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## DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law

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# DOMA AND PRESIDENTIAL DISCRETION: INTERPRETING AND ENFORCING FEDERAL LAW

Joseph Landau\*

*By creating a federal definition of “marriage,” the Defense of Marriage Act (DOMA) denies married same-sex couples more than 1,000 benefits under federal law. But DOMA does not prevent the federal government from granting benefits to same-sex couples under all circumstances. By interpreting laws other than DOMA, the Obama Administration has extended domestic partner benefits to married and unmarried same-sex couples in areas such as employment, housing, and health care. Moreover, in the unique context of immigration law, the Obama Administration has exercised prosecutorial discretion to prevent the foreign-born spouses and partners of U.S. citizens from facing removal from the United States. By exercising discretion in the interpretation and enforcement of federal law, the Administration serves its twin obligations of promoting equal protection while faithfully executing the laws—including complying with DOMA. These features of executive discretion highlight the President’s broader role in a conversation with the coordinate branches on questions of constitutional meaning.*

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#### INTRODUCTION

The Defense of Marriage Act<sup>1</sup> (DOMA) became law in 1996 but had little practical impact until equal marriage rights for same-sex couples became a reality. Currently, a small but growing number of U.S.<sup>2</sup> and foreign<sup>3</sup> jurisdictions permit marriage between same-sex couples, and

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1. Pub. L. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1783C (2006)).

2. In the United States, six states—Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont—and the District of Columbia recognize the right of same-sex couples to marry. In California, 18,000 same-sex couples were married between June 16, 2008 (when a state supreme court ruling invalidating a statute denying same-sex couples the freedom to marry went into effect, *see In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008)), and November 5, 2008 (when Proposition 8, an amendment to the California Constitution that limited marriages to different-sex couples, took effect, *see CAL. CONST. art. I, § 7.5*). *See Jesse McKinley, Same-Sex Married Couples in California Await Court’s Ruling*, N.Y. TIMES, May 26, 2009, at A10. Since then, the California Supreme Court has held that Proposition 8 did not nullify those marriages. *See Strauss v. Horton*, 207 P.3d 48, 119–22 (Cal. 2009). In 2012, three states—New Jersey, Washington State, and Maryland—passed laws providing same-sex couples the right to marry. New Jersey Governor Chris Christie vetoed New Jersey’s bill, and while the governors of the other two states signed their states’ respective bills, both laws face a referendum in the November 2012 elections (which will take place after publication of this Article).

3. Eleven foreign countries—Argentina, Belgium, Canada, Denmark, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden—permit marriage between same sex couples. *See* CÓDIGO CIVIL [COD. CIV.] [CIVIL CODE] art. 26.618 (Arg.); CODE CIVIL [C.CIV.] art. 143 (Belg.); Civil Marriage Act, S.C. 2005, c. 33 (Can.); Hjúskaparlögum [Marriage Code], no. 31/1993 (as amended in 138th Congress, Law no. 65 (June 22, 2010)) (Ice.); Wet Openstelling Huwelijk (Act on the Opening Up of Marriage), Stb. 2001, p. 9 (Neth.); CIV. CODE, § 33 (enacted June 27, 2008) (Nor.); Assembleia da República, n. 9/2010 (May 31, 2010) (Port.); C.C., art. 44 (as amended by law 13/2005, July 1, 2005) (Spain); ÄKTENSKAPSBALK [ÄKTB][MARRIAGE CODE] 2009:260 (Swed.); *Minister of Home Affairs v. Fourie* 2005 (1) SA 524 (CC) at 56–62 paras. 90–98 (S. Afr.).

In addition, same-sex couples can legally marry in the federal district of Mexico. Código Civil Para el Distrito Federal [Civil Code for the Federal District], *as amended*, Lib. Primero De Las Personas, tit. 5, cap. II, art. 146 (Mex.). The Supreme Court of Mexico has held that these marriages must be recognized throughout Mexico. David Agren, *Court Says All Mexican States Must Honor Gay Marriages*, N.Y. TIMES, Aug. 11, 2010, at A6. In Brazil, the Supreme Federal Court voted to grant same-sex couples the same legal rights as unmarried different-sex couples living in “stable unions” (which, in Brazil, essentially refers to the same thing as de facto cohabitation, without registration), and couples living in “stable unions” may petition a judge to convert their union into a marriage. *See Sueann Caulfield, The Recent Supreme Court Ruling on Same-Sex Unions in Brazil: A Historical Perspective*,

section 3 of DOMA<sup>4</sup> prevents thousands of couples with valid marriages from receiving any of the more than 1,000 privileges the federal government provides married couples under tax, pension, Medicare, and Social Security benefit programs.<sup>5</sup>

This Article considers the relationship between the role of executive branch discretion and the Obama Administration's policy to enforce, but not defend in court, section 3 of DOMA. It identifies two different kinds of discretion—interpretive discretion and enforcement discretion—under which federal administrative agencies interpret or enforce laws other than DOMA to extend benefits to same-sex couples (in certain circumstances) or to protect them from harm (in others). Then, it discusses the function of executive discretion in light of the congressional mandate set forth in DOMA section 3 and the President's understanding of his dual obligations to equal protection and the faithful execution of the laws.

Part I details the Obama Administration's interpretation of DOMA section 3, including its decision to enforce the law but not defend it in court.<sup>6</sup> The Administration has advanced the argument that DOMA section 3, as applied to same-sex couples with valid marriages, is unconstitutional, and that all forms of sexual-orientation discrimination, including but not limited to laws restricting marriage rights, should be subjected to heightened judicial scrutiny. These constitutional arguments intersect with executive branch discretion in different ways.

Part II discusses *interpretive discretion*. Although the federal government cannot grant marriage-based benefits either to married same-sex couples (because of DOMA) or same-sex couples in civil unions or other non-marital relationships (because they are not married),<sup>7</sup> it currently

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1 UNIV. MICH. INT'L INST. 7 (2011), available at [http://www.lsa.umich.edu/UMICH/ii/Home/II%20Journal/Documents/2011fall\\_iijournal\\_article3.pdf](http://www.lsa.umich.edu/UMICH/ii/Home/II%20Journal/Documents/2011fall_iijournal_article3.pdf); Iuri Dantas, *Brazil Court Grants Gay Couples Same Rights as Heterosexuals*, BLOOMBERG (May 5, 2011), <http://www.bloomberg.com/news/2011-05-05/brazil-court-grants-gay-couples-same-rights-as-heterosexuals-1-.html>.

4. Section 3 of DOMA defines marriage as “a legal union between one man and one woman” and reserves “the word ‘spouse’ . . . only to a person of the opposite sex who is a husband or a wife.” See Defense of Marriage Act § 3(a), 1 U.S.C. § 7 (2006). It applies that definition to “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.” *Id.*

5. The federal government estimates that there are 1,138 rights and benefits that federal law makes available to married couples. See U.S. Gov. Accountability Office, GAO-04-353R Defense of Marriage Act (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>; see also, e.g., Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 379 (D. Mass. 2010).

6. See Letter from Eric H. Holder, Jr., Att’y Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

7. In addition to the six states and the District of Columbia that recognize the right of same-sex couples to marry, see *supra* note 2, thirteen other states provide civil union, domestic partnership, or other forms of relationship protections. Nine of those thirteen states have broad domestic partnership or civil union laws, and an additional four have more limited forms of domestic partnership. See, e.g., *Where State Laws Stand*,

provides various relationship benefits to same-sex couples regardless of marital status. Section A discusses administrative rulemaking, where the administrative arms of the executive branch have extended domestic-partnership benefits to same-sex couples in contexts such as employment, housing, health care, and immigration. Section B discusses the relationship between these acts of interpretive discretion and the Obama Administration's constitutional interpretation of DOMA.

Part III discusses *enforcement discretion* by using as a case study immigration law, a context in which countless gay and lesbian foreign nationals are barred from acquiring the family-based immigration benefits they would ordinarily receive if the federal government recognized their marriage to a U.S. citizen or lawful permanent resident (LPR). Section A details the range of critical family-based immigration benefits under the Immigration and Nationality Act (INA) that, owing to DOMA section 3, same-sex married couples cannot receive. However, as Section B explains, government officials within two different agencies are using their discretion to spare many binational same-sex couples some of the most punishing consequences wrought by DOMA. Specifically, immigration officials are granting favorable exercises of discretion to the foreign-born partners and spouses of U.S. citizens and LPRs, preventing them from facing removal from the United States. Section C discusses the relationship between enforcement discretion and the Obama Administration's constitutional interpretation of DOMA.

Part IV considers ways that interpretive and enforcement discretion highlight the executive's broader role in a conversation with the coordinate branches on questions of constitutional meaning, as well as questions regarding the relationship between executive branch constitutional interpretation and legislative change. While it is beyond the scope of this Article to provide a comprehensive treatment of these broader questions, the discussion lays a foundation for future work.

### I. THE PRESIDENT AND DOMA

On February 23, 2011, the Obama Administration announced that it would no longer defend the constitutionality of DOMA section 3, which defines marriage for federal purposes as the union between one man and one woman.<sup>8</sup> The Administration had originally defended the statute, but in a letter from Attorney General Eric Holder to House Speaker John Boehner (the "Holder letter"), Holder explained that the Administration was abandoning its defense of DOMA in light of new litigation brought within the Second Circuit that raised fresh opportunities to examine the issue of the proper level of constitutional scrutiny for sexual-orientation-based

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FREEDOMTOMARRY.ORG, <http://www.freedomtomarry.org/pages/where-state-laws-stand> (last visited Oct. 20, 2012).

8. See Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives, *supra* note 6.

classifications.<sup>9</sup> The Obama Administration explained that it had come to view all laws discriminating on the basis of sexual orientation as warranting heightened scrutiny, and that DOMA section 3, as applied to same-sex couples, could not meet that standard.<sup>10</sup> Although the Administration would no longer defend the statute, it would “continue to comply with Section 3 of DOMA, consistent with the executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality.”<sup>11</sup>

The Holder letter argues that DOMA section 3, as applied to same-sex couples with valid marriages, violates equal protection.<sup>12</sup> Moreover, it states that all laws (not just DOMA) that discriminate on the basis of sexual orientation should be subjected to heightened judicial scrutiny.<sup>13</sup> This latter argument, if accepted by the U.S. Supreme Court, could have sweeping implications for equal marriage rights throughout the fifty states. Under a heightened-scrutiny regime, conceivably all of the state statutes and constitutional amendments prohibiting marriage between same-sex couples would be subject to invalidation.<sup>14</sup> Hence, if the argument for heightened scrutiny that the Department of Justice (DOJ) has advanced in litigation were to prevail in the Supreme Court,<sup>15</sup> it is likely that couples within all fifty states would be able to invoke that ruling to secure the freedom to marry. By contrast, were the Supreme Court to invalidate DOMA section 3 under a lesser standard (such as rational basis review), the impact, though significant, would most certainly be far less dramatic (at least in the immediate term) than a ruling requiring heightened scrutiny.<sup>16</sup> Rational

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9. *See id.* On October 18, 2012, the Second Circuit became the first federal court of appeals to apply heightened scrutiny to the context of LGBT rights, invalidating DOMA section 3 on the grounds that it could not satisfy that standard of review. *Windsor v. United States*, Nos. 12-2335-cv(L), 12-2435(Con.), 2012 WL 4937310, at \*10-13 (2d Cir. Oct. 18, 2012), *aff’g* 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *petition for cert. before judgment filed*, No. 12-63 (U.S. July 16, 2012), *petition for cert. before judgment filed*, No. 12-307 (U.S. Sept. 11, 2012).

