Legomsky, Immigration and the Judiciary: Law and Politics in Britain and America 178-219 (1987)(describing the historic development of the plenary powers doctrine from 1849 through the 1980s); See also e.g., Che Chan Ping v. United States, 130 U.S. 581, 606 (1889)(describing Congressional authority to exclude aliens as “conclusive upon the judiciary”); (Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)(“over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”); 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)); Fiallo v. Bell, 430 U.S. 787 (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).
416 See Titshaw, *Meaning of Marriage*, supra note 11 at 544 n. 15. Even if Congress had expressed an anti-gay immigration policy, it might be vulnerable. Judicial deference regarding immigration certainly weighs no more heavily than deference regarding military matters, and a U.S. District Court has recently struck down the law establishing the “don’t ask, don’t tell” policy in the U.S. armed forces in spite of that deference. --- F.Supp. 2d ----, 2010 WL 3526272 (C.D.Cal. 2010).
INA, DOMA was not aimed at any immigration issue, nor did it amend the INA. Instead, it amended the federal Dictionary Act.\footnote{417}

As illustrated above, DOMA’s immigration consequences were barely recognized during the long debate on the Act.\footnote{418} This is the weakest possible context for deferring especially to Congressional power to regulate immigration. Since there is no reason to believe that DOMA was intended to affect recognition of parent-child relationships in the context of immigration and nationality, “deferring” to Congressional silence clearly would be misplaced in this context.

\section{C. In re Golinski: Reading DOMA Narrowly and Other Statutes Broadly}

Despite its hesitance to strike down immigration legislation as unconstitutional, the Supreme Court has interpreted immigration statutes so as to avoid serious issues of constitutionality.\footnote{419} As the Court noted in \textit{Zadvydas v. Davis}, it is a “cardinal principle” of statutory interpretation 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.’”\footnote{420}

The Ninth Circuit’s Chief Judge Kozinski has already construed the Federal Employee Health Benefits Act (FEHBA) very broadly in order to avoid the serious constitutional questions it would raise if DOMA were applied in that context. In \textit{In re Golinski}, Judge Kozinski expressed grave doubt regarding the constitutionality of DOMA’s federal definition of marriage in the context of federal employee benefits.\footnote{421} Rather than expressly finding DOMA unconstitutional, he found this serious constitutional question sufficient to support a “broader construction” of the Federal Employee Health Benefits Act (FEHBA).\footnote{422} Although the FEHBA covers the “members of their family,” defined as “an employee’s spouse and children,”\footnote{423} Chief Judge Kozinski read this coverage authorization as a set of general guidelines stating minimum

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\begin{itemize}
\item \footnote{417}{Pub. L. No. 104-199, 110 Stat. 2419 (1996).}
\item \footnote{418}{See supra notes 355-60 and accompanying text.}
\item \footnote{419}{\textit{Zadvydas v. Davis}, 533 U.S. 678, 689 (2001)(reading implicit procedural safeguards into INA detention statutes so as to avoid finding them in violation of constitutional due process requirements)(citing \textit{Crowell v. Benson}, 285 U.S. 22 (1932)).}
\item \footnote{420}{\textit{Id.}}
\item \footnote{421}{587 F.3d 901 (9th Cir. 2009).}
\item \footnote{422}{\textit{Id.} at 902-03.}
\item \footnote{423}{5 U.S.C. §8901(5) provides that “‘member of family’ means the spouse of an employee or annuitant and an unmarried dependent child under 22 years of age, including-- (A) an adopted child or recognized natural child; and (B) a stepchild or foster child but only if the child lives with the employee or annuitant in a regular parent-child relationship; or such an unmarried dependent child regardless of age who is incapable of self-support because of mental or physical disability which existed before age 22...”}
\end{itemize}
requirements, but allowing provision of benefits beyond this minimum, including those to
spouses who qualify under state law, but not under federal law. 424

V. INTERPRETING THE TERMS “CHILD” AND “PARENT” UNDER THE IMMIGRATION AND
NATIONALITY ACT

A. General Arguments Against Reading DOMA to Prevent Recognition of Parent-Child
Relationships Under the INA

The federal Defense of Marriage Act (DOMA) states that “In determining the meaning of
any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative
bureaus and agencies of the United States, the word 'marriage' means only a legal union
between one man and one woman as husband and wife, and the word 'spouse' refers only to a
person of the opposite sex who is a husband or a wife.” 425 For now, this closes the door to
recognition of same sex “spouses” under any federal law, including the Immigration and
Nationality Act (INA). 426

Given the rapid increase in families with children headed by married same-sex couples,
their issues are likely to arise more frequently as they encounter the US immigration system
with its heavy emphasis on family unity. Many of these families will be separated or forced to
live abroad because of DOMA’s application to the parents as spouses. Many more might be
separated or forced into de facto exile if DOMA prevented recognition of parent-child
relationships under the INA. Fortunately, that generally should not be the case.

