

Mercer University School of Law

Mercer Law School Digital Commons

Articles

Faculty Scholarship

2013

Revisiting the Meaning of Marriage: Immigration for Same-Sex Spouses in a Post-*Windsor* World

Scott Titshaw

Follow this and additional works at: https://digitalcommons.law.mercer.edu/fac_pubs



Part of the [Family Law Commons](#), and the [Immigration Law Commons](#)

Revisiting the Meaning of Marriage: Immigration for Same-Sex Spouses in a Post-*Windsor* World

*Scott Titshaw**

I. INTRODUCTION.....	167
II. A UNIFORM PLACE-OF-CELEBRATION RULE	168
III. <i>ADAMS V. HOWERTON</i> IS DEAD.....	172
IV. CHILDREN OF SAME-SEX SPOUSES AFTER <i>WINDSOR</i>	174
V. CIVIL UNIONS AND OTHER NON-MARITAL RELATIONSHIPS.....	176

I. INTRODUCTION

As U.S. states and foreign nations began recognizing same-sex marriages over the last dozen years, the anti-gay definitions of “marriage” and “spouse” in Section 3 of the Defense of Marriage Act (“DOMA”) rendered those marriages invisible for immigration purposes. Thousands of U.S. citizens were left with a cruel choice between country and family: Remain alone in the United States or start anew with spouses and stepchildren abroad.¹ Other couples did not qualify to emigrate *anywhere* together, leaving them no choice at all.² DOMA also devastated children. Not only might they be separated from one parent, but their own immigration or even

* Associate Professor at Mercer University School of Law. I thank Vickie Neilson for reviewing an early manuscript, and I thank everyone at Immigration Equality, past and present, for all the work they’ve done for binational same-sex couples and their children.

1. Scott Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 539–40 (2010).

2. Many countries restrict immigration to immediate family members of citizens, highly skilled workers, the well-heeled, and refugees from state persecution. Thus U.S. citizens, whose foreign spouses were not from countries recognizing lesbian and gay relationships do not all qualify to emigrate, even if they were willing to leave their homes and jobs.

citizenship status often hinged on definitions of terms like “stepchild” and “born in wedlock.”³

When the Supreme Court struck down Section 3 of DOMA in *United States v. Windsor*,⁴ it eliminated a categorical barrier to immigration for thousands of families. Yet *Windsor* was not an immigration case, and the Court’s opinion did not address at least three resulting immigration questions: What if a same-sex couple legally marries in one jurisdiction but resides in a state that does not recognize the marriage? What if the couple is in a legally-recognized “civil union” or “registered partnership”? How about children born to spouses or registered partners in same-sex couples: will they be recognized as “born in wedlock” for immigration purposes?

The Obama administration appears to have answered the first question, concluding that same-sex spouses who celebrate their marriage in a jurisdiction where it is valid are married for immigration purposes, even if they reside in a state where it is not valid. In the context of immigration law, this uniform place-of-celebration rule rests on firm legal, precedential, and policy ground. As described below, the last two questions have not been resolved.

II. A UNIFORM PLACE-OF-CELEBRATION RULE

The terms “marriage” and “spouse” are scattered liberally throughout the Immigration and Nationality Act (“INA”), determining eligibility for everything from family-based immigrant visas to waivers of deportability and bars on admission.⁵ In fact, the vast majority of U.S. immigration is based on such close family relationships.⁶ This is no accident. Family unification has been the bedrock principle of U.S. immigration policy and law for a very long time.⁷

Because the stakes are so high, federal immigration authorities closely examine *individual* marriages, deeming them bona fide only if they were not entered for the purpose of obtaining immigration benefits.⁸ However, the INA is largely silent about what *categories* of

3. See Scott Titshaw, *A Modest Proposal: to Deport the Children of Gay Citizens, & etc.: Immigration Law, the Defense of Marriage Act and the Children of Same-Sex Couples*, 25 Geo. Immigr. L.J. 407, 411, 415–20 (2011).

4. 133 S.Ct. 2675 (2013).

5. Titshaw, *supra* note 1, at 547–49.

6. *Id.* at 546–47.

7. Stephen H. Legomsky, *Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supra-National Associations*, 25 Geo. Immigr. L. J. 807, 808 (2011).