10. Letter from Eric H. Holder, Jr., Att’y Gen., to John A. Boehner, Speaker, U.S. House of Representatives, *supra* note 6.

11. *Id.*

12. *Id.*

13. *Id.*

14. For a list of state constitutional amendments and state laws restricting marriage to opposite-sex couples or barring all forms of same-sex relationships from receiving state recognition, see *Where State Laws Stand*, FREEDOMTOMARRY.ORG., <http://www.freedomtomarry.org/pages/where-state-laws-stand> (last visited Oct. 20, 2012).

15. *See generally, e.g.*, Combined Reply Brief and Response Brief for the Federal Defendants, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (Nos. 10-2204, 10-2207, 10-2214) (championing heightened scrutiny for all laws discriminating on the basis of sexual orientation); Defendants’ Brief in Opposition to Motions to Dismiss, *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012) (No. C3:10-00257-JSW) (same).

16. It is also noteworthy that many of the plaintiffs in the DOMA litigation, and their attorneys, have challenged DOMA section 3 as applied to the facts and contexts raised in their complaints, rather than challenging DOMA section 3 on its face. *See Golinski v. U.S.*

basis *could* be applied by courts to invalidate state statutes and constitutional amendments prohibiting same-sex couples from marrying, but that outcome is more likely under heightened scrutiny.

## II. DOMA AND INTERPRETATIVE DISCRETION

DOMA section 3 plainly bars married same-sex couples from having their relationships treated as a marriage under federal law. It states:

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.<sup>17</sup>

While this statutory language applies to all references to the words “marriage” and “spouse” in acts of Congress or in rulings, regulations, or interpretations by federal bureaus and agencies, it does not prevent the federal government from interpreting laws *other than* DOMA to extend many *non*-marriage-based federal benefits to same-sex couples.

### A. *DOMA and Federal Benefits*

Where DOMA does not apply, the administrative arms of the executive branch can, and have, extended numerous benefits to same-sex couples, irrespective of whether those couples are eligible to marry or have chosen to do so. These initiatives, which assiduously avoid the nomenclature of “marriage” (employing words like “partner” or “family” instead), are consistent with the Obama Administration’s policy of complying with DOMA unless and until it is subject to judicial invalidation or a legislative repeal.

In 2009, for example, President Obama issued a memorandum to the Director of the Office of Personnel Management and the Secretary of State, directing each to find ways, consistent with DOMA, to expand benefits for the same-sex partners of foreign-service and executive branch government employees.<sup>18</sup> The 2009 Obama memorandum led to a broad expansion of

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Office of Pers. Mgmt., 824 F. Supp. 2d 968, 974 (N.D. Cal. 2012) (“These motions compel the Court to determine whether the Defense of Marriage Act . . . as applied to Ms. Golinski, violates the United States Constitution”); Complaint at 4, *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-01750-VLB (D. Conn. July 31, 2012) (alleging that “DOMA, . . . as applied to the plaintiffs, violates the United States Constitution”); Complaint at 21, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 CV 8435) (“[T]he plaintiff prays that this Court [d]eclare DOMA . . . unconstitutional as applied to the plaintiff.”). Under that approach, a court invalidating DOMA section 3 could conceivably limit its holding to the plaintiff couples or particular federal benefits at issue, leaving unaddressed the validity of section 3 in other contexts. By contrast, a ruling striking down DOMA based on heightened scrutiny would likely require a court to invalidate section 3 in its entirety.

17. Defense of Marriage Act § 3(a), 1 U.S.C. § 7 (2006).

18. See Memorandum for the Heads of Executive Departments and Agencies on Federal Benefits and Non-Discrimination, 74 Fed. Reg. 29,393 (June 17, 2009).

various employment-based benefits for the same-sex domestic partners of federal employees and, in some cases, to the children of same-sex domestic partners of federal employees.<sup>19</sup> The State Department also extended to the same-sex domestic partners of foreign-service employees a range of additional benefits such as diplomatic passports, training, medical care, and family-member preferences for employment at posts abroad.<sup>20</sup>

The Obama Administration has expanded relationship benefits for same-sex couples in a number of other contexts as well.<sup>21</sup> On April 15, 2010, the President directed the Department of Health and Human Services (HHS) to enhance hospital visitation rights for same-sex couples by requiring hospitals that receive Medicare and Medicaid funds to allow patients to designate visitors and surrogates (including same-sex partners) to make critical medical decisions on their behalf.<sup>22</sup> Subsequently, the Centers for Medicare & Medicaid Services (CMS), a sub-agency of HHS, proposed regulations expanding the list of potential visitors to include “a spouse, a domestic partner (including a same-sex domestic partner), another family member, or a friend.”<sup>23</sup> On April 27, 2010, the Obama Administration

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19. Memorandum for the Heads of Executive Departments and Agencies on Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 75 Fed. Reg. 32,247 (June 2, 2010). The memorandum states that: (1) the children of same-sex partners fall within the definition of “child” for federal child care subsidies; (2) same-sex domestic partners qualify as “family members” under employee assistance programs and other programs; (3) a same-sex partner of a federal retiree can receive annuities upon the death of the federal retiree; (4) employees’ same-sex partners and children are dependents for purposes of evacuation payments; and (5) federal employees can receive unpaid leave in order to meet the needs of their same-sex partners or the children of their same-sex partner. *See id.*

20. *See* Press Release, Hillary Rodham Clinton, Sec’y of State, Benefits for Same-Sex Domestic Partners of Foreign Service Employees (June 18, 2009), available at <http://www.state.gov/secretary/rm/2009a/06/125083.htm>. The Department of State implemented this policy by changing the Foreign Affairs Manual (guidance followed by U.S. consulates around the world) so that same-sex domestic partners would qualify as “eligible family members” with respect to benefits and allowances. *See* 14 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 511.3 (2012).

21. These policies have yet to receive much treatment in the academic literature. For one noteworthy exception, see Mathew S. Nosanchuk, *The Endurance Test: Executive Power and the Civil Rights of LGBT Americans*, 5 ALB. GOV’T L. REV. 440, 445, 456–57 (2012) (cataloguing various Obama Administration initiatives that promote LGBT equality).

22. *See* Memorandum for the Secretary of Health and Human Services on Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies, 75 Fed. Reg. 20,511 (Apr. 15, 2010); Chris Johnson, *Obama Mandates Hospital Rights for LGBT Couples*, WASH. BLADE (Apr. 16, 2010), <http://www.washingtonblade.com/2010/04/16/obama-memo-mandates-hospital-rights-for-lgbt-couples/>; *see also* Michael D. Shear, WASH. POST, *Visiting Rights Given to Gays*, Apr. 16, 2012, at A1.

23. Medicare and Medicaid Programs: Changes to the Hospital and Critical Access Hospital Conditions of Participation To Ensure Visitation Rights for All Patients, 75 Fed. Reg. 70,831–32 (proposed Nov. 19, 2010). Separately, CMS suggested that states should extend to same-sex spouses and domestic partners important Medicaid benefits (including the protection of the couple’s combined resources when one partner moves into an institution for long-term care, as well as exemptions from state-imposed liens or the state’s pursuit of estate recovery against beneficiaries) even though such benefits “cannot be directly applied to same-sex spouses or partners as a result of DOMA.” Letter from Cindy Mann, Dir., Ctr.



expanded its interpretation of the Violence Against Women Act (VAWA) to apply to cases of same-sex gender-motivated violence.<sup>24</sup> While the DOJ recognized that the word “spouse” was specifically included among the list of possible victims covered by VAWA, it also noted the presence of other, marriage-neutral terms in the statute, such as “intimate partner,” “dating partner,” and “another person,” all of which could be extended to cases in which offenders and victims are of the same sex.<sup>25</sup> On June 22, 2010, the U.S. Department of Labor issued a ruling allowing same-sex couples with children to take leave under the Family Medical Leave Act (FMLA), regardless of whether the state or the employer recognized that parent-child relationship.<sup>26</sup> Finally, on March 5, 2012, the Department of Housing and Urban Development (HUD) issued a rule broadening the definition of “family” in HUD’s core housing programs to ensure that individuals are not excluded on the basis of sexual orientation or because they are in “an LGBT relationship.”<sup>27</sup>

Presidential administrations have provided these family-based benefits in the immigration context as well. One recent development concerns proposed regulations that would allow same-sex couples to file a single

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for Medicaid, CHIP and Survey & Certification, to State Medicaid Dirs. (June 10, 2011), available at <http://www.medicareadvocacy.org/wp-content/uploads/2011/06/Same-Sex-Partners-SMD-6-10-11-2.pdf>.

24. Charlie Savage, *Gay Couples Gain Under Violence Against Women Act*, N.Y. TIMES, June 11, 2010, at A18.

25. Whether the Criminal Provisions of the Violence Against Women Act Apply to Otherwise Covered Conduct When the Offender and the Victim are the Same Sex, Memorandum Op. for the Acting Deputy Att’y Gen., 34 Op. O.L.C. 1, 3–6 (2010).

26. Administrator’s Interpretation, No. 2010-3 (Dep’t of Labor June 22, 2010), available at [http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.htm](http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm). As the news release accompanying the interpretation explained, “All families, including LGBT families, are protected by the FMLA.” See Press Release, U.S. Dep’t Labor, U.S. Department of Labor Clarifies FMLA Definition of “Son and Daughter” (June 22, 2010), available at <http://www.dol.gov/opa/media/press/WHD/WHD20100877.htm>; see Robert Pear, *Gay Workers Will Get Time to Care for Partner’s Sick Child*, N.Y. TIMES, June 22, 2010, at A13.

27. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5664 (Feb. 3, 2012) (to be codified at 24 C.F.R. pts. 5, 200, 203, 236, 400, 570, 574, 882, 891, 982). The rule requires owners and operators of HUD-assisted facilities to make housing available without regard to sexual orientation or gender identity; prohibits lenders from using sexual orientation or gender identity as a basis to determine a borrower’s eligibility for FHA-insured mortgage financing; and clarifies that all otherwise eligible families cannot be excluded from participating in HUD programs. See Press Release, U.S. Dep’t of Hous. and Urban Dev., HUD Secretary Donovan Announces New Regulations to Ensure Equal Access to Housing for All Americans Regardless of Sexual Orientation or Gender Identity (Jan. 30, 2012), available at [http://portal.hud.gov/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2012/HUDNo.12-014](http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2012/HUDNo.12-014); HUD Announces New LGBT Regulations, HOUS. AGENT MAG. (Jan. 31, 2012), <http://houstonagentmagazine.com/hud-announces-new-lgbt-regulations/>. The announced rule followed a January 24, 2011, proposed rule, which cited evidence that LGBT individuals and families were unfairly and arbitrarily excluded from housing opportunities in the private sector. See Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity, 76 Fed. Reg. 4194, 4194 (proposed Jan. 24, 2011).

customs declaration form when returning from travel abroad.<sup>28</sup> Another important immigration-related benefit, which predates the Obama Administration, concerns the ability of the same-sex spouse or partner of a nonimmigrant—a foreign national who comes to the U.S. temporarily for a specific purpose (such as a foreign government official, student, or temporary worker)—to accompany the nonimmigrant to the United States. Since 1993, the executive branch has permitted the gay and lesbian partners of nonimmigrants to apply for a visitor’s visa that allows them to accompany their same-sex partner to the United States.<sup>29</sup> In 2011, the Obama Administration issued a memorandum to facilitate the process of extending a partner’s status.<sup>30</sup>

### B. Interpretive Discretion and Constitutional Commands

While these domestic-partner benefits address some of the inequities resulting from DOMA, they fall far short of providing married same-sex couples the litany of federal protections that are specifically tied to marriage.<sup>31</sup> Yet, because both married and unmarried same-sex couples can take advantage of the benefits made possible through interpretive discretion, these policies apply to all eligible same-sex couples throughout the fifty states.<sup>32</sup> Hence, even in a post-DOMA world—in which a couple’s

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28. On March 27, 2012, U.S. Customs and Border Protection, a division of the Department of Homeland Security (DHS), announced that it would broaden the definition of family to include “two adult individuals in a committed relationship wherein the partners share financial assets and obligations, and are not married to, or a partner of, anyone else, including, but not limited to, long-time companions, and couples in civil unions or domestic partnerships.” 77 Fed. Reg. 18,143, 18,144 (Mar. 27, 2012). The proposed change was intended to “more accurately reflect relationships between members of the public who are traveling together as a family.” *Id.*

29. See *B-2 Visa Available for Non-Spouse, Same-Sex Partner of L-1*, INS Says, INTERPRETER RELEASES, Mar. 29, 1993, at 421–22; see also 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 41.31, N14.4 (2002); Telegram from Colin Powell, Sec’y of State, Dep’t of State, to All Diplomatic and Consular Posts, Re: B 2 Classification for Cohabiting Partners (July 1, 2001), available at [http://travel.state.gov/visa/laws/telegrams/telegrams\\_1414.html](http://travel.state.gov/visa/laws/telegrams/telegrams_1414.html).

30. Although applicants can seek extensions in increments of six months from DHS for as long as the principal continues to maintain his or her nonimmigrant status, see 8 C.F.R. § 214.2 (2011), such extensions were often difficult to obtain. Beginning in 2011, U.S. Citizenship and Immigration Services issued a memorandum advising enforcers to consider a nonimmigrant’s cohabitating partnership as a “favorable factor” when granting extensions of the visitor’s status. See Policy Memorandum, U.S. Citizenship and Immigration Servs., Dep’t Homeland Sec., Changes to B-2 Status and Extensions of B-2 Status for Cohabiting Partners and Other Nonimmigrant Household Members (Aug. 7, 2011), available at [http://www.uscis.gov/USCIS/Laws/Memoranda/2011/August/Cohabiting\\_Partners\\_PM\\_081711.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/2011/August/Cohabiting_Partners_PM_081711.pdf) (“When evaluating an application for change to or extension of B-2 status based on cohabitation, the cohabitating partner’s relationship to the nonimmigrant principal alien in another status will be considered a favorable factor in allowing the household member to obtain or remain eligible for B-2 classification.”).

31. See *supra* note 5 and accompanying text.

32. Some of these benefits apply only to same-sex couples, while others apply to different-sex couples as well. For example, the government does not extend federal employee and foreign-service benefits, described *supra* notes 19–20 and accompanying text,

eligibility for federal marriage benefits might turn on whether their state of domicile allowed them to marry—these federal benefits could still be important for those same-sex couples living in the majority of states that do not recognize their freedom to marry.

One might think of the Obama Administration's efforts in this domain as straddling two conflicting constitutional demands, both of which are evident within the Holder letter. On the one hand, the Administration has articulated its view that all discrimination on the basis of sexual orientation, including but not limited to the lack of equal marriage rights, should be subjected to heightened judicial scrutiny. At the same time, however, the Administration is committed to enforcing DOMA consistent with its constitutional obligation to "take Care that the Laws be faithfully executed."<sup>33</sup> While there is no way to harmonize perfectly these competing constitutional commands, the Obama Administration has pursued a middle-ground strategy. Under the Administration's DOMA enforcement policy, the agency denies requests for family-based benefits from same-sex couples with valid marriages, preserving judicial review over the question of DOMA's constitutionality. Yet, by actively challenging the constitutionality of DOMA section 3 in the pending litigation, the Obama Administration is endeavoring to persuade the federal courts to accept its

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to unmarried different-sex couples. *See* 74 Fed. Reg. 29,393 (June 17, 2009); 14 U.S. DEP'T OF STATE, *supra* note 20, § 511.3 (extending benefits explicitly and exclusively to "same-sex domestic partners" of a federal employee and to a "spouse or . . . [same-sex] domestic partner" of a foreign service employee). Other benefits apply regardless of sexual orientation. The hospital visitation benefits, described *supra* note 22 and accompanying text, for example, apply to both same- and different-sex couples. *See* 75 Fed. Reg. 20,511 (Apr. 15, 2010) (stating that the patient should have the right to designate visitors regardless of, *inter alia*, sexual orientation or gender identity). Similarly, the interpretation of the FMLA leave provisions, discussed *supra* note 26 and accompanying text, includes unmarried same- and different-sex couples. *See* Administrator's Interpretation, No. 2010-3 (Dep't of Labor June 22, 2010), available at [http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.htm](http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm) (stating that the Act includes any adult who assumes obligations of a parent, regardless of whether that adult has a legal relationship to the child). Along the same lines, the rules issued by HUD and the U.S. Customs and Border Protection, discussed *supra* notes 27 and 28 and accompanying text, respectively, apply to same- and different-sex couples. *See* 77 Fed. Reg. 5662, 5664 (Feb. 3, 2012) (to be codified at 24 C.F.R. pts. 5, 200, 203, 236, 400, 570, 574, 882, 891, 982) (providing that HUD-assisted or insured housing inquiries would be made without regard to sexual orientation, gender identity, or marital status); *see also* 77 Fed. Reg. at 18,144 (broadening the definition of "family" to encompass "two adult individuals in a committed relationship wherein the partners share financial assets and obligations, and are not married . . .," including couples in civil unions or domestic partnerships). Finally, the memorandum issued by U.S. Citizenship and Immigration Services regarding B-2 Visas, discussed *supra* notes 29–30 and accompanying text, also applies to both same- and opposite-sex couples. *See* Policy Memorandum, U.S. Citizenship and Immigration Servs., *supra* note 30 (instructing officers to consider cohabitation, regardless of the sex of either partner, as a "favorable factor" when granting extension of B-2 status). The issue of differential treatment—and the consistency of such policies with the Obama Administration's articulation of heightened judicial scrutiny for sexual-orientation-based classifications—could become increasingly relevant as same-sex couples secure the right to marry in additional states.

33. U.S. CONST. art. II, § 3; *see also* Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives, *supra* note 6.

heightened scrutiny argument,<sup>34</sup> a position whose ripple effects could be felt well beyond the context of DOMA section 3. In the meantime, the Obama Administration pursues the middle ground of exercising interpretive discretion—either by construing an existing statutory or regulatory category to include same-sex partners,<sup>35</sup> or by developing new rules that create a category that did not previously exist that includes same-sex partners.<sup>36</sup>

### III. DOMA AND ENFORCEMENT DISCRETION

Unlike the many areas of federal law where the Obama Administration, by interpreting laws other than DOMA, can provide non-marriage-based benefits to same-sex couples, the immigration context presents different, and greater, obstacles to the executive's use of discretion to promote the rights of same-sex couples. The INA is replete with family-based benefits that are specifically tied to marriage, making it impossible to interpret or expand those statutory categories to same-sex couples without violating DOMA. Consequently, DOMA prevents the executive branch from providing virtually all family-based immigration benefits to the foreign-born spouses of U.S. citizens or LPRs based on their marriages, depriving more than 28,500 U.S.-based binational same-sex couples,<sup>37</sup> nearly half of whom have children,<sup>38</sup> access to a number of critical family-based immigration benefits. Although the Administration cannot, consistent with DOMA, provide family-based immigration benefits to foreign nationals based on their marriages to U.S. citizens and LPRs, it is increasingly using

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34. Shortly before this Article went to print, the Second Circuit invalidated DOMA section 3 under a heightened scrutiny analysis in *Windsor v. United States*. Nos. 12-2335-cv(L), 12-2435(Con.), 2012 WL 4937310 (2d Cir. Oct. 18, 2012), *aff'g* 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *petition for cert. before judgment filed*, No. 12-63 (U.S. July 16, 2012), *petition for cert. before judgment filed*, No. 12-307 (U.S. Sept. 11, 2012). *Windsor* reflects the first-ever federal appellate court decision applying heightened judicial scrutiny in the context of LGBT rights.

35. In the federal benefits context, for example, President Obama directed federal agencies to reinterpret the existing definitions of "family members" and "child" to include same-sex domestic partners and the children of same-sex domestic partners, respectively. *See supra* note 19 and accompanying text; *see also* Memorandum for the Heads of Executive Departments and Agencies on Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 75 Fed. Reg. 32,247 (June 2, 2010).

36. In the housing context, for example, HUD amended existing rules by promulgating new regulations adding the categories "sexual orientation" and "gender identity" to those groups that were already included within the relevant HUD programs. *See supra* note 27 and accompanying text; *see also* Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. at 5662–64.

37. For purposes of this discussion, a binational couple consists of one partner who is a U.S. citizen or LPR and a second, foreign-national partner who is neither a U.S. citizen nor an LPR. *See* Craig J. Konnoth & Gary J. Gates, *Same-Sex Couples and Immigration in the United States*, WILLIAMS INST. 1 (Nov. 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Konnoth-Binational-Report-Nov-2011.pdf>.

