COMMENTS

Transgender Inopportunity and Inequality: Evaluating the Crossroads Between Immigration and Transgender Individuals

Alexandra Caggiano[*]

I. INTRODUCTION

Despite being married to a U.S. citizen, non-citizen transgender[1] individuals and non-citizen spouses married to transgender (trans) U.S. citizens still face deportation today due to current immigration policies. One such example was Ady Oren and her husband, Jack Keegan.[2] Jack, born female, never had reconstructive surgery—which courts generally

[*] J.D. Candidate, Seattle University School of Law, 2014; B.A. Law, Societies & Justice, University of Washington, 2010. Thanks to Andre Dayani and the staff of the Law Review for their wonderful assistance on this Comment. I also owe many thanks to my parents, Robbie and Mark; my brothers, Matt and Jack; and my boyfriend James for their love and support (and especially patience). And of course, thank you to my great aunt, Leah Hurwitz, for the idea behind this Comment and for being great in every sense of the word.

1. This Comment uses the term "transgender" or "trans" in light of the evolving definition adopted by many scholars and advocates more versed in the area than myself. *See, e.g.*, Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 37 n.1 (2000) (using the term transgender or trans "in its most inclusive sense, as an umbrella term encompassing: pre-operative, post-operative[,] and non-operative transsexual people; cross-dressers, feminine men[,] and masculine women; intersexed persons; and more generally, anyone whose gender identity or expression differs from conventional expectations of masculinity or femininity"); s*ee also Trans 101*, SYLVIA RIVERA L. PROJECT, http://srlp.org/resources/trans-101/ (last visited Oct. 7, 2013) (using the term to broadly refer to individuals "whose gender identity and/or expression that does not or is perceived to not match stereotypical gender norms associated with our assigned gender at birth").

2. Oren, 2006 WL 448282 (BIA 2006).

use as an indicator when deciding whether to grant the petition for visas.[3] The court reviewing the petition reversed his case to allow Jack an opportunity to submit evidence that his birth state recognized his changed gender.[4] Luckily, he was able to obtain medical documentation stating that his transition was complete (and at least in Michigan, that standard was enough) so his petition was granted.[5] But many trans individuals are not so lucky and cannot afford the requisite medical documentation that would allow them to stay in this country.

When forced to return to their home countries, trans individuals are likely to encounter violence from those who perpetuate hate towards transgender and gender non-conforming individuals.[6] Instead of protecting these individuals and preserving the immigrants' marriages, the United States continues to send people back to their native countries solely because those individuals do not fall within the narrowly constructed definition of marriage some states use that is legally recognized by federal courts.[7] Trans individuals receive disparate treatment as a direct result of this discrepancy among states and their respective definitions of marriage. This Comment argues that such inconsistent treatment is unfair and, more importantly, unconstitutional.

Current legal trends suggest that this kind of disparate treatment toward trans individuals should not happen. Although the United States has a history of refusing to recognize trans marriages as lawful, that trend appears to be dying today. In 2004, the United States Citizenship and Immigration Services (CIS) Director for Operations issued a memorandum instructing CIS personnel not to recognize the validity of any marriage or intended marriage between individuals where one or both parties claim to be a transsexual.[8] But shifting away from that exclusive approach, the Board of Immigration Appeals (BIA) made progress in 2005

---

3. *See* Victoria Neilson, *Immigration Law and the Transgender Client*, 4 J. RACE GENDER & ETHNICITY 6, 9 (2009).

4. Lovo-Lara, 23 I. & N. Dec. 746, 748 (BIA 2005); Nielson, *supra* note 3.

5. Neilson, *supra* note 3, at 9.

6. Johanes Rosello, *Transgender Immigrant Fears for Her Life If Deported*, NEW AM. MEDIA (Elena Shore trans., Nov. 2, 2012), http://newamericamedia.org/2012/11/transgender-immigrant-fears-for-her-life-if-deported.php.

7. *See* Rachel Tiven, *On Valentine's Day, Binational Gay and Lesbian Couples Struggle to Stay Together*, IMMIGR. EQUALITY (Feb. 12, 2009), http://immigrationequality.org/2009/02/on-valentine%E2%80%99s-day-binational-gay-and-lesbian-couples-struggle-to-stay-together/.

8. Interoffice Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigration Servs., to Reg'l Dirs., Serv. Ctr. Dirs., Dist. Dirs., and Dir. of Office of Int'l Affairs (Apr. 16, 2004), *available at* http://www.state.gov/documents/organization/82784.pdf (deeming this action to be consistent with DOMA and existing CIS policy).

when it issued the precedential decision *In re Lovo-Lara*.[9] The *Lovo-Lara* decision changed the guidelines that CIS officers use, leading them to recognize trans marriages when considering whether to grant an immigrant visa, legal permanent residence, or green card for eligible applicants.[10]

Moreover, in February 2011, President Obama directed the Attorney General's office to no longer defend the constitutionality of the Defense of Marriage Act (DOMA), a statute that allowed the federal and state governments to refuse to recognize same-sex marriages.[11] Additionally, recent Supreme Court decisions published on June 26, 2013, also paved the way for recognition of all marriages, regardless of sexuality.[12] As a whole, these decisions illustrate that it is unjust for only *some* noncitizen applicants who are able to meet stringent state requirements, if any are even offered, to receive immigration benefits.