8. 8 U.S.C. §1186a. Same-sex spouses now must demonstrate these same *bona fides*.

marriage it will recognize for immigration purposes. Immigration authorities and judges have relied, therefore, on state and foreign family law to determine whether a disputed type of marriage or divorce is valid for immigration purposes.⁹ The U.S. Supreme Court has recognized that such federal reliance on state family law is appropriate since “there is no federal law of domestic relationships, which is primarily a matter of state concern.”¹⁰ But *which* state law applies when married couples cross state lines?

In the case of same-sex marriage, President Obama has made his policy preference clear: “If you’ve been married in Massachusetts and you move someplace else, you’re still married, and . . . under federal law you should be able to obtain the benefits of any lawfully married couple.”¹¹ Although he also recognized that such a uniform place-of-celebration rule may not be legally possible in all federal contexts,¹² his Administration has now adopted that rule in the context of federal immigration law.

The Department of State has clearly announced: “If your marriage is valid in the jurisdiction (U.S. state or foreign country) where it took place, it is valid for immigration purposes.”¹³ U.S. consulates abroad will apply this place-of-celebration rule even for couples planning to reside in a state that will not recognize their marriage.¹⁴

The Justice Department’s Board of Immigration Appeals (“BIA”) has published an opinion recognizing the validity of a New Jersey couple’s same-sex marriage, focusing solely on the law of Vermont where it was celebrated.¹⁵ The Department of Homeland Security’s U.S. Citizenship and Immigration Service (“USCIS”) has also issued guidance recognizing this uniform place-of-celebration rule,¹⁶ and two of the first same-sex marriage cases it approved involved Florida and Colorado couples married in New York and Iowa.

9. See Titshaw, *supra* note 1, at 564–79.

10. *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (focusing on state domestic law to determine whether a child was “legitimate” and, therefore, covered by the term “children” under federal copyright law).

11. Chris Johnson, *Obama Talks DOMA, gay rights in Africa*, WASH. BLADE, June 27, 2013, <http://www.washingtonblade.com/2013/06/27/in-africa-obama-talks-doma-gay-rights/>.

12. *Id.* (“But I’m speaking as a President, not a lawyer.”).

13. *U.S. Visas for Same-Sex Spouses: FAQs for Post-Defense of Marriage Act*, http://travel.state.gov/visa/frvi/frvi_6036.html.

14. *Next Steps on DOMA – Guidance for Posts* (unclassified state 00112850) (Aug. 2013), http://travel.state.gov/pdf/Next_Steps_On_DOMA_Guidance_For_Posts_August_2013.pdf.

15. *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013).

16. In early August, USCIS replaced more ambiguous initial guidance with clearer language favoring a uniform place-of-celebration focus. *Implementation of the Supreme Court Ruling on the Defense of Marriage Act FAQ* (Aug. 2, 2013),

The uniform place-of-celebration rule for recognizing same-sex marriage comports with the expectations of both Democratic and Republican lawmakers who recently dodged an amendment to recognize same-sex partners under the Senate's comprehensive immigration reform bill by arguing that DOMA's judicial demise would eliminate immigration inequality for all married same-sex couples.¹⁷ It is also consistent with well-established guidance on marriages involving transgender spouses under the INA.

Until *Windsor* struck down DOMA's federal rejection of same-sex marriages, transgender spouses were required to demonstrate that their unions qualified as valid different-sex marriages under state law. Both the Bush and Obama administrations have focused on the place of marriage celebration to make that determination, although some states of domicile would not recognize gender reassignment for marriage or other purposes.¹⁸ The USCIS even allows fiancé(e) petitioners who indicate a specific intent to marry in a jurisdiction where the marriage would not be valid "the opportunity to submit . . . an affidavit attesting that the intended marriage will take place in a jurisdiction where" it will be valid for immigration purposes.¹⁹

There is some older authority refusing to recognize marriages of close relatives and biracial couples for immigration purposes due to strong public policy objections by the couples' state of domicile.²⁰ One scholar has suggested the old-fashioned concept of marital domicile on which these exceptions were based no longer fits an age of increased mobility and spousal equality.²¹ In any event, the relevant published opinions are distinguishable from modern same-sex marriage cases since the exceptions they recognized were based on enforced state criminal statutes prohibiting cohabitation or evasion of state law.²²

<http://www.uscis.gov/portal/site/uscis/menuitem.eyJ1d4c2a3e5b9ac89243c6a7543f6d1a/vgnnextoid=2543215c310af310VgnVCM100000082ca60aRCRD&vgnnextchannel=2543215c310af310VgnVCM100000082ca60aRCRD>.

