

Say “I Do”: The Judicial Duty to Heighten Constitutional Scrutiny of Immigration Policies Affecting Same-Sex Binational Couples

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INTRODUCTION

Eric Affholter knew he was breaking the law.¹ Eric, a former district public defender in St. Louis City, was aware that arranging a sham marriage between a female friend and his gay Peruvian partner, Pedro Cerna-Rojas, could ruin his legal career, lead to his criminal prosecution, and cause his partner’s deportation. But what was his choice? Eric loved Pedro.

The couple met in 2002 when Pedro was pursuing his degree in international business.² They fell in love, and, like many couples, decided to purchase a home and build a life together.³ As Pedro’s student visa neared expiration in 2004, the couple contacted an immigration attorney.⁴ Pedro and Eric found no legal means to keep Pedro in the United States, so Eric arranged a sham marriage between a friend and Pedro in December 2004.⁵

Eric was indicted for marital fraud on June 1, 2007.⁶ Pedro left the country and returned to Peru.⁷ For simply desiring to live in the same country with a man that he loved, Eric faced up to five years imprisonment and a fine of up to \$250,000,⁸ as well as potential suspension or disbarment in Missouri.⁹ On October 12, 2007, U.S. District Court Judge Catherine Perry sentenced Eric to a year of probation and a \$2000 fine.¹⁰ Judge Perry noted that her leniency was due to Eric taking responsibility for his crime and the unlikelihood of a repeat offense.¹¹ Although Eric is now a convicted felon, a

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1. Heather Ratcliffe, *Sham Marriage Nets Year of Probation*, ST. LOUIS POST-DISPATCH, Oct. 13, 2007, at A10.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* “A marriage is a sham ‘if the bride and groom did not intend to establish a life together at the time they were married.’” *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979) (quoting *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975) (emphasis omitted)).

6. Robert Patrick, *Charges Reveal Immigration Dilemma for Gay Couples*, ST. LOUIS POST-DISPATCH, June 11, 2007, at B1.

7. *Id.*

8. 8 U.S.C. § 1325(c) (2006).

9. On November 20, 2007, the Missouri Supreme Court suspended Eric Affholter’s law license for two years. *Former Public Defender’s Law License is Suspended*, ST. LOUIS POST-DISPATCH, Nov. 21, 2007, at B4.

10. Ratcliffe, *supra* note 1, at M1.

11. *Id.*

crowd of supporters applauded him as he left the courtroom.¹² More than sixty supporters wrote Judge Perry asking for leniency.¹³ Eric's father, Lloyd Affholter, wrote in his plea, "Wrong yes, but the crime was not an act of malice, but an act of love."¹⁴

Consider another scenario:¹⁵ Nancy, a U.S. citizen, meets and falls in love with Jane, a British citizen. Jane, an affluent woman, planned to move to the United States, purchase a home, pay taxes, and generally contribute to the U.S. economy. However, this proved to be impossible since Jane is a foreign-national woman involved with another woman. The process was complicated and hostile:

I tried to find a legal way of staying with my partner in the US but this proved to be difficult, demoralising, degrading and even quite hostile at times. At the time I had a visa that allowed me 6 months stay at a time in the US. As I entered the country on my last visit, the official at passport control said "you are coming to the US too much." Of course there is no word of what constitutes "too much." I said that my visa only had another six months to run and he merely said "we can invalidate your visa at any time."¹⁶

Jane tried to acquire a professional working visa; however, Jane needed to qualify as a professional and have a position within a particular field in order to procure this visa.¹⁷ Obtaining an E2 visa can be difficult: the government only issues approximately 40,000 each year,¹⁸ and these visas are gone within the first few days of the year. As Jane states, "I was constantly being told by Attorneys [sic] that the easiest way to get in to the U.S. was to marry an American. If that route had been open to me I certainly would have done that, but I could not as America discriminates against same[-]sex partnerships."¹⁹ As a result, Nancy left the United States. She lamented,

It is not fair that we could not have stayed in America and lived and worked there. If I had been a man, there would not have been a problem. There are different laws for "straight" people in the US. The UK does not just let anyone into their country, but they do not discriminate against same[-]sex partnership.²⁰

12. *Id.*

13. *Id.*

14. *Id.*

15. The first-person narrative of Nancy and Jane's visa experience is on file with the *Indiana Law Journal* [hereinafter Narrative]. For other examples of the hardships faced by same-sex, binational couples, see SCOTT LONG, JESSICA STERN & ADAM FRANCOEUR, HUMAN RIGHTS WATCH & IMMIGRATION EQUAL., FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW (2006) [hereinafter FAMILY, UNVALUED].

16. Narrative, *supra* note 15.

17. See Bureau of Consular Affairs, U.S. Dep't of State, Employment-Based Visas, http://travel.state.gov/visa/immigrants/types/types_1323.html.

18. See Bureau of Consular Affairs, U.S. Dep't of State, Visa Bulletin for Dec. 2007, http://travel.state.gov/visa/frvi/bulletin/bulletin_3841.html.

19. Narrative, *supra* note 15.

20. *Id.*

Same-sex binational couples face tremendous obstacles to maintaining their loving, committed relationships in the United States.²¹ Like Eric and Nancy, their choices frequently are limited to marital fraud or leaving the country. With the passage of the federal Defense of Marriage Act (DOMA) in 1996, Congress strictly defined marriage as the union between a man and a woman, which effectively barred gay and lesbian couples from marriage and its legal entitlements.²² Federal law provides more than 1138 benefits, rights, and protections on the basis of marital status.²³ One legal entitlement of marriage is the relative ease with which a heterosexual binational couple may acquire a visa for the non-citizen spouse.²⁴ The immigration problems for same-sex binational couples have two main causes: first, that immigration law is family-centered, and second, that the U.S. government refuses to recognize same-sex marriage and same-sex families. What is a person to do if U.S. immigration law and policy will not recognize his or her family as a family? What is the role of the judiciary in this problem? Although the Constitution confers on Congress what the Supreme Court has described as plenary power to create and regulate immigration law,²⁵ this Note argues that it is appropriate for the judiciary to be less deferential to Congress in these matters in order to protect U.S. citizens from constitutional infringements created by these laws.

This Note will explore the constitutionality of immigration law's discrimination against same-sex binational couples—that question is contingent upon the constitutionality of same-sex marriage bans in general—and the role the judiciary should play in remedying this situation. Part I evaluates the constitutionality of same-sex marriage bans and argues that a heightened form of scrutiny should be applied to challenges to these bans. Part II describes current immigration law, its overarching policies, and how these laws affect same-sex binational couples. Part III scrutinizes Congress' plenary power and the judiciary's deference to this power despite the historical use of immigration law to discriminate against gays and lesbians and various ethnic groups. Finally, this Note proposes that the discrimination against U.S. citizens

21. For this Note, a binational couple is defined as a couple composed of one U.S. citizen partner and one foreign-national partner. Furthermore, this Note only focuses on civil marriages, not civil unions.

22. 28 U.S.C. § 1738(c) (2006).

23. See U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004).

24. See FAMILY, UNVALUED, *supra* note 15, at 8.

25. See U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish a uniform Rule of Naturalization."). The Supreme Court has held that Congress should be given wide discretion in matters of immigration because of its plenary power to regulate this matter. "The Court without exception has sustained Congress's 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (citing *Boutilier v. INS* 387 U.S. 118, 123 (1967)). But see *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) ("But that [plenary] power is subject to important constitutional limitations."); *INS v. Chadha*, 462 U.S. 919, 941–42 (1983) (stating that Congress must choose "a constitutionally permissible means of implementing" that power); *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889) (stating that congressional authority is limited "by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations").

in same-sex binational couples warrants heightened judicial scrutiny of immigration laws and less deference to Congress' plenary power than what the courts historically have given to immigration matters.