38. *See* Gary J. Gates, *Bi-National Same-Sex Unmarried Partners in Census 2000: A Demographic Portrait*, WILLIAMS INST. 9 (Oct. 27, 2005), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Binational-Report-Oct-2005.pdf> (noting that approximately 46 percent of binational same-sex couples in the U.S. have children under age eighteen living with them in their home).

its discretion in immigration enforcement to spare foreign nationals in binational same-sex couples some of the most severe consequences wrought by DOMA. Specifically, immigration officials are exercising prosecutorial discretion to prevent the foreign-born spouses and partners of U.S. citizens from being removed from the United States.

#### A. Marriage Benefits Under Immigration Law

The INA provides a litany of family-based benefits for married couples. These include permanent residence for noncitizen spouses,<sup>39</sup> visas for foreign-based fiancé(e)s,<sup>40</sup> and waivers of bars to inadmissibility that prevent foreign-national spouses from obtaining status as LPRs.<sup>41</sup> DOMA

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39. Cf. 8 U.S.C. § 1154(a)(1)(A)(i)–(iii)(I) (2006) (outlining procedures for granting immigrant status for foreign-national spouses). Given that spousal immigration (in which a U.S. citizen or an LPR sponsors a noncitizen for immigration benefits) accounts for 25 percent of all LPRs, DOMA’s impact on binational couples inside and outside the United States cannot be overstated. See Cori K. Garland, Note, *Say “I Do”: The Judicial Duty to Heighten Constitutional Scrutiny of Immigration Policies Affecting Same-Sex Binational Couples*, 84 IND. L.J. 689, 702 (2009); see also RANDALL MONGER & JAMES YANKAY, DEP’T OF HOMELAND SEC., U.S. LEGAL PERMANENT RESIDENTS: 2011, ANNUAL FLOW REPORT (2012), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR\\_FR\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR_FR_2011.pdf).

Unlike the more highly favored U.S.-citizen-sponsored spousal petitions, which are not subject to numerical limitations, see 8 U.S.C. § 1151(b), LPR-sponsored spousal petitions are not accorded “immediate relative” status and are instead handled under family-sponsored preference categories, which are subject to yearly quotas and multiyear backlogs. See 8 U.S.C. § 1153(a)(1)–(4) (listing order of preference categories, with “[s]pouses . . . of permanent resident aliens” listed second). See also STUART ANDERSON, NAT’L FOUND. FOR AM. POLICY, FAMILY IMMIGRATION: THE LONG WAIT TO IMMIGRATE 1 (2010) (noting a four-year estimated minimum wait for spouses and minor children of LPRs). Moreover, those foreign nationals who obtain LPR status independently of marriage do not qualify for naturalization after three years, as in the case of LPRs in heterosexual marriages with U.S. citizens. Cf. 8 U.S.C. § 1430 (allowing an LPR who is married to a U.S. citizen to naturalize if the LPR, after obtaining LPR status, has, inter alia, lived in marital union with the U.S. citizen and resided in the U.S. continuously for a period of three years). Without the marriage benefit, it takes five years to naturalize. See 8 U.S.C. § 1427.

40. Cf. 8 U.S.C. § 1101(a)(15)(K)(i). This provision allows a U.S. citizen to sponsor his or her fiancé(e) for entry into the United States as a nonimmigrant foreign national, provided the couple met within two years of filing the petition and intend to marry within ninety days of the arrival of the noncitizen fiancé(e). See 8 U.S.C. § 1184(d)(1); see also Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1650–52 (2007) (explaining the fiancé(e) visa and the limitations placed on these visas to avoid fraudulent entry into the United States). In cases where the couple married abroad, the foreign-born spouse can be sponsored for a K-3 visa. See generally 8 C.F.R. § 41.81 (2011).

41. See, e.g., 8 U.S.C. § 1182(a)(3)(d)(iv) (providing a waiver of inadmissibility due to membership in a totalitarian party where the foreign national is the spouse of a U.S. citizen or LPR, the foreign national is not a threat to national security, and the waiver would assure family unity); 8 U.S.C. § 1182(a)(9)(B)(v) (providing a waiver of inadmissibility due to unlawful presence in the United States to prevent “extreme hardship” to the U.S.-citizen or LPR spouse of the foreign national); 8 U.S.C. § 1182(a)(9)(C)(iii) (providing a waiver of the ten-year inadmissibility period due to reentry or attempted reentry after an order of removal if the foreign national experienced battery or extreme cruelty at the hands of a U.S.-citizen or LPR spouse and there is a “connection” between the battery or extreme cruelty and the foreign national’s removal, reentry, or attempted reentry); 8 U.S.C. § 1182(d)(11) (providing a waiver of inadmissibility due to alien smuggling where the foreign national is already an

prevents binational same-sex couples from obtaining any of these benefits based on their marriage. In addition, DOMA makes the non-LPR foreign-born same-sex spouses of U.S. citizens *prima facie* ineligible for cancellation of removal—an important defense to removal—unless the foreign national can claim the relief based on a relationship with a U.S. citizen or LPR parent or child.<sup>42</sup> Finally, DOMA prevents nonimmigrant foreign nationals who come to the U.S. temporarily from bringing their same-sex spouses with them as a derivative of the principal's visa classification.<sup>43</sup>

Unless the foreign-national spouses can find an independent basis for entering or remaining in the United States,<sup>44</sup> these binational couples often face untenable choices. They can try to relocate to a foreign country that will recognize their relationship for immigration purposes<sup>45</sup> or admit both individuals independently of each other. But when a foreign national's visa reaches expiration, that individual must often make a choice between leaving loved ones behind or remaining in the United States without lawful status, which can subject the person to removal proceedings. Moreover, if

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LPR or seeking admission or adjustment of status based on his or her U.S.-citizen or LPR spouse; the foreign national smuggled or attempted to smuggle his or her then-spouse, parent, or child into the United States; and waiver would assure family unity); 8 U.S.C. § 1182(d)(12) (providing a waiver of inadmissibility due to certain specified civil penalties involving civil fraud if the foreign national is already an LPR or seeking adjustment of status based on his or her U.S.-citizen or LPR spouse, has no prior civil penalties, committed the civil fraud to support the immigration of a foreign national spouse or child, and waiver would assure family unity); 8 U.S.C. § 1182(g)(1) (providing a waiver of inadmissibility due to a communicable disease of public health significance where the foreign national is the spouse of a U.S. citizen or LPR); 8 U.S.C. § 1182(h) (providing, subject to a few exceptions, a waiver of inadmissibility due to various types of criminal activity to prevent "extreme hardship" to the U.S.-citizen or LPR spouse of the foreign national); 8 U.S.C. § 1182(i) (providing a waiver of inadmissibility due to misrepresentation to prevent "extreme hardship" to the U.S.-citizen or LPR spouse of the foreign national).

42. In the case of non-permanent residents, cancellation relief is limited to those who can establish, *inter alia*, "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1). A nonpermanent resident who is granted cancellation of removal is granted an adjustment of status to that of an LPR. *See id.*

43. *Cf.* 8 U.S.C. §§ 1184(d)(1), 1258(a) (2006) (allowing the spouse of a foreign national to receive a visa to join the principal nonimmigrant foreign national in the United States). *But cf. supra* notes 29–30 and accompanying text (noting workarounds in which the partners of nonimmigrants can obtain a visitor's visa).

44. Foreign nationals most frequently obtain permanent residence through sponsorship by a U.S.-citizen or LPR relative, or through an employer. *See Visa Types for Immigrants*, TRAVEL.STATE.GOV, [http://travel.state.gov/visa/immigrants/types/types\\_1326.html](http://travel.state.gov/visa/immigrants/types/types_1326.html) (last visited Oct. 20, 2012). Other avenues, such as the diversity lottery or asylum, are less common.

45. Citizens of the following countries can sponsor their partners for immigration benefits: Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. *See Immigration Roundup*, PARTNERS TASK FORCE FOR GAY & LESBIAN COUPLES (Mar. 29, 2011), <http://www.buddybuddy.com/immigr.html>.

the foreign national leaves the country after falling out of status and then tries to reenter, he or she could face as much as a ten-year bar to reentry.<sup>46</sup>

Despite the litany of statutory marriage-based benefits provided within the immigration context, the executive branch retains the power to exercise discretion not to assert the full scope of its enforcement authority in cases that do not meet the agency's enforcement priorities. Recently, foreign nationals in same-sex marriages to U.S. citizens and LPRs have been the recipients of favorable exercises of discretion in cases in which executive branch officials have elected not to remove from the United States the foreign-national same-sex spouses of U.S. citizens and LPRs. Presidential administrations have for some time invoked such discretion not to prosecute the immigration laws vigorously in categories of certain low-priority cases,<sup>47</sup> and, recently, officials have extended the same kind of discretion on a case-by-case basis to many couples who, because of DOMA section 3, cannot obtain a family-based immigration benefit based on their valid marriage to a person of the same-sex. Hence, even though the Obama Administration's enforcement of DOMA section 3 means that it cannot grant the same-sex foreign-born spouse of a U.S. citizen or LPR immigration benefits (such as permanent residence) based on the marriage, immigration officials have refrained from using the full scope of their enforcement powers against such individuals in the removal context.

### B. Prosecutorial Discretion

Prosecutorial discretion, a topic that has garnered significant attention of late,<sup>48</sup> concerns the authority of the immigration enforcement arm of the executive branch not to assert the full scope of its powers of enforcement in an individual case or category of cases.<sup>49</sup> It is a function of the executive

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46. Under the INA, any foreign national who is unlawfully present in the United States for a period of more than 180 days but less than one year is subject to a bar on admission for three years from the date of departure or removal; if the foreign national is unlawfully present for one year or more, that individual is subject to a bar on admission for ten years from the date of departure or removal. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(I) (making inadmissible any foreign national who "was unlawfully present in the United States for a period of more than 180 days but less than 1 year . . . [who] again seeks admission within 3 years of the date of such alien's departure or removal"); 8 U.S.C. § 1182(a)(9)(B)(i)(II) (making inadmissible any foreign national who "has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal").

47. *See generally* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 *YALE L.J.* 458 (2009).

48. Most recently, attention has surrounded the Obama Administration's policy to aid youngsters who would have benefited from the proposed, but not passed, DREAM Act by deferring action to remove certain youth who came to the United States as children. *See infra* note 124 and accompanying text.