17. Ryan Lizza, *What the DOMA Decision Means for Immigration Reform*, *The New Yorker*, June 26, 2013, <http://www.newyorker.com/online/blogs/newsdesk/2013/06/what-the-doma-decision-means-for-immigration-reform.html>.

18. *Matter of Lovo-Lara*, 23 I & N Dec. 746 (BIA) (2005); USCIS Adjudicator's Field Manual § 21.3(a)(2)(J) [hereinafter *A.F.M.*].

19. *A.F.M.*, *supra* note 18, at § 21.3(a)(2)(J).

20. Scott Titshaw, *supra* note 1, at 565–73 (2010); *See also e.g.*, *A.F.M.*, *supra* note 18, at §§ 21.3(a)(2)(C). Some valid state marriages would also be invalid for immigration purposes due to an express federal public policy objection such as the bar on admissibility of practicing polygamists, 8 U.S.C. §1182(a)(10)(A), as same-sex marriages were invalid under the federal policy of DOMA §3 before *Windsor*.

21. Kerry Abrams, *Marriage and Immigration – Which State's Law Applies?*, <http://www.concurringopinions.com>.

22. Titshaw, *supra* note 1, at 565–73.

Similar criminal treatment of same-sex cohabitation or out-of-state marriage would likely be invalid after *Lawrence v. Texas*.²³

In addition to its consistency with precedent, a uniform place-of-celebration rule implements immigration law's bedrock principle of family unification. It would substantially undermine this principle if qualification for married couples to enter the United States and live together turned on the U.S. citizens' state of residence. Imagine a federal immigration system that only allowed a U.S. citizen to live with her foreign national wife and stepchild if she moved from Tennessee to a state that respects her marriage. Such hyper-federalism would result in a new, interstate version of the dilemma previously faced by same-sex, binational couples under DOMA: Tennesseans would have to choose between life alone in Tennessee or starting anew with their families in another state. This would undermine the freedom of interstate movement and the concept of national citizenship embodied in the Fourteenth Amendment for U.S. citizens with same-sex, foreign partners.

An immigration rule that conditions recognition of same-sex marriages on states of residence would also dramatically restrict interstate and international commerce, even in cases not involving U.S. citizens. Entrepreneurs and employers would have to consider the marriage law of worksite locations as a significant factor in determining where to locate or to base married lesbian and gay employees. (Of course, this issue would arise outside the immigration context as well, but other missing benefits would not directly prohibit married couples from living together in the same state.)

Although the majority opinion in *United States v. Windsor* included a great deal of language about Section 3 of DOMA undermining states' traditional authority over family law, federalism was not its ultimate rationale. In the end, Justice Kennedy found it "unnecessary to decide whether the federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance" since DOMA presents discrimination of an unusual character and thereby "violates basic due process and equal protection principles" guaranteed by the Fifth Amendment.²⁴ On this point, the opinion echoed the refrains of equality, personhood and dignity in choice of intimate and familial relationships that featured prominently in Justice Kennedy's opinions in *Lawrence v. Texas* and *Romer v. Evans*.²⁵ These ideas also support a unified place-of-celebration rule for marriage validity. As Justice Scalia points out in dissent, *Windsor*

23. 539 U.S. 558 (2003) (holding Texas's homosexual sodomy law unconstitutional).

24. *Windsor*, 133 S.Ct. at 2692.

25. *Id.* at 2694–95.

also supports a constitutional requirement of full marriage equality for same-sex couples.²⁶ While the Court has not yet taken that step, it has made clear that government policies discriminating against same-sex couples raise serious constitutional issues. This is significant because the Court has held that ambiguities in an immigration statute should be interpreted so as to avoid “ ‘serious doubt’ as to its constitutionality.”²⁷ A uniform place-of-celebration rule would avoid such doubts.