The *Lovo-Lara* decision remains important in immigration law because, although the Supreme Court struck down DOMA in *United States v. Windsor*, the Court left the decision of whether to legalize same-sex marriages to the states.[13] Thus, it is still important to understand the *Lovo-Lara* court's reasoning, and its direct and indirect implications on certain applicants. In its decision, the *Lovo-Lara* court cited three main reasons why it determined that a postoperative transsexual's marriage to

---

9. *See generally Lovo-Lara*, 23 I. & N. Dec. 746.

10. As a response to *Lovo-Lara*, the CIS director issued new memoranda in 2009 and 2012 stating new procedures for recognizing trans marriages. *See* Interoffice Memorandum from Carlos Iturregui, Chief, Office of Policy & Strategy, U.S. Dep't of Homeland Sec. Citizenship & Immigration Servs., to Field Leadership, U.S. Dep't of Homeland Sec. Citizenship & Immigration Servs. 3–4 (Jan. 14, 2009), *available at* http://www.uscis.gov/USCIS/Laws%20and%20Regulations/Memoranda/Petitions_Transsexual.pdf (agreeing to issue documents reflecting an individual's preferred gender if the applicant presents the required documentation); Policy Memorandum from U.S. Dep't of Homeland Sec. Citizenship and Immigration Servs. on Adjudication of Immigration Benefits for Transgender Individuals; Addition of Adjudicator's Field Manual (AFM) Subchapter 10.22 and Revisions to AFM Subchapter 21.3 (AFM Update AD12–02) (Apr. 10, 2012) [hereinafter 2012 CIS Memo], *available at* http://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Transgender_FINAL.pdf.

11. *See Obama: DOMA Unconstitutional, DOJ Should Stop Defending in Court*, HUFFINGTON POST, http://huffingtonpost.com/2011/02/23/obama-doma-unconstitutional_n_827134.html (last updated May 25, 2011, 7:35 PM).

12. *See* Hollingsworth v. Perry, 558 U.S. 183 (2013); United States v. Windsor, 133 S. Ct. 2675 (2013).

13. *See Windsor*, 133 S. Ct. at 2691. In fact, although written eight years prior to the *Windsor* decision, the *Lovo-Lara* court came to almost the same conclusion as the Supreme Court when determining the scope of the federal government's ability to regulate marriage. *Lovo-Lara*, 23 I. & N. at 751 ("While we recognize, of course, that the ultimate issue of the validity of a marriage for immigration purposes is one of Federal law, that law has, from the inception of our nation, recognized that the regulation of marriage is almost exclusively a State matter.").

her partner could be legally recognized under federal law—thereby circumventing the then-existing DOMA.[14] First, the court noted that DOMA did not define the word "spouse" in terms of the sex of the parties.[15] Second, DOMA did not directly address the issue of how to define the sex of a postoperative transsexual or the effect on that individual's subsequent marriage.[16] Third, despite existing case law that raised that question at the time of DOMA's enactment, DOMA only focused on preventing same-sex marriage.[17] Based on those three reasons, the *Lovo-Lara* court created the following two-part inquiry to determine if the marriage is valid for immigration purposes:[18] First, has the trans individual changed his or her gender in a way that is legally recognized by the government?[19] Second, does the state in which the couple resides recognize such a marriage?[20] If both questions are answered in the affirmative, the *Lovo-Lara* court determined, the parties may be lawfully recognized as an opposite-sex couple, thereby fulfilling DOMA's section three requirements.[21] But this test highlights the discrepancies that exist in how immigration applicants are treated when a couple with a trans partner

14. *Lovo-Lara*, 23 I. & N. at 748–51 (holding that DOMA does not preclude trans marriages involving a postoperative transsexual where the state considers it a lawful opposite sex marriage).

15. *Id.* at 748.

16. *Id.* at 749.

17. *Id.* at 751.

18. *Id.*

19. *Id.* Most states require postoperative transsexual surgery for legal recognition, like in *Lovo-Lara*. *See, e.g.*, ALA. CODE § 22-9A-19(d) (2004) ("Upon receipt of a certified copy of an order of a court . . . indicating that the sex of an individual born in this state has been changed by surgical procedure and that the name of the individual has been changed . . . ."); CAL. HEALTH & SAFETY CODE § 103425(a) (2012) ("Whenever a person has undergone clinically appropriate treatment . . . the person may file a petition with the superior court in any county . . . ."); N.C. GEN. STAT. § 130A-118(b)(4) (2004) ("A new certificate of birth shall be made by the State Registrar when: . . . (4) A written request from an individual is received by the State Registrar to change the sex on that individual's birth record because of sex reassignment surgery. . . ."); OR. REV. STAT. § 432.235(4) (2005) (using similar language to Alabama and many other states' statutes, requiring evidence "indicating that the sex of an individual born in this state has been changed by surgical procedure" and a legal name change). For a complete list of states' requirements, see *Sources of Authority to Amend Sex Designation on Birth Certificates*, LAMBDA LEGAL (Jan. 3, 2012), http://lambdalegal.org/publications/sources-of-authority-to-amend [hereinafter *Sources of Authority*].