As its sponsors emphasized, the federal definition section of DOMA purports to do only
one “simple” thing, to limit the words “marriage” and “spouse” for all federal purposes to the
context of a “legal union between one man and one woman as husband and wife...” 427 Every indication in the House Judiciary Committee Report, the House and Senate debates, and the
Presidential signing statement demonstrates a very limited intention of DOMA, merely defining
these two words for federal purposes. 428

Since authors and leading legislative proponents of DOMA repeatedly congratulated
themselves on the simple, straightforward language of the Act, while also repeatedly

DOMA’s plain meaning foreclosed any other construction of the FEHB).
and 28 U.S.C. §1738C.
426 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, 314 B.R.
123, 134 (W.D. Wash. 2004).
427 See supra note 253 and accompanying text.
428 See supra notes 253-397 and accompanying text.
referencing the importance of legislative history in clarifying the intended consequences of a bill, it is particularly appropriate to limit DOMA to its plain meaning and expressed legislative intent.\(^\text{429}\) Congressional debate on DOMA focused on refusing benefits to same-sex spouses, and none of the scattered references to children indicated any intent to affect recognition of legal parent-child relationships.\(^\text{430}\) In fact most of the debate ignored even the gay couples’ legal relationships, focusing on the affect that recognizing same-sex marriage could allegedly have on families led by different sex couples and on American society in general.\(^\text{431}\) There were more references to Christianity, Sodom and Gomorrah and the fall of the Greek and Roman empires than there were to federal benefits for gay couples.\(^\text{432}\) Specifically, Congress paid very little attention to immigration consequences in general, and none to immigration consequences with regard to the children of lesbian and gay male parents.\(^\text{433}\)

If Members of Congress had perceived that DOMA would undermine parent-child relationships within families headed by same-sex couples, the Act might not have passed. It certainly would have encountered more vocal opposition. Rep. Steve Largent and other anti-gay members of this same 104th Congress pushed hard to force D.C. to abandon ordinances that would grant benefits to same-sex domestic partners and allow same-sex couples to jointly adopt children.\(^\text{434}\) They repeatedly succeeded at the former but failed at the latter.\(^\text{435}\) The Clinton administration also acquiesced in the denial of domestic partnership benefits, but opposed limitations on adoption by same-sex couples.\(^\text{436}\)

In his DOMA signing statement, President Clinton claimed to have always “strenuously opposed discrimination of any kind, including discrimination against gay and lesbian Americans.”\(^\text{437}\) While it is not clear how he reconciled this idea with the discriminatory treatment of same-sex spouses under DOMA, it would have been much more difficult to ignore discrimination in the allocation of immigration benefits against children on the basis of their parents’ same-sex marriages. The Clinton administration demonstrated recognition of this issue when it worked to eliminate Rep. Largent’s anti-adoption rider to the D.C. appropriations bill.\(^\text{438}\) Thus, President Clinton may have withheld support for DOMA if it were expected to harm children in a similarly tangible manner.

Finally, applying DOMA to prevent recognition of parent-child relationships under the

\(^{429}\text{See supra notes 397-97 and accompanying text.}\)
\(^{430}\text{See supra notes 282-91 and accompanying text.}\)
\(^{431}\text{See e.g., supra note 322 and accompanying text.}\)
\(^{432}\text{See supra notes 307-13 and accompanying text.}\)
\(^{433}\text{See supra notes 355-60 and accompanying text.}\)
\(^{434}\text{See supra notes 300-06 and accompanying text.}\)
\(^{435}\text{See supra notes 303-06 and accompanying text.}\)
\(^{436}\text{See supra note 306 and accompanying text.}\)
\(^{437}\text{DOMA Signing Statement, supra note 258.}\)
\(^{438}\text{See supra notes 306 and accompanying text.}\)
INA would raise serious issues of constitutionality. These constitutional problems auger in
favor of any reasonable construction of DOMA and INA provisions, which avoids serious
constitutional issues by limiting the scope of DOMA as originally intended.