49. Memorandum from John Morton, Dir., ICE, Dep't of Homeland Sec., to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel, ICE, Dep't of Homeland Sec., on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (June 17, 2011) [hereinafter *Exercising Prosecutorial Discretion*], *available at*

branch's inherent law-enforcement authority and is driven by resource constraints, diplomatic relationships, and humanitarian concerns.<sup>50</sup> The power to exercise prosecutorial discretion, while intrinsic to law enforcement in both civil and criminal contexts, is given further meaning under the broad powers the executive branch possesses in the field of immigration.<sup>51</sup> While prosecutorial discretion is not specifically mentioned

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<http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (defining prosecutorial discretion as the decision “not to assert the full scope of the enforcement authority available to the agency in a given case”); *see also* U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE FACT SHEET ON PROSECUTORIAL DISCRETION GUIDELINES (2000) (“Prosecutorial discretion is the authority that every law enforcement agency has to decide whether to exercise its enforcement powers against someone.”); Memorandum from Bo Cooper, Gen. Counsel, Immigration & Naturalization Serv., to Comm’r, Immigration & Naturalization Serv., on INS Exercise of Prosecutorial Discretion 3 (undated), *available at* <http://shusterman.com/pdf/prosecutorialdiscretionmemo-cooper.pdf> (“Because . . . the INS does not have the resources fully and completely to enforce the immigration laws against every violator, it exercises prosecutorial discretion thousands of times every day. INS enforcement priorities, including the removal of criminal aliens and the deterrence of alien smuggling, are examples of discretionary enforcement decisions on the broad, general level that focus INS enforcement resources in the areas of greatest need.”); Memorandum from Doris Meissner, Comm’r of Immigration & Naturalization Serv., U.S. Dep’t of Justice, to Reg’l Dirs., District Dirs., Chief Patrol Agents, Reg’l and Dist. Counsel (Nov. 17, 2000).

Prosecutorial discretion—the decision whom to prosecute—should not be confused with discretionary decisions to grant various forms of relief from removal (such as cancellation of removal or asylum); whether an individual deserves an exception to certain bars to eligibility, admissibility, or removability (for instance, whether an individual applying for asylum more than one year past entry to the United States has demonstrated “extraordinary” circumstances warranting an exception to the one-year deadline on asylum claims); or requests for adjustment of status. *See, e.g.*, DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 231 (2007).

50. *See* Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 6 (2012) [hereinafter Wadhia, *Sharing Secrets*]; *see also* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244–45 (2010) [hereinafter Wadhia, *Role of Prosecutorial Discretion*]. As a fiscal matter, prosecutorial discretion saves money, allowing the government to focus its efforts on the most serious offenders and those cases that fall squarely within its enforcement priorities of “national security, border security, public safety, and the integrity of the immigration system.” *See* Exercising Prosecutorial Discretion, *supra* note 49, at 2; *see also* Memorandum from Bo Cooper, *supra* note 49 (discussing the origins of prosecutorial discretion and its application in immigration proceedings). The financial aspect is critical because the agencies that enforce immigration law have the resources to remove annually fewer than 4 percent of those noncitizens living in the United States without authorization. *See* Memorandum from John Morton, Director, ICE, Dep’t of Homeland Sec., to All ICE Employees, Dep’t of Homeland Sec. (Mar. 2, 2011), *available at* <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>. As a humanitarian matter, moreover, many individuals in technical violation of civil immigration laws are otherwise law-abiding and highly valuable members to society, possessing important civic, religious, and family ties to U.S. citizens, corporations, and other institutions. *See* Wadhia, *Role of Prosecutorial Discretion*, *supra* note 50, at 246 (discussing the two-fold purpose of using prosecutorial discretion to conserve resources and promote humanitarian concerns); *see also* Wadhia, *Sharing Secrets*, *supra* note 50, at 12–13 (listing the humanitarian factors considered when officials grant favorable exercises of discretion).

51. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.”). These vast decision-making powers in immigration are often referred to



within the INA or immigration regulations, it has been recognized by the Board of Immigration Appeals<sup>52</sup> (BIA) and the federal courts,<sup>53</sup> most recently in *Arizona v. United States*,<sup>54</sup> in which the Supreme Court noted the importance of prosecutorial discretion in the broader scheme of immigration enforcement. As Justice Kennedy's majority opinion observed, "A principal feature of the removal system is the broad discretion exercised by immigration officials" who, "as an initial matter, must decide whether it makes sense to pursue removal at all."<sup>55</sup>

Immigration discretion spans a number of different stages of the enforcement process—including the initiation of detainers, investigations, and arrests; determinations regarding the commencement of removal proceedings, appeals, and motions to reopen; and the execution of final

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as the government's "Plenary Powers" doctrine in immigration law. *See, e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). Plenary Powers refers to the political branches' broad powers over immigration policy and the powers of Congress and the executive branch to establish substantive immigration law for noncitizens, with drastically curtailed judicial review. *See id.* at 547 ("In general the [Plenary Power] doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions."). While the doctrine has been heavily criticized, *see, e.g.*, Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, it remains in force.

52. *See, e.g.*, *In re Yauri*, 25 I. & N. Dec. 103, 110 (B.I.A. 2009) (noting DHS's prosecutorial discretion over deferred action and citing cases); *In re Bahta*, 22 I. & N. Dec. 1381 (B.I.A. 2000) (finding that the legacy INS had prosecutorial discretion to decide whether to commence removal proceedings against a particular individual subsequent to the 1996 immigration reforms).

53. *See, e.g.*, *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489–92 (1999) (finding that the legacy INS retained inherent prosecutorial discretion as to whether to bring removal proceedings).

54. 132 S. Ct. 2492 (2012).

55. *See id.* at 2499. Justice Kennedy went on to articulate the underlying policy reasons for such broad discretion:

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

*Id.* Justice Scalia, in dissent, indicted the Obama Administration for its June 15, 2012, policy that would aid youngsters who came to the United States as children and would benefit from passage of the DREAM Act. *See id.* at 2521 (Scalia, J., dissenting); *see also infra* note 124 and accompanying text.

orders of removal as well as decisions regarding detention and parole.<sup>56</sup> Where prosecutorial discretion is concerned, three Department of Homeland Security (DHS) subagencies exercise responsibility: (1) Immigration and Customs Enforcement (ICE), which includes a complement of DHS trial attorneys who act as prosecutors before immigration judges and the BIA and have the authority to make recommendations to administratively close removal cases,<sup>57</sup> as well as a corps of on-the-ground officers who work on the frontline of enforcement, including detention and removal, and who are oftentimes the last resort for foreign nationals who seek to avoid the execution of a removal order;<sup>58</sup> (2) U.S. Citizenship and Immigration Services (USCIS), which is the subagency charged with adjudicating nonadversarial affirmative petitions and applications, such as marriage-based adjustment-of-status applications,<sup>59</sup> but which also may exercise prosecutorial discretion to, for example, hold cases in abeyance or grant deferred action;<sup>60</sup> and (3) U.S. Customs and Border Protection (CBP), which is charged with border-related enforcement actions such as border patrol and airport inspections.<sup>61</sup> Additionally, while officials within the DOJ—which houses the Executive Office for Immigration Review (EOIR), including the BIA and the cadre of immigration judges who decide removal cases<sup>62</sup>—do not exercise

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56. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1826–43 (2011) (detailing the numerous stages when prosecutorial discretion is exercised).

57. See *Office of the General Counsel*, U.S. DEP'T OF HOMELAND SEC., <http://www.dhs.gov/office-general-counsel> (last visited Oct. 20, 2012). Administrative closure is discussed *infra* at note 69.

58. See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., PROTECTING THE HOMELAND: TOOL KIT FOR PROSECUTORS (2011), available at <http://www.ndaa.org/pdf/tool-kit-for-prosecutors%20v.2%20linked%2005.02.11.pdf>; see also *Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/overview/> (last visited Oct. 20, 2012).

59. Adjustment of status is the process by which an eligible individual already in the United States can obtain permanent resident status without having to return to his or her country of origin to complete visa processing. See *Adjustment of Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2da73a4107083210VgnVCM100000082ca60aRCRD&vgnextchannel=2da73a4107083210VgnVCM100000082ca60aRCRD> (last visited Oct. 20, 2012).

60. *Visa Retrogression*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a294b16dedc0f210VgnVCM100000082ca60aRCRD&vgnextchannel=aa290a5659083210VgnVCM100000082ca60aRCRD> (last visited Oct. 20, 2012). For a discussion of deferred action, see *infra* note 68 and accompanying text.

61. See *About CBP*, CUSTOMS & BORDER PROT., <http://www.cbp.gov/xp/cgov/about/> (last visited Oct. 20, 2012). CBP can exercise discretion regarding whether or not to bring truncated, or so-called expedited removal proceedings for those caught attempting to enter the United States. Those proceedings, as well as CBP's exercise of discretion, are beyond the scope of this Article.

62. The EOIR is composed of immigration courts, the Office of the Chief Immigration Judge, and the Board of Immigration Appeals (BIA), which hears appeals of most immigration decisions. This bifurcated system was created by the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002) (codified at 6 U.S.C. § 101 (2006)), which abolished the former Immigration and Naturalization Service and divided those

*prosecutorial* discretion, they also possess various discretionary powers that have been important in a number of cases involving binational same-sex couples as well.<sup>63</sup>

### 1. DHS Discretion in Action

On June 17, 2011, ICE Director John Morton issued a memorandum that specifically authorized immigration field officers to use prosecutorial discretion and provided them with several criteria to guide the decision whether to grant a favorable exercise of discretion in a particular case.<sup>64</sup> These included a foreign national's "ties and contributions to the community, including family relationships,"<sup>65</sup> and "whether the person has a U.S. citizen or permanent resident spouse, child, or parent."<sup>66</sup> On August 18, 2011, the Obama Administration and DHS announced the creation of an interagency committee to conduct a review of pending removal cases to focus immigration enforcement on the priorities established in the Morton memorandum.<sup>67</sup> Since that time, various DHS officials have begun to use their discretion in cases of binational same-sex couples, thereby sparing them some of DOMA's harshest consequences. *First*, in those cases in which a noncitizen already has been placed in removal proceedings, the government has agreed to favorable exercises of discretion by seeking to close cases on the immigration court's active docket. *Second*, in some circumstances in which foreign nationals in binational same-sex relationships were *not* facing removal proceedings but feared removal as their status approached expiration, the government has provided a limited reprieve by granting noncitizens "deferred action," a temporary abatement from immigration enforcement in cases where there are compelling

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responsibilities among the DHS and DOJ. Under the Homeland Security Act, the adversarial adjudicatory functions of immigration courts and the BIA are housed within DOJ and overseen by the Attorney General. The prosecutorial and enforcement functions, as well as the nonadversarial adjudicatory functions, are housed within DHS and are overseen by the Secretary of Homeland Security. See 6 U.S.C. §§ 275, 291, 521; see also Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 483–84 (2007).