III. *ADAMS V. HOWERTON* IS DEAD

In 1982, the Ninth Circuit decided *Adams v. Howerton*,²⁸ a fluke of a case, which has been cited repeatedly over the last thirty years, largely because of its flukishness. Decided fourteen years before DOMA was enacted and twenty years before any U.S. state actually recognized same-sex marriage, *Adams* discounted the state Attorney General’s opinion that Colorado same-sex marriages were not valid in that state, and proceeded to hold that a U.S. citizen’s “marriage” to another man would not qualify for immigration purposes even if it were valid.²⁹ Of course, that case was the last word on a hypothetical issue based on a premise (a valid same-sex marriage under state law), which would not exist for another two decades. Despite repeated attempts to resuscitate it, including a recent *New York Times* op-ed,³⁰ *Adams* is dead and should remain so.³¹

The reasoning of *Adams* was originally a three-legged stool, but now it has no leg left to stand on. The Ninth Circuit held that the *Adams-Sullivan* marriage could not be valid under federal immigration law for three reasons: (1) immigration statutes at the

26. *Windsor*, 133 S.Ct. at 2709–10 (Scalia, J., dissenting).

27. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)(citing *Crowell v. Benson*, 285 U.S. 22 (1932)).

28. 673 F.2d 1036 (1982), *cert. denied* 102 S.Ct. 2393 (1982).

29. *Id.*

30. Aberto R. Gonzales & David N. Strange, *What the Court Didn't Say*, N.Y. TIMES, July 18, 2013, at A23.

31. In addition to its specific holding, a much-cited two-part general test of marriage validity described in *Adams* also seems to have been replaced by recognition of a more useful three-part test, even in the Ninth Circuit. See *Agyeman v. INS*, 296 F. 3d 871 n.2 (9th Cir. 2002) (looking at (1) legal validity; (2) bona fides; and (3) no public policy exception); see also Titshaw, *supra* note 1 at 550–53 (distilling the test employed by courts as (1) validity where celebrated; (2) state or federal categorical public policy exceptions; and (3) bona fides of the particular marriage in question). If immigration authorities extended the uniform place-of-celebration rule to all marriage contexts, only federal public policy exceptions would remain relevant. But there is still an argument that marriages recognized in *no* U.S. state (e.g., minors under the age of thirteen or polygamists) would not be valid under the INA, even without an express *federal* policy on point.) See Titshaw, *supra* note 1, at 570.

time barred admission into the United States of foreign “sexual deviants” such as homosexuals, expressing a clear federal policy incompatible with same-sex marriage; (2) the court was deferring to Immigration and Naturalization Service interpretation of the INA to reject such marriages; and (3) Congress did not intend to deviate from the “ordinary, contemporary, common” dictionary definition of “marriage” in order to benefit same-sex spouses.³²

The first two rationales originally provided a valid basis for the decision in *Adams*. Yet they are no longer valid. The first rationale was superseded in 1990, when Congress repealed the “sexual deviant” ground of inadmissibility. The second rationale actually favors same-sex spouses now that immigration officials have begun recognizing their marriages.

The third rationale in *Adams* was always misguided, but that was difficult to see from a vantage point two decades away from actual state-sanctioned, same-sex marriage. At the time, the Court’s unprecedented construction of a specifically anti-gay, federal definition of marriage (inferred from Congressional silence) coincided with the law in all fifty states. If one did not squint too hard, it appeared that *Adams* was merely following the customary practice of deference to state family law definitions. But the advent of state same-sex marriage two decades later cleared the fog. In a time when some, but not all states recognize same-sex marriage, Congressional silence more logically implies the intent to follow longstanding precedent and look to state family law.

Even if one employed the *Adams* court’s approach of examining dictionary definitions of “marriage” to determine its meaning, one could find a new answer. Widespread movement toward marriage equality in the U.S. and other English speaking countries has altered the common meaning of “marriage” so that many dictionaries now expressly include same-sex couples within their definitions.³³

In a world without *Adams* or DOMA, the Obama administration has appropriately clarified the spousal choice-of-law issue in favor of a uniform place-of-celebration rule, but it has not completely resolved the other two immigration questions posed in the second paragraph of this essay: How will civil unions or registered partnerships be treated? How about children born to spouses or registered partners in same-sex couples?

32. *Adams*, 673 F.2d at 1040.