I. CONSTITUTIONAL ARGUMENTS FOR LEGAL RECOGNITION OF SAME-SEX MARRIAGE

A constitutional challenge to immigration laws as discriminatory against same-sex binational couples is contingent upon a successful constitutional challenge to same-sex marriage bans, particularly the federal DOMA. The constitutionality of same-sex marriage bans has been analyzed exhaustively in scholarly literature, so this Note will only provide a brief analysis of this issue.²⁶ Currently, the Supreme Court has not recognized sexual orientation as a suspect classification that warrants heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment.²⁷ Given that same-sex marriage bans can likely survive rational basis scrutiny,²⁸ this Part briefly examines three constitutional arguments for heightened scrutiny analysis, which the same-sex marriage bans could not withstand.

A. Substantive Due Process Arguments

1. The Fundamental Right to Marry

The Supreme Court has held that marriage is a fundamental right and has derived this right from the liberty implicit in the Due Process clause of the Fifth and Fourteenth Amendments.²⁹ *Loving v. Virginia* carefully advanced this argument: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."³⁰ The Court stated that

[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of

26. See generally EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION (2004) (offering an in-depth overview of the constitutional arguments against same-sex marriage bans); DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE (2006) (providing first-person accounts from same-sex couples, politicians, and political activists in specific states where the issue has been contested, as well as analysis of the judiciary's role in this debate); SAME-SEX MARRIAGE: PRO AND CON: A READER (Andrew Sullivan ed., 1997) (providing a collection of the arguments for and against same-sex marriage, including the House and Senate debates on the Defense of Marriage Act).

27. GERSTMANN, *supra* note 26, at 41.

28. *Id.* Courts frequently find that the state can advance rational reasons for limiting marriage to opposite-sex couples. Such reasons include promoting stability in families, fostering the traditional family, or refusing to create a state endorsement of homosexual behavior. *E.g.*, *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (concluding that the New York legislature has rational reasons for creating the same-sex marriage ban). *Contra* *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (holding that the Massachusetts same-sex marriage ban statute does not survive rational basis review).

29. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

30. 388 U.S. at 12.

the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. . . . Under our Constitution, the freedom to marry or not marry a person of another race resides with the individual and cannot be infringed upon by the State.³¹

The fundamental right to marry extends beyond the right to marry an individual of another race.³² In *Zablocki v. Redhail*, the Court observed, “[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals.”³³ Because the Court’s precedents clearly state that the right to marry is of “fundamental importance,” when a statute significantly interferes with the exercise of that right, the Court has stated that “‘critical examination’ of the state interests advanced in support of the classification is required.”³⁴ Therefore, the Court’s opinion should be interpreted as requiring the judiciary to examine carefully the constitutionality of any statute that interferes with the fundamental right to marry, including the rights of same-sex couples. Furthermore, because the *Zablocki* precedent applies to all situations in which the fundamental right to marriage is burdened,³⁵ it is a logical argument that this right should be extended to same-sex couples.³⁶

2. *Lawrence*’s Universality of Fundamental Rights

The Supreme Court’s marriage precedent centers on the right to order one’s private interactions and family without government intrusion. In *Lawrence v. Texas*, the Court advanced this idea in a manner that is particularly favorable to those seeking legal

31. *Id.*

32. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

33. *Id.*

34. *Id.* at 383.

35. Even prison inmates are entitled to the fundamental right of marriage if the right does not contravene some “legitimate penological objective.” *Turner v. Safley*, 482 U.S. 78, 95–96 (1987).

36. The argument against extending the fundamental right to marriage to same-sex couples is rooted in reinforcing the historical definition of marriage as a union between one man and one woman, and protecting the institution from “revisionism.” 142 CONG. REC. 17,073 (1996) (statement of Rep. Seastrand); *see also* 142 CONG. REC. 17,079 (1996) (statement of Rep. Canady) (stating that seventy percent of Americans oppose same-sex marriage because they feel it is immoral and should not be elevated to the status of heterosexual unions). Opponents also argue that marriage is predicated on the right to procreate, and therefore, by definition, marriage is dual-gendered. GERSTMANN, *supra* note 26, at 85. Although the Supreme Court has mentioned the important link between marriage and raising children, *see Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), the Court has never held that the fundamental right to marry is contingent upon a couple’s ability to have children. *See Turner*, 482 U.S. at 95–96; *Zablocki*, 434 U.S. at 386. This argument also fails because people who are unable to have children, for example, the elderly and the infertile, are allowed to marry, and proving a person’s fertility would be a violation of privacy. *See GERSTMANN, supra* note 26, at 93–96.

recognition of same-sex marriage.³⁷ *Lawrence* recognized the human dignity of gays and lesbians and the universality of fundamental rights.³⁸

In *Lawrence*, the Court held that the Texas statute criminalizing homosexual sodomy was unconstitutional because the liberty protected by the Fourteenth Amendment affords all people the right to engage in certain personal and private conduct without the intervention of the government.³⁹ Justice Kennedy, writing for the majority, stated that “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct” and that this liberty protects a person from unwanted governmental intrusion.⁴⁰ Relying heavily on *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴¹ the *Lawrence* Court stated that “our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, [and] family relationships.”⁴² Homosexual persons may use this constitutionally protected autonomy to make these personal decisions “just as heterosexual persons do.”⁴³ With this statement, Kennedy acknowledged that homosexuals, like heterosexuals, are entitled to the protection the Constitution affords.

Justice Kennedy carefully skirted the constitutional issue of formal governmental recognition of same-sex marriages and civil unions by stating that “[the present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”⁴⁴ His opinion nonetheless strongly favored the legal recognition of same-sex marriage. By emphasizing the essential liberties and autonomy afforded to all U.S. citizens, Kennedy stressed the more general notion of the fundamental rights of liberty, privacy, and autonomy as opposed to a more specific fundamental right of gays and lesbians to engage in sodomy. This framing of the liberty at stake facilitates the argument that same-sex marriage bans violate the Due Process Clause because they violate a universal right, as opposed to a special right for gays and lesbians. By strengthening an individual’s right to make decisions concerning one’s personal life without governmental interference, *Lawrence* strengthens the argument that gays and lesbians are entitled to the same fundamental rights heterosexuals already receive.

It is striking that although the Court based its analysis on privacy cases where strict scrutiny had been applied, the opinion did not follow this standard course and refer to a fundamental right or strict scrutiny analysis.⁴⁵ The Court’s ambiguity on the underlying fundamental interest and the applicable level of scrutiny does not undermine the importance of the opinion and its declared principles, even though it does complicate their application. *Lawrence* reaffirms the idea that the Due Process Clause protects the

37. *Lawrence v. Texas*, 539 U.S. 558 (2003).

38. GERSTMANN, *supra* note 26, at xi.

39. 539 U.S. at 578.

40. *Id.* at 562.

41. 505 U.S. 833 (1992).

42. *Lawrence*, 539 U.S. at 573–74 (quoting *Casey*, 505 U.S. at 851).

43. *Id.* at 574.

44. *Id.* at 578.