63. See *infra* Part III.B.2.

64. See Exercising Prosecutorial Discretion, *supra* note 49, at 2.

65. *Id.*

66. *Id.*

67. See Letter from Janet Napolitano, Dir., U.S. Dep't. of Homeland Sec., to Sen. Dick Durbin (Aug. 18, 2011), available at <http://www.aila.org/content/default.aspx?docid=36684>. This review effort was intended to implement the goals stated in the Morton memorandum of making more efficient use of limited resources to effect removals against those foreign nationals with serious criminal records, who pose national security threats, or who are egregious violators of immigration law. See Julia Preston, *U.S. Issues Deportation Policy's First Reprieves*, N.Y. TIMES, Aug. 23, 2011, at A15. As of June 2012, immigration officials had reviewed more than 400,000 cases, exercising discretion not to pursue removal against 4,403 foreign nationals (less than 2 percent of the total number of cases). See Julia Preston, *Deportations Continue Despite U.S. Review of Backlog*, N.Y. TIMES, June 6, 2012, at A13.

humanitarian issues or a government interest at stake and the applicant is considered a low priority for enforcement.<sup>68</sup>

*a. Administrative Closure of Removal Proceedings*

In several individual cases, immigration officials within DHS have determined that, in light of the agency's resource constraints, certain removal proceedings against the foreign-born same-sex spouses of U.S. citizens do not meet agency enforcement priorities and should be administratively closed.<sup>69</sup> In June 2011, for example, the government moved to administratively close removal proceedings against Venezuelan national Henry Velandia, who came to the United States in 2002 and, in 2010, married Josh Vandiver, a New Jersey resident.<sup>70</sup> In August 2011, the government also moved to administratively close removal proceedings against Alex Benshimol, also from Venezuela and whose husband, Doug Gentry, had unsuccessfully filed a marriage-based petition for immigrant status for Benshimol in July 2010.<sup>71</sup> (Judges agreed to administratively close both cases.<sup>72</sup>) In each case, DHS trial attorneys originally balked at a favorable exercise of discretion, prompting the immigration judge to grant long continuances so that the agency could reconsider.<sup>73</sup>

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68. See OFFICE OF CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, DEP'T OF HOMELAND SEC., DEFERRED ACTION: RECOMMENDATIONS TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS 2 (2011), available at <http://www.dhs.gov/xlibrary/assets/cisomb-combined-dar.pdf> ("When accorded deferred action, an individual is able to remain, temporarily, in the United States: USCIS declines to exercise its authority to issue a Notice to Appear and does not place the individual in removal proceedings."). A Notice to Appear is the charging document that initiates removal proceedings. A grant of deferred action does not constitute permanent residence or confer legal status; rather, it is a promise not to bring removal proceedings for a specified period of time (usually one or two years). TOOL KIT FOR PROSECUTORS, *supra* note 58, at 4.

69. Administrative closure is a device to remove a case temporarily from an immigration judge's active calendar (or from the BIA's docket). See *In re Avetisyan*, 25 I. & N. Dec. 688, 692–95 (B.I.A. 2012). Administrative closure is not the same thing as a termination or conclusion of immigration proceedings; when a case is administratively closed, either the government or the respondent to the proceedings can move to have the case re-calendared before the judge (or to reinstate an appeal before the BIA). See *id.* at 695. Administrative closure is not unique to immigration; rather, it is a standard feature of federal civil procedure. See, e.g., *St. Marks Place Hous. Co., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 610 F.3d 75, 80–81 (D.C. Cir. 2010).

70. See Kirk Semple, *U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage*, N.Y. TIMES, June 30, 2011, at A16.

71. See Chris Geidner, *Immigration Judge Closes Deportation Case Against Married Gay Man*, METROWEEKLY (Aug. 20, 2011, 1:25 PM), <http://www.metroweekly.com/poliglot/2011/08/immigration-judge-closes-depor.html>. Benshimol remained after his visitor status expired in 2009, see Seth Hammelgram, *CA Couple Fights Deportation*, EDGE S.F. (July 7, 2011), [http://www.edgesanfrancisco.com/news/local/121962/ca\\_couple\\_fights\\_deportation](http://www.edgesanfrancisco.com/news/local/121962/ca_couple_fights_deportation), causing him to face a ten-year bar to applying for reentry. See *supra* note 46 and accompanying text (discussing bars to reentry under 8 U.S.C. § 1182(a)(9)(B)(i) for foreign nationals who accumulate unlawful presence).

72. See Semple, *supra* note 70; Geidner, *supra* note 71.

73. See *infra* notes 104–06 and accompanying text.

Later that year, government attorneys took similar action in at least two additional cases. In November 2011, the government filed a motion to administratively close removal proceedings against Monica Alcota, an Argentine national who lives in Queens, N.Y., with her U.S.-citizen wife, Cristina Ojeda.<sup>74</sup> One month later, it moved to administratively close removal proceedings against Michael Thomas, a citizen of Trinidad and Tobago who in 2010 married his American spouse, John Brandoli, in Massachusetts.<sup>75</sup> Immigration judges granted motions to administratively close both cases.

*b. Deferred Action*

In a few other cases, officials within USCIS have granted deferred action to foreign nationals who could face removal proceedings despite being validly married to U.S. citizens. One such case involved Australian national Anthony John Makk, who is married to Bradford Wells, an American who is suffering from AIDS-related complications.<sup>76</sup> The couple, who have been together for nineteen years and married for seven years, faced the possibility of separation as Makk's status reached expiration.<sup>77</sup> Makk's application for permanent residence as Wells's spouse was denied in August 2011.<sup>78</sup> On the heels of a media campaign that included pleas by members of Congress, USCIS granted Makk deferred action for two years beginning on January 4, 2012.<sup>79</sup> Similarly, on May 22, 2012, after similar pleas from members of Congress, USCIS granted deferred action to Japanese immigrant Takako Ueda, who married U.S. citizen Frances Herbert in 2011.<sup>80</sup> The government also provided Tim Smulian, a South African national married to Edwin Blesch, a U.S. citizen, a one-year grant of deferred action.<sup>81</sup> Blesch and Smulian are plaintiffs in

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74. See *id.*; see also Michael Bowman, *U.S. Immigration Judge Suspends Deportation for Gay Spouse*, VOICE OF AMERICA (Mar. 26, 2011), <http://www.voanews.com/content/us-immigration-judge-suspends-deportation-of-gay-spouse-118741179/174610.html>.

75. See *Officials Agree to Close Deportation Case Involving Gay Binational Couple*, ADVOCATE (Dec. 16, 2011), <http://www.advocate.com/news/daily-news/2011/12/16/officials-agree-close-deportation-case-involving-gay-binational-couple>. The request for prosecutorial discretion had previously been denied. See Maria Sacchetti, *Two Reprieves Give Immigrants Cautious Hope*, BOS. GLOBE, Nov. 26, 2011, at A1.

76. See Carolyn Lochhead, *Deportation Threat Lifted from S.F. Gay Spouse*, SFGATE (Jan. 5, 2012, 4:00 AM), <http://www.sfgate.com/nation/article/Deportation-threat-lifted-from-S-F-gay-spouse-2442468.php>.

77. *Id.*

78. *Id.*

79. Press Release, Rep. Nancy Pelosi, *Pelosi Statement on Anthony John Makk and Bradford Wells* (Jan. 4, 2012), available at <http://pelosi.house.gov/news/press-releases/2012/01/pelosi-statement-on-anthony-john-makk-and-bradford-wells.shtml>.

80. See *Deportation Threat Lifted for Lesbian Vt. Couple*, FOXNEWS.COM (May 22, 2012), <http://www.foxnews.com/us/2012/05/22/deportation-threat-lifted-for-lesbian-vt-couple/>.

81. See Miranda Leitsinger, *Gay Couples, Where Spouse is Foreigner, Sue Over DOMA*, NBCNEWS.COM (Apr. 3, 2012, 3:42 PM), [http://usnews.msnbc.msn.com/\\_news/2012/04/03/11004440-gay-couples-where-spouse-is-a-foreigner-sue-over-doma?lite](http://usnews.msnbc.msn.com/_news/2012/04/03/11004440-gay-couples-where-spouse-is-a-foreigner-sue-over-doma?lite).

one of a number of federal-court challenges brought by binational couples affected by DOMA.<sup>82</sup>

## 2. DOJ Discretion in Action

Shortly after the Obama Administration's February 23, 2011, announcement to enforce but not defend DOMA section 3, the Attorney General issued a precedential immigration ruling in *Matter of Dorman*<sup>83</sup> that already has had cascading effects in a number of cases concerning binational same-sex couples. *Dorman* involved a British citizen who entered the United States in 1996, overstayed his nonimmigrant status, and subsequently entered into a New Jersey same-sex civil union<sup>84</sup> with a U.S. citizen partner in 2009.<sup>85</sup> Upon being placed in removal proceedings, Dorman sought a form of discretionary relief from removal known as cancellation of removal that, if granted, would result in LPR status.<sup>86</sup> In order to be eligible for that relief, Dorman would have to demonstrate "exceptional and extremely unusual hardship" to a qualifying relative, which the INA defines as a U.S. citizen or LPR spouse, parent, or child.<sup>87</sup> The immigration judge flatly denied Dorman's request for cancellation of removal relief on the grounds that his same-sex partner was not a qualifying relative, and the BIA affirmed that holding.<sup>88</sup> Dorman appealed that decision by filing a petition for review of his final order of removal in the Third Circuit, but the case was returned to the agency when the Attorney General invoked a procedure, used sparingly in immigration law, of certifying the BIA's decision to himself and remanding the action to the BIA for reconsideration.<sup>89</sup>

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82. See Complaint, *Blesch v. Holder*, No. 12-1578 (E.D.N.Y. Apr. 2, 2012); see also *Revelis v. Napolitano*, 844 F. Supp. 2d 915 (N.D. Ill. 2012); *Lui v. Holder*, No. 2:11-CV-01267-SVW (JCGx) (C.D. Cal. dismissed Feb. 22, 2012); Complaint, *Aranas v. Napolitano*, No. SACV12-1137-JVS(MLGx) (C.D. Cal. July 12, 2012). Two other cases, *Torres-Barragan v. Holder*, No. 10-55768 (9th Cir. dismissed Apr. 10, 2012), and *In re Dorman*, 25 I. & N. Dec. 485 (A.G. 2011), were resolved without any ruling regarding DOMA's constitutionality. The Ninth Circuit dismissed *Torres-Barragan* on the petitioner's voluntary motion after his case was remanded to the agency, where it was administratively closed, see Order, *Torres-Barragan*, No. 10-55768 (9th Cir. Apr. 10, 2012), ECF No. 39, and *Dorman* was certified to the Attorney General, remanded to the BIA, and eventually ordered administratively closed by the immigration court. See *infra* notes 89-92 and accompanying text.

83. See *Dorman*, 25 I. & N. Dec. at 485; see also *Protecting and Preserving the Rights of LGBT Families: DOMA, Dorman, and Immigration Strategies*, LEGAL ACTION CENTER (June 13, 2011), <http://www.legalactioncenter.org/sites/default/files/DOMA-Removal-Proceedings-6-13-2011.pdf>.

84. N.J. STAT. ANN. § 26:8A-1 (West 2012). New Jersey does not currently allow same-sex couples to marry. See *supra* note 2.

85. *Dorman*, 28 I. & N. Dec. at 485.

86. For an explanation of cancellation of removal, see *supra* note 42 and accompanying text.

87. 8 U.S.C. § 1229b(b)(1) (2006).

88. *Dorman*, 28 I. & N. Dec. at 485.