B. Interpreting INA §101(b)(1)(A) - Why “Child Born in Wedlock” Includes the Child of
a Legal Same-Sex Marriage

DOMA does not purport to define the term “born in wedlock,” which is employed in INA
§101(b)(1)(A). Rather, its language is limited to definition of the words “marriage” and “spouse”
as they appear in federal acts, regulations, rulings and interpretations. Its plain meaning does
not reach the meaning of “child born in wedlock” under INA §101(b)(1)(A). Thus, we look to
context, legislative history, and other indicators of legislative intent.

The phrase “born in wedlock” directly relates to the parents’ marriage. While it is
determined by their marriage at a specific point in time, “born in wedlock” actually describes an
attribute of the child, not her parents. Her parents’ relationship can change. However, the
child’s indelible “born in wedlock” label remains, even if her parents later divorce, remarry each
other or someone else, or even die. From the child’s point of view, the category of marriage her
parents maintain is irrelevant. In fact, the inalterable nature of a child’s “legitimate” birth or
birth “in wedlock” is the very reason why Congress was compelled to amend INA §101(b)(1)(A)
in 1995 to change the label affixed at birth to children with missing fathers so that they could be
recognized as “abandoned” to adoption by mothers alone.440

Applying INA §101(b)(1)(A)’s reference to “legitimate child” before 1995, the BIA and
courts consistently referred to the relevant state or foreign family law to determine the child’s
“legitimacy.”441 This was true, even regarding parent-child relationships within polygamous
marriages and other marriages that would not have been recognized for other purposes under
the INA.442 The 1995 change of “legitimate child” to “born in wedlock” altered this definition to
eliminate the possibility that children could be “legitimate” under the INA when their parents
had never married.443

As the BIA appears to have recognized, however, there is no reason to assume this new
wording federalized the meaning of the phrase “born in wedlock.”444 That should still depend
on the relevant family law recognition of birth “in wedlock,” just as “legitimate child” always
relied on state or foreign recognition of legitimacy in the case of children of concubines and
couples involved in a “common law marriage.”445 If Congress had desired to define “in wedlock”

439 See supra notes 405-24 and accompanying text.
440 See supra notes 198-203 and accompanying text.
441 See supra notes 123-33 and accompanying text.
442 See supra notes 134-88 and accompanying text.
443 See supra notes 204-07 and accompanying text.
444 See supra note 206 and accompanying text.
445 See supra note 206-07 and accompanying text.
as well, it could have. In fact, since DOMA was a creature of the same Congress that enacted the 1995 immigration amendments, it should have certainly been aware that it was using the term “in wedlock” or “out of wedlock,” without any reference to the words “spouse” or “marriage,” or any further definition in the INA or in DOMA.

The legislative history of DOMA confirms the plain and limited meaning of DOMA’s definitions of “marriage” and “spouse,” which does not apply to INA §101(b)(1)(A). This history reveals little focus on immigration, let alone any intent to alter the definitions of “child”, “stepchild” or “parent.” Therefore, there is no reason to stretch the meaning of DOMA to apply to parent-child relationships just because the corresponding parental marriage would not be recognized on account of DOMA. This is particularly true because such a broad construction of DOMA would trigger constitutional concerns beyond those inevitably raised by DOMA’s plain meaning. As the US Supreme Court recently recognized in Zadvydas v. Davis, “It is a cardinal principle of statutory interpretation” that a statutory reading raising serious constitutional doubt should be avoided if any alternative reading “is fairly possible by which the [constitutional] question may be avoided.”

C. Interpreting INA §101(b)(1)(B) - Why “Stepchild” Includes the Stepchild of a Legal Same-Sex Spouse

The best textual argument for applicability of DOMA to the definition of “child” under the INA is in the context of stepparent-stepchild relationships covered under INA §101(b)(1)(B). That provision specifically refers to a “stepchild” who “had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred…” Since DOMA provides a definition for “marriage” as used “[i]n determining the meaning of any Act of Congress[,]” it could be read literally to proscribe recognition of a child and his biological parent’s same-sex spouse. This construction would also be consistent, to a point, with the BIA’s understanding of stepparent relationships in the context of polygamous marriages.