45. Renee M. Landers, *A Marriage of Principles: The Relevance of Federal Precedent and International Sources of Law in Analyzing Claims for a Right to Same-Sex Marriage*, 41 NEW ENG. L. REV. 683, 694 (2007).

right to order one's personal life free from government intrusion. Furthermore, *Lawrence* advances this right by applying the protection to gay and lesbian citizens. This right so closely mirrors the liberty interests described in the privacy cases, upon which the Court expressly relies, that it seems that the Court in fact applied some form of heightened scrutiny. In the future, courts should adhere to this heightened scrutiny when relying on the jurisprudence set forth in *Lawrence*.⁴⁶

Lawrence is significant because it moves past an idea of "gay rights" and special privileges for gays and lesbians, and moves toward an idea of fundamental rights to which all citizens are entitled. The Court's precedent establishes both that marriage is a fundamental right and that homosexuals, like heterosexuals, are entitled to the liberty rights derived from the Due Process Clause. The right to order one's personal life free of government intrusion should include the right to marry a person of one's choice, regardless of whether that person is of the opposite or the same sex. As a result, the fundamental right to marry should be recognized for same-sex couples.

B. Same-Sex Marriage Bans as Sex Discrimination: The Equal Protection Argument

Another constitutional basis for challenging same-sex marriage bans that would require heightened scrutiny derives from the Equal Protection Clause of the Fourteenth Amendment, which operates "to protect disadvantaged groups from discriminating practices, however deeply engrained or longstanding."⁴⁷ When conducting constitutional analysis with the Equal Protection Clause, the baseline is "a principle of equality that operates as a criticism of existing practice . . . it protects against traditions, however long-standing and deeply rooted."⁴⁸ "All successful cases for same-sex marriage rights have relied at least in part on an equal protection argument."⁴⁹

Two interrelated arguments comprise the equal protection argument: first, same-sex marriage bans facially discriminate on the basis of sex (the formal argument), and second, the rationales offered as justifications for sex-based classifications in these bans rely upon sex stereotypes that are an impermissible basis for government action (the sex-stereotyping argument).⁵⁰

46. Recently, two circuits of the U.S. courts of appeals have recognized that the *Lawrence* precedent "requires something more than traditional rational basis review." *Witt v. Dep't of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008). In *Witt*, the Ninth Circuit stated that the *Lawrence* Court's reasoning for overruling *Bowers v. Hardwick* was inconsistent with rational basis review and evidenced that the Court applied a heightened level of scrutiny in *Lawrence*. *Id.* at 817; see also *Cook v. Gates*, 528 F.3d 42, 52 (1st Cir. 2008) ("[W]e are persuaded that *Lawrence* did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy and applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label."). But see *Lofton v. Sec'y of the Dept. of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (holding that *Lawrence* did not apply strict scrutiny).

47. Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

48. *Id.* at 1174.

49. Justin Reinheimer, *Same-Sex Marriage Through the Equal Protection Clause: A Gender-Conscious Analysis*, 21 BERKELEY J. GENDER, L. & JUST. 213, 227 (2006).

50. See Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 462

The formal argument proposes that same-sex marriage bans discriminate on the basis of sex because these bans exclude same-sex couples from the right to marriage on the basis of the sex of their partners.⁵¹ This argument suggests that same-sex marriage bans facially discriminate on the basis of sex because, for example, if a woman seeks to marry another woman, she is denied the marital right because she is not a man.⁵² This argument originates from *Loving v. Virginia*, in which the Court held that the Virginia miscegenation statute violated the Equal Protection Clause.⁵³ Some members of the judiciary have summarily dismissed the formal argument because of the equal application of the discrimination to both men and women.⁵⁴ The Supreme Court expressly rejected such an “equal application” argument in *Loving*.⁵⁵ Another reason the formal argument lacks strength is that many members of the judiciary accept the notion that the racial segregation that motivated the miscegenation statutes in *Loving* was much more egregious and insidious than the motives for same-sex marriage bans,⁵⁶ that the contexts of the constitutional violations are not similar, and that the discrimination is not of equal magnitude.⁵⁷

On the other hand, the sex-stereotyping argument is more persuasive and successful than the formal argument. When upholding same-sex marriage bans, courts justify the bans by using arguments that rely on traditional gender roles within a traditional nuclear family.⁵⁸ Many of these arguments rest on the notion that traditional marriage can be the only true marriage because it promotes the “true nature” of men and women—that is, the “inherent” complementariness of men and women.⁵⁹ These sex-based classifications in same-sex marriage bans rely on “gender-based stereotypes that tend to perpetuate traditional gender hierarchies and limit the freedom of both women and men to choose how to structure their lives and relationships.”⁶⁰

Gender-role arguments run contrary to the constitutional norm that the government in its treatment of individuals be gender neutral.⁶¹ When states create legislation that

(2007).

51. See GERSTMANN, *supra* note 26, at 45. For a detailed analysis of the formal sex discrimination argument, see generally Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994). See also *In re Marriage Cases*, 183 P.3d 384, 435–40 (Cal. 2008) (analyzing the California same-sex marriage ban through both the formal and the sex-stereotyping argument).

52. See *Hernandez v. Robles*, 855 N.E.2d 1, 29 (N.Y. 2006) (Kaye, J., dissenting).

53. See *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

54. See *Hernandez*, 855 N.E.2d at 10–11.

55. See *id.* at 8.

56. See *Hernandez*, 855 N.E.2d at 11; GERSTMANN, *supra* note 26, at 47–49.

57. See GERSTMANN, *supra* note 26, at 47–49.

58. *Hernandez*, 855 N.E.2d at 7 (justifying the New York same-sex marriage ban because the legislature could rationally believe that it is better for children to grow up with both a mother and a father); *Morrison v. Sadler*, 821 N.E.2d 15, 29–31 (Ind. Ct. App. 2005) (stating that the Indiana legislature has a rational reason to create laws, like Indiana’s same-sex marriage ban, that promote “responsible procreation” in order to create stable, two-parent homes for children); *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 461–63 (Ariz. Ct. App. 2004) (holding that the Arizona legislature’s concern with procreation and protecting children is a rational basis for restricting the right to marry to opposite-sex couples).

59. See Widiss et al., *supra* note 50, at 500.

60. *Id.* at 480.

61. *Id.* at 463; see also *United States v. Virginia*, 518 U.S. 515, 533–34 (1996).

discriminates on the basis of sex, heightened scrutiny analysis is triggered.⁶² To withstand a constitutional challenge, “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”⁶³ The Supreme Court typically has rejected sex-based classifications resting on stereotypes about the proper roles of the sexes, noting that “[t]he purpose of requiring the close relationship [between gender-based classifications and important governmental objectives] is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.”⁶⁴ The Court has rejected these gender-role reinforcing arguments in the context of equal access to schools,⁶⁵ employment discrimination,⁶⁶ and child support.⁶⁷ Most importantly, the Court did not require the plaintiffs in these cases to prove that the statutes were rooted in a desire to subordinate women. Rather, the Court found the practices unconstitutional because they each relied on and gave credence to gender roles and stereotypes and drew express lines based on gender.

In analyzing bans on same-sex marriage, courts must ascertain whether the statutory objective of these bans reflects archaic and stereotypic gender notions.⁶⁸ Because same-sex marriage bans reflect these gender notions and draw gender lines, courts should apply heightened scrutiny. Many courts, however, have not considered such factors.⁶⁹ In *Hernandez v. Robles*, the New York Court of Appeals relied on traditional notions of the proper roles of men and women and perpetuating these roles to children in upholding a same-sex marriage ban.⁷⁰ In *Morrison v. Sadler*, the Indiana Court of Appeals embraced stereotypes of vulnerable women and philandering men and the necessity of heterosexual marriage to protect women from being left pregnant and alone.⁷¹ Decisions such as *Hernandez* and *Morrison* that support same-sex marriage bans, in effect, reinforce ideas of feminine weakness, women’s proper place in society, and the value of traditional male-headed households. Endorsing sex-based classifications on the grounds that men and women, by virtue of their gender,

62. *United States v. Virginia*, 518 U.S. at 532–33.

63. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

64. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725–26 (1982).

65. *See United States v. Virginia*, 518 U.S. at 533–34 (“‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. . . . [Sex-based] classifications may not be used . . . to create or perpetuate the legal, social, and economic inferiority of women.”); *Hogan*, 458 U.S. at 725–26.

66. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–52 (1989) (stating that Title VII protects women from employment discrimination that is based on sex stereotyping).

67. *See Stanton v. Stanton*, 421 U.S. 7, 17 (1975) (invalidating a Utah statute requiring parents to support their sons until age twenty-one, but their daughters only until age eighteen, because the state defended the statute relying on “old notions” that a man needs more education and training to provide a home for his family).

68. *See* Widiss et al., *supra* note 50, at 485.

69. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 435–39 (Cal. 2008) (examining the sex-stereotyping argument, and after a thorough inquiry, dismissing it as a basis for strict scrutiny of the California same-sex marriage ban).

70. *See* 855 N.E.2d 1, 7 (N.Y. 2006).

71. *See* 821 N.E.2d 15, 29–31 (Ind. Ct. App. 2005).

necessarily play different roles in the lives of their children and in their relationships harms both women and men, and therefore, these classifications should be rejected as sex discrimination.⁷² Courts must look at the underlying sex-based classifications in these bans and engage in reasoned analysis rather than a simple application of traditional assumptions about the proper roles of men and women.⁷³ Because these bans reinforce gender roles and the Supreme Court has rejected traditional gender roles as an important governmental interest justifying gender-based classifications,⁷⁴ same-sex marriage bans should not withstand heightened scrutiny.

C. The Equal Citizenship Argument

Another approach to challenging the constitutionality of same-sex marriage bans uses the concept of equal citizenship advanced by Kenneth Karst. Underlying the Fourteenth Amendment is a core principle of equal citizenship,⁷⁵ and “the essence of equal citizenship is the dignity of full membership in society.”⁷⁶ Equal citizenship “gives every citizen a right to be treated as a respected and responsible participant in community public life.”⁷⁷ In essence, equal citizenship requires that society treat each individual as a person who belongs—a person entitled to societal respect and to participate in society.⁷⁸ Equal citizenship guards against degradation of a particular person or group and the imposition of any stigma to that person or group.⁷⁹ Thus, any society that embraces equal citizenship will rebuff any inequalities that impose a stigma onto a person or group.⁸⁰

According to Karst, the equal citizenship argument is a crucial part of both the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments.⁸¹ Karst points to the *Lawrence* opinion as an example of how basing an argument in the Due Process Clause advances the Equal Protection Clause’s purpose: “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”⁸² By advancing the core principles of equal citizenship, *Lawrence* represents an important step toward recognizing that the essence of legal equality is to protect all persons’ substantive rights at the same level.⁸³ *Lawrence*’s treatment of substantive due process requires the government to offer

72. Widiss et al., *supra* note 50, at 505.

73. *See id.* at 485.

74. *See supra* text accompanying notes 64–67.

75. *See* Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 102 (2007) [hereinafter *Equal Citizens*].

76. Kenneth L. Karst, *The Supreme Court 1976 Term: Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5 (1977).

77. *Equal Citizens*, *supra* note 75, at 102.

78. Karst, *supra* note 76, at 6.

79. *Id.*

80. *Id.*

81. *See Equal Citizens*, *supra* note 75, at 100–02.

82. *Id.* at 136 (quoting *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)).

83. GERSTMANN, *supra* note 26, at xi.

persuasive justification for an invasion of liberty that stigmatizes a social group and denies its members the status of respected equal citizens.⁸⁴

Equal citizenship is an academic theory. The Court has not explicitly recognized it, nor formulated a level of scrutiny that should be applied to cases alleging a denial of equal citizenship. The *Lawrence* decision appears to recognize the principle,⁸⁵ so it could be deduced that the level of scrutiny applied to equal citizenship constitutional challenges would be the level of scrutiny applied in *Lawrence*. Unfortunately, the *Lawrence* majority never explicitly stated the level of scrutiny it applied, making application of the *Lawrence* level of scrutiny to other cases very difficult.⁸⁶

However, equal citizenship is both a distillation of the principles underlying the Due Process and Equal Protection Clauses and the fundamental idea behind the Fifth and Fourteenth Amendments. “[It] is not a rule for decision but a principle, a norm ‘which officials must take into account.’”⁸⁷ Karst argues that equality, the crux of equal citizenship, is a fundamental interest and that the government would have to advance a compelling interest in order to justify an invasion into this right.⁸⁸ As a result, arguing the principles of equal citizenship along with an equal protection or due process argument could only help advance those arguments. One could assume that heightened scrutiny should be applied to constitutional challenges under an equal citizenship argument.

The equal citizenship argument, independent of the Due Process and Equal Protection Clauses, provides strong support for challenges to same-sex marriage bans because they deny gays and lesbians full societal membership. A same-sex marriage ban explicitly excludes same-sex couples from the fundamental right of marriage, thereby sending the message that same-sex couples are not entitled to the same benefits and privileges associated with marriage that opposite-sex couples receive. The sentiment behind these bans—“You do not belong”—stigmatizes gays and lesbians individually and as a group. Same-sex marriage bans prohibit homosexuals from fully participating in society. In turn, gays and lesbians lose the respect of society since they become a group of second-class citizens who are not entitled to marriage. Under this argument, same-sex marriage bans contradict the equal citizenship principle of the Fifth and Fourteenth Amendments.

After an examination of the due process, equal protection, and equal citizenship arguments challenging the constitutionality of same-sex marriage bans, this Part has established that heightened scrutiny should be applied when analyzing these bans, and that the bans cannot withstand these constitutional challenges. Assuming same-sex marriage bans would not withstand constitutional challenges under a heightened scrutiny review, Part II will analyze the structure of immigration law, its underlying policies, and how it applies to same-sex binational couples.

84. *Equal Citizens*, *supra* note 75, at 141.

85. *See supra* text accompanying note 82.

86. *See supra* text accompanying notes 45–46.

87. Karst, *supra* note 76, at 41.

88. *See id.* at 40–42.

II. THE IMMIGRATION LEGISLATION AND IMPEDIMENTS

Same-sex binational couples must navigate the hostile waters of immigration law in order to maintain their loving relationships in the United States. Because civil marriage is not available to them, the foreign national of the same-sex couple must seek other ways to acquire legal permanent resident status. This Part outlines the immigration avenues available to same-sex binational couples, the policies underlying the current immigration law structure, and the impact of the federal Defense of Marriage Act, which acts as a huge impediment for same-sex binational couples.

A. The Family-Based Immigration Policy

A foreign national has four routes to become a legal permanent resident: (1) family sponsorship, (2) employment-based preferences, (3) the diversity program, or (4) refugee status.⁸⁹ Although the original Immigration and Nationality Act of 1952 (“INA of 1952”) laid the foundation for the current employment-based and family-based categories for immigration, the current immigration scheme, the Immigration Act of 1990 (“IA of 1990”),⁹⁰ specifically was structured to encourage family unification and family-based immigration.⁹¹ Current immigration law awards immigrant visas largely to those who have family ties to the United States.⁹² For example, in 2006, 1,266,129 people became legal permanent residents of the United States.⁹³ Nearly two-thirds of these individuals were granted this status based on familial relationships.⁹⁴ Spouses of U.S. citizens accounted for 339,843 legal permanent residents, more than one-quarter of the entire group.⁹⁵

Immigration law also privileges the marital relationship.⁹⁶ Spouses of U.S. citizens experience a much shorter waiting period to achieve legal permanent resident status than do spouses of green card holders because the spouses of citizens are classified as “immediate relatives.”⁹⁷ Immediate relatives are defined as “children, spouses, and parents of a citizen of the United States.”⁹⁸ Immediate relatives are not subject to any immigration numerical limitations.⁹⁹ Since immediate relatives are exempt from numerical limitations, the process moves faster because immigration becomes only a

89. See KELLY JEFFREYS & RANDALL MONGER, DEP’T OF HOMELAND SEC. ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2007, at 1–4 (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR_FR_2007.pdf [hereinafter DHS ANNUAL FLOW REPORT].

90. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

91. Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J. C.R. & C.L. 345, 357 (2007).

92. See *id.* at 358.

93. DHS ANNUAL FLOW REPORT, *supra* note 89, at 2.

94. See *id.* at 3.

95. *Id.*

96. Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1636 (2007).

97. *Id.*

98. 8 U.S.C. § 1151(b)(2)(A)(i) (2006).

99. See *id.*

matter of processing paperwork and standard bureaucratic delays.¹⁰⁰ For other family-preference immigrants who are subjected to the numerical limitations, the wait to acquire an immigrant visa is approximately five years.¹⁰¹ Undoubtedly, a foreign national with a U.S. citizen spouse has an advantage when trying to achieve legal permanent resident status.

The Congressional Record illustrates Congress' goal to create an immigration policy that emphasizes the family and family unification.¹⁰² Representative Bonior explained that "[t]he number of slots would be expanded so that children and spouses of permanent residents may join their families in this country."¹⁰³ He called the legislation "pro[-]family" and advocated for the family reunification amendments because "it is anti[-]family to allow such long separations," and the separations can lead to illegal immigration because it would then be the only means for many families to reunite more quickly.¹⁰⁴ He added that Congress "should not be denying immigrant families *the most fundamental right*—the chance to be together."¹⁰⁵ Representative Fish concurred that "the cornerstone of our immigration policy in this legislation remains steadfast . . . and that is family reunification."¹⁰⁶ Clearly, Congress intended to create an immigration policy that united families.

B. The DOMA Complication

Because immigration policy is family-centric, Congress' definitions of "family" and "spouse" determine who may or may not acquire residency in the United States. Congress defines "spouse" and "marriage" in the Defense of Marriage Act (DOMA) and by extension, limits the definition of family for immigration purposes. Enacted on September 21, 1996, DOMA¹⁰⁷ limits the definition of a marriage to a legal union between a man and a woman and requires no state to acknowledge same-sex marriages contracted in another state.¹⁰⁸ DOMA must be read in conjunction with 1 U.S.C. § 7, which states that in determining the meaning of any act of Congress, "marriage" is defined as "only a legal union between one man and one woman as husband and wife," and "spouse" is to be defined "[to refer] only to a person of the opposite sex who is a husband or a wife."¹⁰⁹

Even though the discrimination of same-sex binational couples did not begin or end with DOMA,¹¹⁰ its negative impact on same-sex binational couples cannot be

100. Abrams, *supra* note 96, at 1636.

101. *See id.*

102. *See* 136 CONG. REC. 27,072 (1990) (statement of Rep. Bonior).

103. *Id.*

104. *Id.*

105. *Id.* (emphasis added).

106. 136 CONG. REC. 27,073 (1990) (statement of Rep. Fish).

107. 28 U.S.C. § 1738C (2000) ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.").

108. Francoeur, *supra* note 91, at 357.

109. 1 U.S.C. § 7 (2006).

110. *See infra* Part III.A–III.C.

overstated.¹¹¹ Because DOMA refuses to recognize same-sex marriage or any union of a same-sex couple, spousal immigration benefits cannot be conferred on same-sex binational couples. Given that spousal immigration accounts for a quarter of the legal permanent residents and immigration law fails to recognize same-sex marriages, same-sex binational couples are disadvantaged to a significant degree when compared with their heterosexual counterparts. Most importantly, due to DOMA's construction of the terms "marriage" and "family," it essentially undermines Congress' intent to have a family-centric immigration policy by dividing the families that are created by same-sex binational couples. The practical effect of DOMA and the family-sponsorship immigration method contravenes the family-centric legislative intent behind the IA of 1990.

III. THE INTERPLAY BETWEEN CONGRESS' PLENARY POWER AND THE HISTORICAL DISCRIMINATORY PRACTICES IN IMMIGRATION LAW

The Supreme Court gives Congress wide latitude to regulate entry into the United States and has held that this is one of the "plenary powers" given to the legislature in the Constitution.¹¹² The plenary powers doctrine, the doctrine that establishes Congress' absolute authority over immigration, originated in the 1880s and created a deferential approach for the courts to the immigration laws.¹¹³ Beginning with the *Chinese Exclusion Case*, Congress' power "to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments."¹¹⁴ Congress' plenary power over immigration derives from "the right of the sovereign to protect itself from the invasion of outsiders and the right to expel outsiders once they have gained physical access to the United States."¹¹⁵ The Court has found that only limited judicial inquiry into matters of immigration legislation is justified because of the inherently political nature of these policies.¹¹⁶

Because immigration laws have been essentially immune from judicial constraint, "the political process allows the majority to have its way with noncitizens."¹¹⁷ The judiciary's deferential approach creates inconsistencies in the application of

111. For a thorough discussion of the effect DOMA has on the INA, see generally Matthew S. Pinix, *The Unconstitutionality of DOMA + INA: How Immigration Law Provides a Forum for Attacking DOMA*, 18 GEO. MASON U. CIV. RTS. L.J. 455 (2008).

112. *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 604–06 (1889); see also FAMILY, UNVALUED, *supra* note 15, at 13. The court based its reasoning on U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization.").

113. Janel Thamkul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CAL. L. REV. 553, 557–58 (2008).

114. *Chinese Exclusion Case*, 130 U.S. at 606–07.

115. *Abrams*, *supra* note 96, at 1644.

116. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

117. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1120 (1998).

constitutional protections such as due process and equal protection,¹¹⁸ and at times becomes a complete abdication of the judiciary's role as a check on congressional power. This Note does not suggest that Congress should not ordinarily have plenary power over immigration law. Rather, this Note encourages the judiciary to apply a more probing scrutiny to challenges to immigration law, giving less deference to Congress than it has historically given to these challenges. Such extreme deference overlooks and permits Congress to infringe the constitutional rights of many U.S. citizens,¹¹⁹ and creates a situation where the judiciary abandons its role as a check on the political branches.¹²⁰ Despite the fact that naturalization, immigration, and foreign relations are committed by the Constitution to the executive and legislative branches,¹²¹ it is the distinctive duty of the judiciary to shield the Constitution and strike down laws that are unconstitutional.¹²²

A. A Brief Survey of Discriminatory Immigration Restrictions

Exclusionary immigration restrictions began in 1882 with the passage of the Chinese Exclusion Act.¹²³ Motivated by popular resentment toward the influx of Chinese immigrants looking for opportunities on the railroads or in the Gold Rush, Congress appeased the masses by forbidding any further immigration or naturalization of Chinese citizens.¹²⁴ This ban remained in place until 1965.¹²⁵ In the 1920s, Congress established the national origins quota system in an effort to control the ethnic composition of the United States.¹²⁶ This system favored northern European immigrants over all other immigrants and greatly restricted the numbers of non-northern Europeans

118. Thamkul, *supra* note 113, at 558.

119. Courts have been relatively unreceptive to claims by citizens that they are harmed by immigration law. For example, citizens claiming injury when their undocumented parents are deported have not received constitutional protection. Abrams, *supra* note 96, at 1647 n.95. This Note, however, advances a stronger argument. The exclusion of same-sex binational couples from the family preference avenue of immigration directly targets one group of U.S. citizens, homosexuals, and arbitrarily denies them a series of constitutional rights.