89. *Id.* The Attorney General has broad authority to certify to himself and review de novo BIA decisions. See 8 C.F.R. § 1003.1(h) (2011) (allowing the Attorney General, the

The Attorney General ordered the BIA to consider four questions spanning a range of issues: (1) whether Dorman could be considered a “spouse” under New Jersey law; (2) whether, absent the requirements of DOMA, Dorman’s same-sex partnership or civil union would qualify him to be considered a “spouse” under the INA; (3) what impact, if any, the timing of Dorman’s civil union should have on his request for discretionary relief; and (4) whether, assuming Dorman had a “qualifying relative,” he would be able to satisfy the “exceptional and extremely unusual hardship” standard for cancellation of removal.<sup>90</sup> While it is difficult to comprehend how the executive branch could provide a marriage-based benefit to a same-sex spouse or domestic partner while still enforcing DOMA,<sup>91</sup> the Attorney General’s remand order has provided Dorman a critical reprieve from removal: after his case was remanded to the BIA and, in turn, remanded to the immigration judge, the government moved to have the case administratively closed.<sup>92</sup>

For some time, *Dorman* was a crucial resource for attorneys seeking a favorable exercise of DHS discretion in their clients’ removal proceedings.<sup>93</sup> Following the decision, the BIA relied on it to remand at least five cases in which a U.S. citizen had filed a marriage-based visa petition for a same-sex spouse. In four of the cases, the USCIS Field Office Director denied the visa petitions, determining in each case that the marriage did not constitute a valid spousal relationship in light of DOMA section 3.<sup>94</sup> All four cases were appealed from USCIS to the BIA. The fifth case, a removal proceeding, involved a motion to reopen before the BIA in light of a pending visa petition filed by the respondent’s same-sex

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Secretary of DHS, the Chairman of the BIA or a majority of the BIA to refer the latter’s decisions to the Attorney General for review); *see also* Taylor, *supra* note 62, at 483–84 & n.35 (discussing the process for certifying decisions to the Attorney General). This certification power, though sparingly used, is a powerful tool in that it allows the Attorney General to pronounce new standards for the agency and overturn longstanding BIA precedent. *See* Laura S. Trice, *Adjudication by Fiat: The Need For Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766 (2010).

90. *See* 8 U.S.C. § 1229b(b)(1)(D) (2006) (requiring that removal of foreign-born individual would cause “exceptional and unusual hardship requirement” to a U.S.-citizen spouse, parent, or child).

91. *See* Defense of Marriage Act § 3(a), 1 U.S.C. § 7 (2006) (applying the definition of marriage as “a legal union between one man and one woman” to “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”).

92. Case on file with the Fordham Law Review; *see* James O’Shea, *Gay Undocumented Irishman Has His Deportation Suspended*, IRISH CENT. (July 20, 2012, 10:30 AM), <http://www.irishcentral.com/news/Gay-married-illegal-Irishman-has-his-deportation-suspended--163155386.html>. The government sought administrative closure after the couple married in New York. Email from Nicholas Mundy, Esq., Counsel to Dorman, to author (Aug. 29, 2012, 11:28 EST) (on file with author).

93. *Dorman* was especially important prior to the issuance of formal DHS guidelines providing for prosecutorial discretion in the cases of binational same-sex couples. *See infra* note 113 and accompanying text.

94. Cases on file with the Fordham Law Review.

U.S. citizen spouse.<sup>95</sup> The government did not contest the bona fides of the marriage on appeal but opposed any reopening on grounds that the adjustment-of-status application<sup>96</sup> was barred by DOMA.

In the first four appeals originating within USCIS, the BIA remanded the cases to the agency in light of *Dorman* and directed USCIS to determine the validity of the marriages under state law and whether, absent the requirements of DOMA, each beneficiary would be considered a “spouse” under the INA.<sup>97</sup> In the fifth case, the BIA, also citing *Dorman*, ordered the case reopened and remanded the matter to the immigration judge to determine the validity of the marriage under state law and whether, absent the requirements of DOMA and assuming the immediate availability of an immigrant visa, the beneficiary would be considered a “spouse” under the INA.<sup>98</sup>

Another important aspect of enforcement discretion involves cases in which immigration judges, exercising their discretion on behalf of the Attorney General,<sup>99</sup> have administratively closed proceedings or delayed them for long periods. In one case originating out of Denver, Colorado,<sup>100</sup> an immigration judge administratively closed removal proceedings despite DHS’s opposition by relying on a recent BIA ruling clarifying the discretionary power of immigration judges to administratively close proceedings.<sup>101</sup> Although the DHS trial attorney opposed removing the case from the immigration judge’s active docket, the judge, citing *Dorman*, ordered the case administratively closed pending *Dorman*’s resolution.<sup>102</sup> In other cases, including many in which requests by DHS trial attorneys for administrative closure were eventually forthcoming, immigration judges granted continuances for months, if not years, so that the government could

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95. Case on file with the Fordham Law Review.

96. For an explanation of adjustment of status, see *supra* note 59.

97. See generally Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (2006).

98. These BIA orders were issued very recently, and thus it remains to be seen how, exactly, they will be resolved. However, assuming that all of these beneficiaries would be considered lawful spouses in the absence of DOMA, it is hard to see how the petitions could be granted as long as section 3 remains in force.

99. Immigration Judges are appointed by the Attorney General and delegated the responsibility to act on the Attorney General’s behalf. See 8 U.S.C. § 1101(b)(4) (2006); see also 8 C.F.R. § 1240.31 (2011) (“Subject to any specific limitation prescribed by the Act and this chapter, immigration judges shall also exercise the discretion and authority conferred upon the Attorney General . . . as is appropriate and necessary for the disposition of such cases.”).

100. Case on file with the Fordham Law Review.

101. See *In re Avetisyan*, 25 I. & N. Dec. 688 (B.I.A. 2012) (establishing a six-factor test under which immigration judges can administratively close proceedings).

102. On October 1, 2012, an immigration judge in Charlotte, North Carolina, granted a motion to administratively close removal proceedings in the case of a foreign national whose only basis for relief from removal was an adjustment of status based on his marriage to a U.S. citizen. The couple had been in a committed relationship for more than nine years when they married in Vermont on September 10, 2012. Email from Helen Parsonage, Esq., to author (Oct. 1, 2012, 17:36 EST) (on file with author). Like many other foreign-national same-sex spouses of U.S. citizens, DOMA remains the only impediment to the foreign national’s ability to obtain permanent residence.



reconsider a favorable exercise of discretion. In Alex Benshimol's case,<sup>103</sup> for example, the immigration judge ruled initially that the case would be continued for twenty-six months unless the government agreed to a favorable exercise of discretion, and, in response, the DHS trial attorney asked the immigration judge to administratively close the case.<sup>104</sup> Henry Velandia,<sup>105</sup> during his proceedings, received a seven-month continuance before his case was administratively closed on the government's motion.<sup>106</sup>

### C. Enforcement Discretion and Constitutional Commands

Cases in which DHS officials have agreed to a favorable exercise of discretion, and the analogous uses of discretion in similar cases by officials within DOJ, address a conundrum that became apparent after the Obama Administration announced that it would no longer defend section 3 in court: although the Administration understood its Take Care obligations<sup>107</sup> to require it to comply with DOMA section 3 so long as it remained good law,<sup>108</sup> it seemed wrongheaded to remove from the United States spouses of U.S. citizens and LPRs who, but for DOMA—a law the Obama Administration not only believed to be unconstitutional but was actively challenging in court—would be eligible for permanent residence. Under a DOMA enforcement policy, USCIS cannot grant family-based immigration benefits to the same-sex foreign-born spouses of U.S. citizens and LPRs based on a valid marriage, but it can use its enforcement discretion to prevent the foreign national from removal, sparing binational couples some of the most serious consequences resulting from DOMA's requirement that the government not recognize the marriage for purposes of federal marriage-based benefits.

For some time, Obama Administration officials stated,<sup>109</sup> but refused to put in writing, a policy of including same-sex relationships within the definition of the "family relationships" officials would consider when granting favorable exercises of discretion.<sup>110</sup> After members of Congress

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103. See *supra* note 71 and accompanying text.

104. See Dan Schreiber, *Case of Gay Couple Facing Deportation Gets Two-Year Delay*, S.F. EXAMINER (July 13, 2011, 2:11 PM), <http://www.sfexaminer.com/local/2011/07/case-gay-couple-facing-deportation-gets-two-year-delay>.

105. See *supra* note 70 and accompanying text.

106. See Adriana Hauser, *Federal Authorities Drop Deportation Case Against Same-Sex Partner*, CNN (June 30, 2011), [http://articles.cnn.com/2011-06-30/us/new.jersey.deportation.case\\_1\\_deportation-process-lavi-soloway-gay-couples?\\_s=PM:US](http://articles.cnn.com/2011-06-30/us/new.jersey.deportation.case_1_deportation-process-lavi-soloway-gay-couples?_s=PM:US).

107. See *supra* note 33 and accompanying text.

108. See *supra* note 6 and accompanying text.

109. See Robert Pear, *Fewer Youths To Be Deported in New Policy*, N.Y. TIMES, Aug. 19, 2011, at A1.

110. For example, DHS would state in writing only that "LGBT individuals' ties and contributions to the community" constituted "one factor relevant to determining whether a case is a low priority." See Letter from Nelson Peacock, Assistant Sec'y, Office of Legislative Affairs, U.S. Dep't of Homeland Sec., to Congressman Jerrold Nadler, U.S. House of Representatives (Oct. 25, 2011) (emphasis added) (on file with the Fordham Law Review).

made repeated requests that the Obama Administration put the policy in writing to “increase awareness of DHS’s position on this issue among DHS staff, adjudicators, the immigration bar, and affected individuals,”<sup>111</sup> DHS Secretary Janet Napolitano announced on September 27, 2012, that she would “direct[] ICE to disseminate written guidance to the field that . . . ‘family relationships’ includes long-term, same-sex partners.”<sup>112</sup> That guidance, issued on October 5, 2012,<sup>113</sup> is important because it removes any doubt that the same-sex foreign-national partners of U.S. citizens and LPRs (married or not) are eligible for favorable exercises of discretion, ensuring that no unnecessary obstacle prevents DHS from exercising discretion in worthy cases of binational couples.

To be sure, these favorable exercises of discretion are a second-best solution. After all, they do not actually constitute a substantive immigration benefit for binational same-sex couples; they are merely a reprieve, either by staving off removal proceedings or, where those proceedings are already initiated, by taking those cases off the immigration court’s active docket. Still, enforcement discretion provides the Obama Administration with a way of negotiating its dual commitments to equal protection and the faithful execution of the laws. It also promotes the Obama Administration’s broader goal of having a coordinate branch of government provide the decisive vote on DOMA’s enforceability.