33. See e.g., MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/marriage> (Definition: (a) (1): the state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law (2): the state of being united to a person of the same sex in a relationship like that of a traditional marriage.).

IV. CHILDREN OF SAME-SEX SPOUSES AFTER *WINDSOR*

United States v. Windsor allows recognition of many parent-child relationships that were invisible under Section 3 of DOMA. Because the definition of “stepchild” in the INA expressly references the “marriage creating the relationship,”³⁴ lesbian and gay stepparents presumably did not count under DOMA. Now the State Department will recognize these stepparents for immigration purposes.³⁵ Children born to married same-sex parents should also be recognized as “born in wedlock” for immigration purposes.³⁶ However, the State Department has drawn the opposite conclusion with regard to U.S. citizenship transmission upon birth abroad.

Questions of immigration and citizenship are based on different titles of the INA with different definitions of “parent” and “child.”³⁷ And the State Department takes an extremely limited view of parent-child relationships in the context of automatic citizenship upon birth abroad, requiring a genetic link between a child and her U.S. citizen parent.³⁸ As an increasing number of modern families use assisted reproductive technology to conceive children, this leads to absurd and harsh results. If a U.S. citizen and her Brazilian wife have a child abroad, the child’s citizenship would depend entirely upon whose egg was fertilized, even if the U.S. citizen carries and gives birth to her wife’s genetic child. This approach also applies to different-sex spouses: If a U.S. citizen wife gives birth abroad to a baby conceived *in vitro* using a donated egg and the sperm of her foreign national husband, that child is not a citizen. This can result in long delays, permanent family separation, and even stateless children.

The State Department’s genetic fixation even extends to categorizing children whose “*genetic* parents were not married at the time of birth” as “born out of wedlock” for citizenship transmission purposes.³⁹ This includes children of different-sex married couples who use donated eggs or sperm. It includes *all* children born to same-sex spouses, even after *Windsor*.

34. 8 U.S.C. § 1101(b)(B).

35. *FAQs for Post-DOMA*, *supra* note 13.

36. See 8 U.S.C. § 1101(b)(A); Scott Titshaw, *Sorry Ma’am, Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 118 (2010).

37. Compare 8 U.S.C. § 1101(b) (defining “child” and “parent” for purposes of immigration under INA Titles I and II) with 8 U.S.C. § 1101 (c)(1) (defining them for purposes of Title III).

38. See Titshaw, *supra* note 36, at 102–05; see also 7 FAM §§ 1131.4-1 and 1131.4-2 (focusing on the source of eggs and sperm to determine birth out of wedlock).

39. 7 Foreign Affairs Manual § 1445.5-7(a) (categorizing such children under 8 U.S.C. § 1409, which covers those “born out of wedlock”) (emphasis added).

Only the strongest legal rationale would justify such discrimination against children of same-sex marriages now that those marriages provide immigration benefits to the parents. Yet, there is no such rationale.

The Ninth Circuit Court of Appeals has rejected the State Department's genetic essentialist approach to citizenship acquisition. It focuses instead on state or foreign family-law to determine whether a child was "born out of wedlock."⁴⁰ Children born "out of wedlock" fall under INA § 309, which expressly requires a "blood relationship" for citizenship transmission, while section INA §301 is silent on that issue. Reasoning that Congress meant this distinction, the court refused to require a "blood relationship" for citizenship transmission from a married U.S. citizen to a child born abroad to him and his wife, the child's biological mother. This textual analysis is based on well-established canons of statutory construction. The State Department's approach, on the other hand, seems to stem from a literal translation of *jus sanguinis* (law of the blood),⁴¹ a term derived not from the INA, but from sixth-century scholars who drafted the Justinian Code, a highly unlikely source for analyzing the results of *in vitro* fertilization.

The Ninth Circuit's approach also constitutes better policy. It avoids arbitrary and cruel distinctions, promotes the fundamental INA policy of family unification, and results in fewer stateless children. It is also more consistent with Supreme Court opinions in *Windsor* and other cases, which focus on state law to determine family statuses not expressly defined by federal statute.⁴²

Unfortunately, since the State Department decides most cases of citizenship transmission upon birth abroad, its misguided approach continues to create arbitrary and unfair results. However, this approach is not required by statute, and the State Department is currently reconsidering it.⁴³ In the meantime, *Windsor* will allow many families to immigrate together to the United States based on stepparent-stepchild relationships while awaiting clarification of the citizenship issue.