120. The Court is more likely to question Congress' usage of one of its "plenary powers" if, in using one of these powers, Congress has disregarded or exceeded an overarching constitutional principle such as federalism or separation of powers. See *United States v. Lopez*, 514 U.S. 549, 577–79 (1995) (Kennedy, J., concurring) (arguing in the context of the Commerce Clause that the political branches have a "sworn obligation to preserve and protect the Constitution in maintaining the federal balance," and that this balance is too vital to freedom for the judiciary "to admit inability to intervene when one or the other level of Government has tipped the scale too far"). For further discussion, see *infra* Part III.D.

121. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

122. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that the judicial branch's duty is to declare "what the law is").

123. Saby Ghoshray, *Race, Symmetry and False Consciousness: Piercing the Veil of America's Anti-Immigration Policy*, 16 TEMP. POL. & CIV. RTS. L. REV. 335, 347 (2007).

124. *Id.* at 345.

125. See Johnson, *supra* note 117, at 1131.

126. *Id.* at 1127.

who could enter the country,¹²⁷ implying a view of superiority of northern Europeans over all others.¹²⁸

Both the Chinese Exclusion Act and the national origins quota system were abolished in 1965 in response to the Civil Rights Act of 1964,¹²⁹ as these exclusionary immigration policies did not comport with the nondiscriminatory policies set forth in the Civil Rights Act.¹³⁰ During Congressional hearings regarding the INA of 1965, Senator Kennedy stated, “[t]his bill [the INA of 1965] is designed to establish the principle of equality and fair play for people of all nations.”¹³¹ Senator Javits commented that the INA of 1965 needed to be passed because the national origins quota system in place was rooted in “the rejected racist assumption that people of one ethnic origin are superior—socially and culturally—to those of another.”¹³² Also, Attorney General Katzenbach commented:

Such a system ought to be intolerable on principle alone. I do not know how any American could fail to be offended by a system which presumes that some people are inferior to others solely because of their birthplace. There is no democratic—indeed no rational—basis for such discrimination. The harm it does to the United States and its citizens is incalculable.¹³³

Members of Congress and the Attorney General recognized the irrational and discriminatory basis for these exclusionary immigration provisions, and in the era of civil rights advancement, repealed these discriminatory provisions of the INA of 1952.

B. The Homosexual Exclusion

Immigration policy historically has discriminated against gays and lesbians as it has against non-white immigrants. The first manifestation of the “homosexual exclusion” can be found in the Immigration and Nationality Act of 1952 (INA).¹³⁴ The INA barred “[a]liens afflicted with psychopathic personality, epilepsy or a mental defect.”¹³⁵ In *Boutilier v. INS*, the Supreme Court stated, “the term ‘psychopathic personality’ as used by Congress . . . was a term of art intended to exclude homosexuals from entry into the United States.”¹³⁶

Since “psychopathic personality” fell under the medical exclusions of the INA, enforcement required an elaborate procedure that began with an inspector’s suspicion

127. *Id.* at 1127–28.

128. *Id.* at 1129.

129. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

130. Johnson, *supra* note 117, at 1131.

131. *Immigration: Hearing on S. 500 Before the Subcomm. on Immigration and Naturalization of the S. Comm. on the Judiciary*, 89th Cong. 2 (1965) (statement of Sen. Kennedy, Chairman, Senate Committee on the Judiciary).

132. *Id.* at 7 (statement of Sen. Javits).

133. *Id.* at 9 (statement of Att’y Gen. Katzenbach).

134. Francoeur, *supra* note 91, at 352.

135. Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163, 182 (1952) (current version at 8 U.S.C. § 1182 (a)(4) (2006)).

136. 387 U.S. 118, 119 (1967).

of an alien's homosexuality at a port of entry.¹³⁷ Then, the alien would undergo a medical examination.¹³⁸ Such a requirement was problematic since sexual orientation cannot be deduced through a medical procedure.¹³⁹ Instead, exclusions were based on the hunches or perceptions of an immigration official.¹⁴⁰ Inevitably, homosexual aliens would only be excluded if the alien made a statement that would indicate his or her sexual orientation.¹⁴¹ Absent an alien's admission, exclusion was based on the immigration official's discriminatory perceptions.¹⁴²

In 1980, the enforcement policy changed from a medical examination to a series of questions on sexual orientation that would attempt to compel a written admission from the suspected homosexual alien.¹⁴³ Because aliens in detention at a port of entry have no constitutional protections, as they have not technically entered the United States, these suspected homosexual aliens could be held indefinitely for refusal to sign the admission statement.¹⁴⁴ After approximately forty years of banning homosexuals from entering the country,¹⁴⁵ the homosexual exclusion was finally repealed by the Immigration Act of 1990.¹⁴⁶

Considering the treatment of non-white immigrants and gay and lesbian immigrants, Congress has used immigration law to exclude groups it sees as inferior and unfit. The laws are veiled in neutral language—for example, the generic-seeming term “psychopathic personality” that did not denote homosexuals until the Supreme Court stated it did—but the laws have the effect of creating a homogenous population that comports with Congress' idea of an ideal, heterosexual American. The immigration exclusions evidence a history of discrimination against different classes of people, including homosexuals. Once it became clear that society would not tolerate the blatantly discriminatory exclusions based on national origin, Congress changed the immigration policy to comport with changing attitudes toward civil rights and impermissible discrimination. In addition, such discriminatory laws would never pass constitutional muster if they affected U.S. citizens and occurred in a context outside of immigration law.

C. Adams v. Howerton

Before the repeal of the homosexual exclusion provision and the passage of DOMA, *Adams v. Howerton* challenged the constitutionality of the homosexual exclusion.¹⁴⁷ Adams, a male American citizen, married Sullivan, a male foreign national, in an effort to use the provision of the INA of 1952 that allows spouses of Americans to qualify for

137. See Robert J. Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439, 456 (1994).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 458.

144. *Id.*

145. Francoeur, *supra* note 91, at 353.

146. *Id.* at 356.

147. 673 F.2d 1036 (9th Cir. 1982).

permanent legal resident status.¹⁴⁸ Adams presented two issues to the court: first, whether, within the meaning of the statute, a citizen's spouse must be an individual of the opposite sex;¹⁴⁹ and second, if interpreted this way, whether the statute was constitutional.¹⁵⁰ The Ninth Circuit concluded that the INS had interpreted the term "spouse" to exclude persons in same-sex marriages.¹⁵¹ The court held that Congress' decision to preferentially confer spouse status only upon those in heterosexual marriages satisfies rational basis scrutiny because Congress wished to pass an immigration policy that furthered "family integrity."¹⁵² Furthermore, the court limited its constitutional analysis of the INA of 1952, stating that it was within Congress' plenary power to admit or exclude aliens and that such decisions are subject only to limited judicial review.¹⁵³ Regarding immigration, the court stated that "Congress has almost [unlimited] plenary power and may enact statutes which, if applied to citizens, would be unconstitutional."¹⁵⁴

However, discriminatory immigration laws do affect U.S. citizens, particularly in the context of same-sex binational couples.¹⁵⁵ Why are courts still deferring to Congress' plenary power in these matters when the rights of U.S. citizens are also affected? Should not this foundation of discrimination trigger more judicial scrutiny?