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111. See Letter from Nancy Pelosi et al., Democratic Leader, U.S. House of Representatives, to Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec. (July 31, 2011) (asking that DHS recognize, in writing, “the ties of a same-sex partner or spouse as a positive factor for discretionary relief in immigration enforcement deportation cases”) (on file with author); see also Chris Geidner, *Pelosi Presses White House on Immigration for Gay Couples*, BUZZFEED POL. (Aug. 1, 2012, 3:02 PM), <http://www.buzzfeed.com/chrisgeidner/pelosi-presses-white-house-on-immigration-for-gay> (noting a renewed effort by members of Congress to persuade the Obama Administration to put in writing its commitment to include binational same-sex couples within its prosecutorial discretion policy). Memorandum from Gary Mead, Exec. Assoc. Dir., U.S. Immigration & Customs Enforcement, Peter S. Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, and James Dinkins, Exec. Assoc. Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Chief Counsel, and All Special Agents in Charge, on Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships (Oct. 5, 2012), available at <http://www.washingtonblade.com/content/files/2012/10/9-Oct-12-PD-and-Family-Relationships.pdf>.

112. Letter from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to Jerrold Nadler, U.S. House of Representatives (Sept. 27, 2012), available at <http://www.washingtonblade.com/content/files/2012/09/12-3384-Nadler-S1-Signed-Response-09.27.12.pdf>; see Julia Preston, *Same-Sex Couples Granted Protection in Deportations*, N.Y. TIMES, Sept. 28, 2011, at A15.

113. Memorandum from Gary Mead, Exec. Assoc. Dir., U.S. Immigration & Customs Enforcement, Peter S. Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, and James Dinkins, Exec. Assoc. Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Chief Counsel, and All Special Agents in Charge, on Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships (Oct. 5, 2012), available at <http://www.washingtonblade.com/content/files/2012/10/9-Oct-12-PD-and-Family-Relationships.pdf>.

## IV. EXECUTIVE DISCRETION, LEGISLATIVE COMMANDS, AND CONSTITUTIONAL MEANING

The Obama Administration's commitment to exercising discretion in furtherance of same-sex couples, both through interpretive discretion and enforcement discretion, is consistent with its broader efforts to use executive branch authority to further LGBT equality more generally.<sup>114</sup> Indeed, both forms of discretion reflect ways that the President can promote a civil-rights agenda through administrative action during periods in which it is difficult to move legislation through Congress.<sup>115</sup> These forms of discretion also illustrate different aspects of the relationship between executive branch constitutional interpretation and legislative change. While a full account of that topic will be saved for future scholarship,<sup>116</sup> a few points are worth mentioning here.

One difference between interpretive and enforcement discretion in their respective implementations is that, while most of the initiatives involving interpretive discretion had been put in place prior to the Attorney General's announcement that the Administration would no longer defend DOMA section 3 in court,<sup>117</sup> the Administration did not begin to exercise enforcement discretion in immigration cases involving binational same-sex couples until after the DOMA announcement.<sup>118</sup> Moreover, while both interpretive and enforcement discretion apply to same-sex couples regardless of marital status, it is noteworthy that all of the recent cases of enforcement discretion reported in the press and discussed in this Article involve only *married* couples. While *Dorman* involved a couple with a New Jersey civil union, it was only after the couple married in New York that DHS agreed to a favorable exercise of discretion.<sup>119</sup> However, to the extent that a foreign national's marital status appeared to be an important factor in obtaining a favorable exercise of discretion, the relevant ICE

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114. See Nosanchuk, *supra* note 21, at 444–46, 456–57, 459–63 (detailing the Obama Administration's broad record of executive branch action in furtherance of LGBT equality).

115. President Obama has expressed his support for the Respect for Marriage Act, which would repeal DOMA. H.R. 1116, 112th Cong. (2011); S. 598, 112th Cong. (2011). See David Nakamura, *Obama Backs Bill to Repeal Defense of Marriage Act*, WASH. POST, July 19, 2011, at A3.

116. See Joseph Landau, *The President and the Passive Virtues: Executive Constitutionalism and Individual Rights* (Sept. 27, 2012) (unpublished manuscript) (on file with the Fordham Law Review).

117. Indeed, at least one such policy dates as far back as 1993, when the legacy INS first indicated that it would extend some immigration benefits to same-sex couples. See *supra* note 29 and accompanying text.

118. Although the pre-2011 prosecutorial discretion memos reference family ties as a factor for prosecutorial discretion, see, e.g., Meissner, *supra* note 49, at 7, that factor likely was not as important then as it is now. As a general matter, the “family ties” factor was a subset of the broader category of “humanitarian concerns,” not the independent factor that it is today. More importantly, however, it was not until very recently that the Administration articulated, orally or in writing, that it would include same-sex couples within the definition of “family” contemplated by its prosecutorial discretion guidelines. See *supra* notes 109–13 and accompanying text.

119. See *supra* note 92 and accompanying text.

guidelines<sup>120</sup>—including the October 5, 2012, guidance for binational same-sex couples<sup>121</sup>—clarify that a foreign national need not be married to a U.S. citizen or LPR to be eligible for prosecutorial discretion.

It is also worth noting that, where binational same-sex couples are concerned, the Obama Administration is pursuing a case-by-case approach, considering one couple at a time, and refusing to put in place mechanisms for the types of across-the-board relief “to the entire category of cases affected by DOMA”<sup>122</sup> that have been used in other contexts. As a practical matter, the Obama Administration’s case-by-case approach requires binational same-sex couples to go to great lengths to persuade government officials, including DHS trial attorneys—their litigation adversaries in removal proceedings—to grant a favorable exercise of discretion, which can require protracted litigation as well as efforts and interventions by legislators, advocacy organizations, and the media. The Obama Administration’s more measured approach to binational same-sex couples is distinguishable from other executive branch policies, including some by prior presidential administrations, to grant favorable exercises of discretion in entire categories of deserving cases. The Obama Administration’s recent Deferred Action for Childhood Arrivals (DACA) policy, for example, defers action for the entire category of eligible young people who came to the United States as children. While the source of DACA is the same June 2011 memorandum by John Morton that has been applied to cases of foreign-born same-sex partners of U.S. citizens,<sup>123</sup> binational same-sex couples must pursue relief on a case-by-case basis, while DACA provides across-the-board relief.<sup>124</sup>

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120. See Exercising Prosecutorial Discretion, *supra* note 49, at 4.

121. See *supra* note 113 and accompanying text.

122. See Chris Geidner, *DOJ Denies Any “Policy” on DOMA-Impacted Cases at Immigration Appeals Board*, METROWEEKLY (July 3, 2012, 2:30 PM), <http://www.metroweekly.com/poliglot/2012/07/doj-denies-any-policy-on-doma-impacted-immigra.html>; see also *supra* note 110 and accompanying text.

123. Exercising Prosecutorial Discretion, *supra* note 49, at 4 (listing criteria for granting favorable exercises of discretion that include whether the foreign national “came to the United States as a young child” or is “pursui[ng] education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States”).

124. To be eligible for deferred action, which, under DACA, includes guaranteed employment authorization, the individual must be at least fifteen years old (individuals in removal proceedings, or who have a final removal or voluntary departure order may apply even if they are younger than fifteen) and must also: (1) have been under the age of sixteen when brought to the United States and have been under the age of thirty-one as of June 15, 2012; (2) have continuously resided, and currently reside, within the United States between June 15, 2007, and the present time; (3) have been physically present in the United States on June 15, 2012, and at the time of making the request; (4) have entered without inspection before June 15, 2012, or fell out of lawful immigration status as of June 15, 2012; (5) be currently in school, have graduated from high school, have obtained a general education certificate, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and (6) have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national

It is conceivable that DOMA's standing in the federal courts could have an effect upon how the Obama Administration chooses to implement its prosecutorial discretion policy for binational same-sex couples. During the past fourteen months, federal courts have struck down section 3 of DOMA eight times, with more rulings likely to follow.<sup>125</sup> Perhaps the Obama Administration will consider changing its policy from a case-by-case approach to a categorical one if additional federal courts invalidate DOMA section 3. In the meantime, these positive acts of executive branch discretion remain a critical stopgap that can greatly lessen some of the most severe harms wrought by DOMA.

#### CONCLUSION

While DOMA section 3 creates a federal definition of the words "marriage" and "spouse," it is not an absolute bar to extending federal benefits to same-sex couples. Nor does section 3 impede the ordinary discretion with which federal agencies carry out their delegations. Hence, the Obama Administration has, consistent with DOMA, found ways of providing benefits to same-sex couples in certain circumstances and protecting binational same-sex couples from harm in other circumstances.

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security and public safety. *See Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM10000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD> (last visited Oct. 20, 2012); *see also* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

125. *Windsor v. United States*, Nos. 12-2335-cv(L), 12-2435(Con.), 2012 WL 4937310 (2d Cir. Oct. 18, 2012), *aff'g* 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *petition for cert. before judgment filed*, No. 12-63 (U.S. July 16, 2012), *petition for cert. before judgment filed*, No. 12-307 (U.S. Sept. 11, 2012); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *aff'g* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010), *and* *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), *petitions for cert. filed*, Nos. 12-13 (U.S. June 29, 2012), 12-15 (U.S. July 3, 2012), *and* 12-97 (U.S. July 20, 2012); *In re Levenson*, 587 F.3d 925 (9th Cir. 2009); *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750 (D. Conn. July 31, 2012), *appeal filed*, No. 12-3273 (2d Cir. Aug. 17, 2012), *petition for cert. before judgment filed*, No. 12-231 (U.S. Aug. 21, 2012), *petition for cert. before judgment filed*, No. 12-302 (U.S. Sept. 11, 2012); *Dragovich v. U.S. Dep't of the Treasury*, No. C 10-1564 CW, 2012 WL 1909603 (N.D. Cal. May 24, 2012), *appeal filed*, No. 12-16461 (9th Cir. June 26, 2012), *and* No. 12-16628 (9th Cir. July 23, 2012); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), *appeal filed*, No. 12-15388 (9th Cir. Feb. 24, 2012), *and* No. 12-15409 (9th Cir. Feb. 28, 2012), *petition for cert. before judgment filed*, No. 12-16 (U.S. July 3, 2012). *But see* *In Chambers Order re Defendants' Partial Motion to Dismiss; Intervenor's Motion to Dismiss, Lui v. Holder*, No. 2:11-cv-01267-SVW-JCG (C.D. Cal. Sept. 28, 2011), ECF No. 38 (upholding DOMA); *In Chambers Order re Defendants' Motion to Dismiss, Torres-Barragan v. Holder*, No. 2:09-cv-08564-RGK-MLG (C.D. Cal. Apr. 30, 2010), ECF No. 24 (same). DOMA also has been struck down in the bankruptcy context. *See In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011); *In re Somers*, 448 B.R. 677 (Bankr. S.D.N.Y. 2011).

The Obama Administration's use of its considerable discretion in the interpretation and enforcement of federal law reflects important ways of engaging its constitutional doubt regarding DOMA section 3 while promoting a civil-rights agenda in the absence of new federal legislation.