While INA §101(b)(1)(B) does employ the word “marriage,” the reasoning above still applies. The language in this subsection focuses primarily upon the child’s status and age at the time she develops a parent-child relationship to her “stepparent,” rather than the parents’ marriage to one another. Given the ambiguity in this section and the lack of intent on the part of legislators to affect parent-child relationships through DOMA, this section too should be read to recognize the relationships of children and their step parents regardless of the sex of the child’s two parents. Although not identical, this approach would be similar to the limited

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446 See supra notes 355-60 and accompanying text.
450 See supra notes 189-94 and accompanying text.
reading of DOMA taken by Chief Judge Kozinski regarding federal benefits in *In re Golinski*\(^{451}\) and by the Bush Justice Department regarding SSA benefits.\(^{452}\)

**D. Interpreting INA §301 – Why the Term “Born ... of Parents” Includes the Child of a Legal Same-Sex Marriage**

Under the DOS’s current construction of INA §301, only genetic parents can transmit their U.S. citizenship to their children, even in the context of a universally recognized different-sex marriage.\(^{453}\) Since INA §309 generally recognizes the transmission of citizenship from a mother or an officially acknowledging father with a “blood relationship” to the child, the DOS’s reading renders INA §301 meaningless with regard to most couples who utilized assisted reproductive technology to conceive children, including same-sex parents.\(^{454}\) However, the DOS’s construction of INA §301 has been rejected by the Ninth Circuit Court of Appeals and criticized by others, including this author.\(^{455}\)

Assuming that it is relevant and generally applicable, there is no serious interpretation of DOMA that would prevent recognition of citizenship transmission to a child born abroad “of” U.S. citizen “parents.” Not only does section 301 fail to include the words “marriage” and “spouse,” but it does not even include other words relating to marital status such as “born in wedlock” or “stepchild.” However, it has been read to apply only to children born in wedlock, so as to avoid a construction of the stricter provisions in INA §309, which expressly applies to children born “out of wedlock.”\(^{456}\)

As described above, family unity is a central goal of the INA, and the BIA and courts have long embraced a liberal understanding of requirements for parent-child recognition.\(^{457}\) This goal is clear not only from the legislative history, but also from the numerous provisions of the INA, which attempt to keep parents and children together, even when one or the other has entered or remained in the U.S. illegally or committed a crime.\(^{458}\) There is no reason to refuse this liberal treatment to parent-child relationships in families headed by same-sex couples as well.

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\(^{451}\) See supra notes 419-24 and accompanying text.

\(^{452}\) See supra notes 398-404 and accompanying text.

\(^{453}\) 7 FAM 1446.2.

\(^{454}\) INA §309; 8 U.S.C. §1409.


\(^{456}\) 8 U.S.C. §1409.

\(^{457}\) See supra notes 65-73 and accompanying text.

\(^{458}\) See supra note 31 and accompanying text.
E. Interpreting INA §§320 & 322—Why “Child” Includes the Child of a Legal Same-Sex Marriage

In most contexts, parent-child relationships covered by Sections 320 and 322 are based on adoption and biological parentage. To that extent, DOMA is obviously irrelevant. However, birth “in wedlock” is relevant in regard to children of U.S. citizen fathers, who have been neither legitimated nor adopted.\(^{459}\) For the same reasons described in the discussion of “born in wedlock” in the context of section 101(b)(1)(A), birth into a same-sex marriage should qualify as birth in wedlock under Sections 320 and 322 as well.\(^{460}\) If anything, the argument is stronger in this context, since there is no express reference to any marriage-related term like “in wedlock” in Sections 320 and 322.

F. Recognizing the Legal Parent-Child Relationships of Children Born into Legally Recognized Unions Other Than Marriage

In order to read INA §§ 301 and 309 in a way that would leave neither meaningless, courts have read the facially broad language of section 301 to apply only in the context of children born in wedlock, in contrast to the express application of section 309 to children born out of wedlock.\(^{461}\) While this is a sensible approach on the basis of traditional assumptions, it may be overly rigid in an era when civil unions, domestic partnerships, and other non-marital relationships are legally recognized, extending a presumption of dual parentage to a child born of one of the partners in the relationship.\(^{462}\)

Since a civil union or registered partnership is not a marriage, reading the term “born in wedlock” as it is normally understood, would not include the children of such relationships. Therefore, they should not qualify under Titles I and II of the INA on the basis of section 101(b)(1)(A). However, the legally recognized “legitimate” children of two parents in a jurisdiction that recognizes civil unions or registered partnerships would not fit easily into the common understanding of “born out of wedlock” either.