D. A Basis for Judicial Scrutiny of Congress' Plenary Power

Although Congress' plenary power is broad, it is neither absolute nor totally immune from scrutiny for discrimination and injustice.¹⁵⁶ For example, in *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court stated that "we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous" that Congress' plenary power can be overcome.¹⁵⁷ The Court did not specify what type of discrimination would be necessary to override Congress' plenary powers and find such a statute unconstitutional. It is possible "that denial of entry may be challenged—including denying people entry solely because of their race or religion."¹⁵⁸

Consider the following hypothetical: Congress changes the INA and forbids any orthodox Jews from acquiring visas. Surely this blatant and arbitrary discrimination

148. *Id.* at 1038.

149. *Adams* was decided in 1982, fourteen years before DOMA defined the term "spouse."

150. *Id.*

151. *Id.* at 1040.

152. *Id.* at 1042.

153. *Id.* at 1041.

154. *Id.* at 1042.

155. *See supra* text accompanying notes 1–20.

156. FAMILY, UNVALUED, *supra* note 15, at 13; *see also* *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) ("But that [plenary] power is subject to important constitutional limitations."); *INS v. Chadha*, 462 U.S. 919, 940–41 (1983) (stating that Congress must choose "a constitutionally permissible means of implementing" that power); *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889) (stating that congressional authority is limited "by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations").

157. 525 U.S. 471, 491 (1999).

158. FAMILY, UNVALUED, *supra* note 15, at 13.

would not be tolerated by the courts because it offends a sense of equality and acceptance. It would seem that the courts would demand that Congress provide a very compelling reason for such exclusions. The courts would perceive this exclusion as an impermissible discriminatory line drawn by Congress and an unchecked avenue to discriminate. If immigration policy as applied to same-sex binational couples offends another constitutional provision, namely a U.S. citizen's equal protection and due process rights, should not the judiciary be examining these laws with heightened scrutiny and less deference to Congress' plenary power? Should not the courts be checking this congressional power?

1. The Judicial Duty to Confront Congress' Constitutional Abuse

In his dissent in *Fiallo v. Bell*, Justice Marshall provided a rationale for a higher level of scrutiny of immigration laws and acknowledged an exception to the almost complete deference to Congress' plenary power regarding immigration law and policy.¹⁵⁹ In *Fiallo*, the Court held that sections of the INA of 1952 were "not unconstitutional by virtue of the exclusion of the relationship between an illegitimate child and his natural father" from its preference categories.¹⁶⁰ Although the majority opinion accepted the traditional limited scope of judicial inquiry into immigration legislation, the *Fiallo* majority did stress that the Court still had the "judicial responsibility under the Constitution" to review the matter.¹⁶¹ Marshall began his dissent by reiterating the judicial duty to insure that acts of Congress "comport[] with Fifth Amendment principles of due process and equal protection."¹⁶² Marshall commented that the Court's review of the matter was "toothless," and an exercise in abdication, not due deference to Congress' plenary powers.¹⁶³ Marshall acknowledged that U.S. citizens "have no constitutional right to compel the admission of their families,"¹⁶⁴ but a problem arose with this general principle because:

Congress did choose to extend such privileges to American citizens but then denied them to a small class of citizens. When Congress draws such lines among citizens, the Constitution requires that the decision comport with Fifth Amendment principles of equal protections and due process. The simple fact that the discrimination is set in immigration legislation cannot insulate from scrutiny the invidious abridgment of citizens' fundamental interests.¹⁶⁵

He then concluded, "[w]hen Congress grants a fundamental right to all but an invidiously selected class of citizens, and it is abundantly clear that such discrimination would be intolerable in any context but immigration, it is our duty to strike the legislation down."¹⁶⁶

159. See 430 U.S. 787, 804–16 (1977) (Marshall, J., dissenting).

160. *Id.* at 800.

161. *Id.* at 793 n.5 (majority opinion).

162. *Id.* at 800 (Marshall, J., dissenting).

163. *Id.* at 805–06.

164. *Id.* at 807.

165. *Id.*

166. *Id.* at 816.

2. U.S. Citizens' Constitutional Rights and Privileges Are Being Denied

Another example of the Court's deference to Congress' plenary power and Justice Marshall's dissent to such deference is *Kleindienst v. Mandel*.¹⁶⁷ *Kleindienst* asked whether the First Amendment conferred upon professors the ability to demand admission of foreign national Mandel into the United States or to compel the Attorney General to allow Mandel's admission because they wish to hear, speak, and debate with him in person.¹⁶⁸ Mandel, a Marxist scholar and journalist, was denied entry into the United States on the grounds that he advocated "the doctrines of world communism" and had previously abused his entry into the United States. The Court recognized that the crux of the issue was not concern with the nonresident alien gaining admission, but the constitutional rights of the U.S. citizens to have the alien enter the country and explain and defend his views.¹⁶⁹ Nonetheless, the Court held that the citizens' rights to debate Mandel did not trump the plenary power of Congress to exclude aliens and the Executive's power to enforce Congress' will.¹⁷⁰

Justice Marshall strongly dissented and asked, "[w]hat is the justification for this extraordinary governmental inference with the liberty of American citizens?"¹⁷¹ Marshall emphasized that none of the Court's plenary power precedent needed to be overruled to allow for Mandel's visitor's visa because "none of them was concerned with the rights of American citizens."¹⁷² According to Marshall, the Court's precedent of deference to Congress' plenary power in regards to the exclusion of aliens was distinguishable from this case because those cases involved only the rights of aliens.¹⁷³ Marshall stated, "[w]hen Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated."¹⁷⁴ Marshall construed *Kleindienst* as an example of the government impermissibly overreaching into the individual liberty of citizens.¹⁷⁵

The case of same-sex binational couples is more compelling than *Kleindienst* in that what is at stake for these particular citizens is greater than the professors in *Kleindienst*. In *Kleindienst*, the issue was the ability of a group of professors to hear Mandel speak. The liberty at stake was the group's First Amendment right to hear Mandel's views and to "engage him in a free and open academic exchange."¹⁷⁶ More is at stake for same-sex binational couples in that they are claiming the fundamental right to be with the person they love and share a life with that person—rights enshrined in the Fourteenth Amendment but denied to same-sex couples by DOMA.¹⁷⁷ In

167. 408 U.S. 753 (1972).

168. *Id.* at 762.

169. *Id.* at 764.

170. *Id.* at 769–70.

171. *Id.* at 777 (Marshall, J., dissenting).

172. *Id.* at 782.

173. *Id.* at 783.

174. *Id.* at 782 (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967)).

175. *Id.* at 785.

176. *See id.* at 760 (majority opinion).

177. *See supra* Parts I.A., II.B.

Kleindienst, the Court rejected the First Amendment claim to override Congress' plenary power.¹⁷⁸ The rights same-sex binational couples assert are arguably more compelling and even more fundamental than the First Amendment right of free speech and provide a more compelling liberty interest from which to base an argument for questioning Congress' plenary power.

Fiallo's majority opinion opens the door to more judicial scrutiny of immigration law.¹⁷⁹ Moreover, Marshall's dissents in *Kleindienst* and *Fiallo* stress the idea that when U.S. citizens' constitutional rights are being compromised by immigration, the Court should show less deference to Congress' plenary power and heighten scrutiny of immigration law. In *Fiallo*, Marshall asserts that when Congress gives certain citizens privileges and denies them to others, "the Constitution requires that the decision comport with Fifth Amendment principles of equal protections and due process."¹⁸⁰ This analysis is particularly relevant to same-sex binational couples' immigration problems. Congress has conferred upon opposite-sex couples the privilege of "spouse" status that accelerates and eases the union of opposite-sex binational couples. Congress denies this privilege to same-sex binational couples. According to Marshall, this unequal treatment would warrant judicial scrutiny to see if the immigration "spouse" privilege would comport with equal protection and due process.