40. See *Solis-Espinoza v. Gonzales*, 401 F.3d 1090 (9th Cir. 2005); *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000). These Ninth Circuit cases dealt with the children of old-fashioned non-marital sexual relationships, but the court expressly rejected the State Department's genetic relationship requirement for U.S. citizenship transmission to children born in wedlock, and its reasoning is even stronger in the context of planned pregnancies using assisted reproductive technology.

41. See 7 Foreign Affairs Manual § 1111(a)(2); *Id.* § 1131.1-1(a).

42. See *United States v. Windsor*, 133 S.Ct. 2675, 2690-93 (2013); *Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

43. See 7 Foreign Affairs Manual §1441.1(e) (added May 3, 2013) (indicating that State is reviewing its policy on reproductive technology and citizenship).

V. CIVIL UNIONS AND OTHER NON-MARITAL RELATIONSHIPS

The State Department has announced that it will not “at this time,” consider civil unions or domestic partnerships as “marriages.”⁴⁴ This may change upon further consideration since it already recognizes cohabitation as “the functional equivalent of marriage” for some purposes if “[l]ocal laws recognize such cohabitation as being fully equivalent in every respect to a traditional legal marriage.”⁴⁵ Immigration officials might at least extend spousal recognition to legally registered couples in jurisdictions that define partners in civil unions as “spouses.”⁴⁶

The uniform place-of-celebration standard allows most couples to travel and marry elsewhere and then qualify for spousal immigration benefits even if they reside in non-recognition states.⁴⁷ Therefore, many couples in civil unions or domestic partnerships now need only marry to qualify.

Yet it is too late for some partners in legal, non-marital unions to marry. The widow of a U.S. citizen normally qualifies for permanent residence in the United States.⁴⁸ If a California domestic partner died before *Windsor* was decided, however, it is too late for marriage.⁴⁹ Perhaps immigration officials will recognize marriage-like civil unions in such compelling circumstances.

A child’s “birth out of wedlock” and resulting immigration disadvantages may also be impossible to cure through a subsequent marriage. There is, however, a strong argument for treating children born into civil unions and other legal relationships carrying presumptions of parenthood as “born in wedlock” under the INA. The choice is binary, aimed solely at a “yes” or “no” answer regarding whether a parent-child relationship exists. The terms are not defined in the INA. Where state family law answers the question “yes,” with all related legal rights and duties, federal recognition seems more appropriate than the alternative.⁵⁰

44. *FAQs for Post-Defense of Marriage Act*, *supra* note 13.

45. 9 Foreign Affairs Manual §40.1 N1.2.

46. *See e.g.*, N.J. STAT. ANN. § 37: 1-33 (2013)(expressly defining the terms “spouse” and even “marriage” under state law to cover civil union relationships.).

47. Given the “public charge” basis for inadmissibility, 8 U.S.C. §1182(4), it is unlikely many otherwise-qualified couples will not be able to afford the trip.

48. *See* 8 U.S.C. 1151(b)(2)(A)(i).

49. The right to marry ends at death except in France, which allows posthumous marriage for some purposes. Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 780 (2009).

50. *See* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 214 – 217, 257 n. 238 (2009) (describing current presumptions of parentage and

If the State Department someday recognizes children born to same-sex spouses for automatic citizenship purposes, the issue of birth “out of wedlock” could be determinative in that context as well. The binary statutory choice regarding automatic citizenship is between birth “out of wedlock” and everything else (rather than birth “in wedlock”), making the argument for recognition even stronger.⁵¹

Thanks to the Supreme Court, immigration authorities have been able to catch up with modern family-law and the reality of same-sex spouses. Now it is time for them to catch up with the realities of relationships between same- and different-sex parents and their children conceived through assisted reproductive technology.

problematic ambiguities regarding rebuttal as well as the District of Columbia law stating that “[a] child born to parents in a domestic partnership shall be treated for all legal purposes as a child born in wedlock.”)

51. See Titshaw, *supra* note 3, at 483-84 (arguing for such recognition based on the textual distinction between the two alternative provisions for citizenship transmission upon birth abroad under 8 U.S.C. §§1401 and 1409).