In choosing among the two possibilities of birth “out of wedlock” under section 309 and birth not “out of wedlock” (the more precisely required construction of section 309), the child of a civil union would fit under the latter category at least as comfortably as under the former. In reading Sections 301 and 309 together, it would not deprive either section of meaning if section 301 is understood to cover the children of a civil union, registered partnership or other relationship, which – although legal and carrying a presumption of parentage – are not

\(^{459}\) INS Adj. Field Manual Appendix 71-7 (updated June 18, 2007) (“Stepchildren and children born out of wedlock who have not been legitimated, are not included in the definition of ‘child’ used in Title III of the INA.”).

\(^{460}\) See supra notes 440-47 and accompanying text.

\(^{461}\) See supra note 49 and accompanying text.

\(^{462}\) See supra note 49.
designated officially as “marriages.” Moreover, this solution tends to promote the underlying goals of the INA – family unification and the liberal treatment of children.

CONCLUSION:

In the eighteenth century, Blackstone recognized that almost “any distinction ..., would with regard to the innocent offspring of his parents’ crimes, be odious, unjust, and cruel to the last degree[.]”\(^{463}\) This sentiment eventually prevailed in American jurisprudence generally, and it has been recognized in the context of punishing “illegitimate” foreign born children for the perceived sins of their parents since at least the 1920s.\(^{464}\) By the 1950s, most “illegitimacy” based distinctions were swept from the then-new Immigration and Nationality Act,\(^{465}\) INA amendments in 1986 largely finished that job.\(^{466}\) In Plyler v. Doe, the U.S. Supreme Court constitutionalized this principle, finding that children of illegal aliens could not be denied public education because of the actions of their parents.\(^{467}\)

Today’s attempts to indirectly prevent same-sex relationships by disadvantaging the children of those relationships is reminiscent of the way children born out of wedlock were once disadvantaged.\(^{468}\) As the BIA recognized from the 1950s onward, parent-child relationships recognized as “legitimate” under state or foreign law were recognizable under U.S. immigration law as well.\(^{469}\) This also generally included parent-child relationships stemming from unrecognizable polygamous marriages.\(^{470}\) Today, the legally recognized children of same-sex marriages should be recognized under the INA for the same reasons.

Families headed by same-sex couples should be no exception to the long-recognized purpose of family-unity underlying U.S. immigration law. If they were, their exclusion should be based on clear Congressional intent. Neither the text, context, or legislative history of DOMA, however, indicates that it should extend to proscribe recognition of a parent-child relationship under the INA, even where that legal relationship is the result of a same-sex marriage or other relationship.

\(^{463}\) 1 Blackstone, Commentaries on the Laws of England 458 (favoring more lenient “bastardy” laws, Blackstone explained that “… really any other distinction, but that of not inheriting, which civil policy renders necessary, would with regard to the innocent offspring of his parents’ crimes, be odious, unjust, and cruel to the last degree[.]”)

\(^{464}\) 32 Op. Atty. Gen. 162 (1920) (“These rules of the common law were based on the supposition that by subjecting an illegitimate child to severe disabilities, illicit relations between the sexes could be discouraged. This view has now been abandoned.”)

\(^{465}\) See supra notes 105-22 and accompanying text.

\(^{466}\) See supra notes 233-42 and accompanying text.

\(^{467}\) 457 U.S. 202 (1982).

\(^{468}\) While there are no reported cases interpreting DOMA and the INA together in the immigration context, there have been numerous efforts to prevent recognition of parent-child relationships in other contexts, such as adoption by long-term gay foster parents. See e.g., Lofton v. Secretary of Dept. of Family and Children Services, 377 F.3d 1275 (11th Cir. 2004), cert. denied 543 U.S. 1081.

\(^{469}\) See supra notes 123-33 and accompanying text.

\(^{470}\) See supra notes 151-84 and accompanying text.
As long as it exists in its present form, DOMA will force many bi-national same-sex couples to live in different countries, devastating them and their children. Yet limiting DOMA’s application under the INA to the issue of same-sex spousal recognition will at least prevent some parents from having to choose between their children and their country.