3. Immigration Regulations Must Be Tied to a Legitimate Immigration Purpose

In addition to Justice Marshall's call for heightened judicial review of immigration laws when these laws compromise a citizen's constitutional rights, Professor Kerry Abrams argues that particular immigration regulations need to be tied to a legitimate immigration purpose for Congress' plenary power to be applicable.¹⁸¹ "[I]f the law in question has nothing to do with the exclusion of immigrants or the deportation of immigrants, but instead regulates the lives of citizens[,] then the plenary power doctrine may not apply at all, and Congress may be overstepping its bounds."¹⁸² Immigration law's exclusion of same-sex couples from the family-preference avenue regulates the lives of citizens by directly interfering in the personal and familial relations of same-sex binational couples. In addition, Abrams argues that the Supreme Court has drawn sharp distinctions "between immigration law, which regulates the exclusion and deportation of aliens, and alienage law, which regulates" aliens' presence in the United States, and tends to apply heightened scrutiny to the latter.¹⁸³ If Congress is using these particular provisions of immigration law and its plenary power

178. *Kleindienst*, 480 U.S. at 769–70.

179. See *supra* text accompanying note 161.

180. *Fiallo v. Bell*, 430 U.S. 787, 807 (1977) (Marshall, J., dissenting).

181. See Abrams, *supra* note 96, at 1646. Abrams considers protecting the sovereign from the invasion of outsiders and expelling outsiders once they have gained physical access to the United States a "legitimate immigration purpose." *Id.* at 1644. The crux of Abrams' argument is that Congress is using immigration law to regulate marriage, which is not a legitimate immigration purpose, and therefore, the judiciary should be less deferential to Congress' plenary power because immigration law has moved beyond the scope of regulating the exclusion of immigrants. See *id.* at 1633.

182. *Id.* at 1646–47.

183. *Id.* at 1644–45.

to regulate the lives of citizens, which is not the same thing as excluding aliens and protecting the sovereign, then the Court has justification to review the immigration laws that are impermissibly regulating the lives of citizens.

4. The Plenary Power Doctrine Is Limited by Overarching Constitutional Principles

Abrams also notes that the Court has checked Congress' plenary power when it conflicts with the doctrine of separation of powers and federalism.¹⁸⁴ The Court is more likely to question Congress' usage of one of its "plenary powers" if, in using one of these powers, Congress has disregarded or exceeded an overarching constitutional principle such as federalism or separation of powers. For example, in *United States v. Lopez*, a case involving Congress' exercise of its sweeping, plenary-like Commerce Clause power, Justice Kennedy argued that the political branches have a "sworn obligation to preserve and protect the Constitution in maintaining the federal balance," and that this balance is too essential to freedom for the judiciary "to admit inability to intervene when one or the other level of Government has tipped the scales too far."¹⁸⁵ In *Lopez*, Kennedy reasoned that the statute at issue was an affront to federalism, and because of this, the statute is an unconstitutional exercise of Congress' plenary-like Commerce Clause power.¹⁸⁶

Applying this reasoning to immigration, it is the judicial branch that violates the separation of powers doctrine when it refuses to examine the constitutionality of immigration laws. Despite the fact that naturalization, immigration, and foreign relations are committed by the Constitution to the executive and legislative branches,¹⁸⁷ it is the distinctive duty of the judiciary to shield the Constitution and strike down laws that are unconstitutional.¹⁸⁸ It is the fact that these immigration provisions seem so glaringly unconstitutional that the courts' proverbial eyebrow should raise. Deference is not synonymous with abdication. The judiciary abdicates its constitutional role when it refuses to review the constitutionality of immigration laws because of the plenary power Congress supposedly possesses over these matters. As discussed in previous sections, the Court has acknowledged that there are limits to Congress' plenary powers. The plenary power doctrine is less absolute than it is perceived.

Congress has drawn yet another impermissible line with immigration law. In doing so, the judiciary should review challenges to the constitutionality of immigration law with less deference than it has historically given to immigration challenges because although the plenary power doctrine is broad, it is not limitless. Excluding only same-sex binational couples from the family preference avenue has nothing to do with protecting the sovereignty of the United States and advances no legitimate immigration purpose. Furthermore, by reviewing the history of immigration law and policy, a pattern emerges of historical discrimination and animosity towards gays and lesbians.¹⁸⁹ Christopher Duenas argues that "[i]n refusing to recognize the family

184. *Id.* at 1646.

185. 514 U.S. 549, 577–78 (1995) (Kennedy, J., concurring).

186. *See id.* at 580.

187. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

188. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that the judicial branch's duty is to declare "what the law is").

189. *See supra* Parts III.A–B.

relations and rights of [gays and lesbians], the laws show the determination of the U.S. government in attempting to keep [gays and lesbians] out of the country.”¹⁹⁰ In the past, exclusionary immigration policies eventually have been realized for what they truly are: impermissible discrimination against a particular group of people. This discrimination offends the essence of equality and equal citizenship.¹⁹¹ The same-sex exclusion from “spouse” status and its privileges can only be rationalized by using the same gender-role and sex-stereotyping arguments that are used to advance same-sex marriage bans. As discussed in Part II.B, these sex-stereotyping arguments are impermissible governmental arguments and should not withstand constitutional scrutiny.

With the IA of 1990, Congress intended to create an immigration policy that unifies families. Congress did so by changing the immigration laws so that it is substantially easier for a spouse of a U.S. citizen to acquire legal permanent residency status. The Defense of Marriage Act limits the term spouse to only married members of the opposite sex. Same-sex binational couples are shut out from this preferential immigration policy, and in turn, same-sex binational couples face separation—the opposite effect intended by the legislature in enacting the immigration laws. This practice advances discrimination that offends express principles of equality in the Constitution. Ultimately, the exclusion denies homosexual U.S. citizens their fundamental rights and equal protection rights.

Although traditionally the Supreme Court has deferred to Congress’ plenary power while scrutinizing immigration law, the Court’s precedent supports the notion that such deference need not be absolute and that the courts can apply a higher form of scrutiny to these statutes. The Court should examine the intent behind the legislation and the practical effect of the statute and determine whether such bans constitute constitutional infringements on the rights of U.S. citizens.

CONCLUSION

Current immigration law and policy in conjunction with DOMA drastically restrict the possibility for same-sex binational couples to live together legally in the United States. Nancy and Eric are not anomalies: the exclusion from the family preference avenue leaves same-sex binational couples no option but to employ other costly legal, and sometimes illegal, means to stay together in this country. These individuals, by virtue of their sexual orientation, are denied the fundamental right of marriage and equal protection under the law. An opposite-sex binational couple simply does not face this same obstacle to living together in the United States. The exclusion denies U.S. citizens in same-sex binational couples their fundamental right to order their private lives without government intrusion, reinforces gender roles and stereotypes, and denies homosexuals equal citizenship. Congress intended to create a family-unifying policy with the 1990 amendments to the INA of 1952. Yet, the exclusion of homosexuals from the family preference system through the Defense of Marriage Act tears families apart. Immigration law historically has discriminated against homosexuals, and the

190. Christopher A. Duenas, Note, *Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811, 816 (2000).

191. See *supra* Part II.C.

exclusion from the family preference system is just another example of such discrimination. Congress has drawn an impermissible discriminatory line that affects the lives of U.S. citizens. It is time for the judiciary to scrutinize immigration law with less deference to Congress' plenary power and discontinue its abdication of its inherent judicial power.