20. Although many states will authorize a new birth certificate reflecting the proper sex after an individual has undergone a transsexual surgery, some states still do not—in effect, leaving trans applicants and applicants with a trans spouse with absolutely no opportunity for recourse in those states under the *Lovo-Lara* decision. *See* IDAHO ADMIN. CODE § 16.02.08.201 (2006); OHIO REV. CODE § 3705.15 (2006); TENN. CODE ANN. § 68-3-203(d) (2006); *see also Sources of Authority*, *supra* note 19.

21. *Lovo-Lara*, 23 I. & N. at 751.

applies for an immigrant visa—the couple's future may vary depending on how their resident state interprets "sex."[22]

The problem, then, is what to make of this precedential ruling. On one hand, the decision *does* recognize the legal validity of trans marriages if one member has undergone sexual reassignment surgery.[23] However, the requirement imposed by the BIA—that the trans individual undergo surgical procedures to change his or her sex[24]—places a burden on the large number of trans individuals who are not capable of meeting this requirement, based on factors such as the individual's inability to pay for such a procedure or unwillingness to conform to a court-mandated standard.[25] Although the decision was quite progressive in light of the then-existing DOMA, the *Lovo-Lara* decision applied the medical model of trans-sexualism[26] to further exclude non-conforming trans individuals from opportunities, such as immigration visas.

Differentiating between individuals who have or have not undergone surgical procedures to alter their identity is an arbitrary and meaningless line in the sand. All trans marriages should be recognized due to the protections afforded by the Constitution's Equal Protection Clause.[27] Not doing so discriminates against those who cannot, or will not, have surgery in order to conform to society's accepted standards of male and female.

Today, because society has advanced its understanding of sexual and gender identity, communities increasingly seek to treat all similarly situated individuals alike, including ensuring that trans individuals receive same and equal treatment.[28] Based on the reasoning found in the *Windsor* and *Lovo-Lara* decisions,[29] the CIS wrongly withholds immigration privileges to some trans individuals because of state adopted gender conformity distinctions. This Comment asserts that the BIA should change its requirements to better reflect the trend of U.S. courts and legislatures towards recognizing marriages among all genders.[30] The

22. *See supra* text accompanying note 19.

23. *Lovo-Lara*, 23 I. & N. Dec. at 753.

24. *See id.*

25. For a more detailed discussion of the difficulties faced by trans individuals in our society, see Dean Spade, *Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, *in* TRANSGENDER RIGHTS 217 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006).

26. *See infra* Part II.

27. U.S. CONST. amend. XIV, § 1.

28. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

29. *See generally Windsor*, 133 S. Ct. 2675; *Lovo-Lara*, 23 I. & N. Dec. 746.

30. *See supra* text accompanying notes 9–11.

current *Lovo-Lara* requirements apply unequally amongst couples with a trans partner and thus should not be upheld. Part II of this Comment provides background for the issue by discussing the medical model—which has largely defined transgender in society—juxtaposed with the concept of self-identity. These two models are important because they provide the backdrop for how trans individuals are treated in the law and in society, and how trans individuals *should* ideally be treated. Part III critiques arguments surrounding gender identification and notes why such strict classifications should be irrelevant. Part III also evaluates the inequities and inconsistencies that stem from the *Lovo-Lara* decision; the equal protections afforded by our Constitution; and the recent court of appeals trend that has deemed DOMA unconstitutional altogether.[31] Part IV proposes how to treat trans marriages involving immigrants and how those individuals will be afforded equal opportunities and protections. Part V briefly concludes.

II. IDENTIFYING TRANSGENDER: THE MEDICAL MODELS VS. THE SELF-IDENTITY MODEL

Traditionally, courts understood gender using the biological model—setting strict biological definitions of male and female.[32] The biological model presumes that there are only two biological categories "and that the social and cultural attributes associated with gender are the natural result of a person's biological sex."[33] Anyone who did not strictly adhere to this system was considered "unnatural" and deemed "unworthy of legal protection."[34] Within the past few decades, however, courts have started to emphasize the medical model—a model that evolved from the biological model.[35] Its emphasis on gender identity as a medical condition differs from that of the self-identity concept, another recently developed model, which does not place individuals in the strict, traditional gender categories.[36] These next two sections further explain the differences between the medical and self-identity models, and discuss how the varying approaches tend to produce different results in how trans individuals are treated, especially within the purview of immigration law.

---

31. *See generally* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012); Windsor v. United States, 699 F.3d 169 (2d Cir. 2012).

32. *See* Franklin Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 719 (2005).

33. *Id.*

34. *Id.* at 719–20.

35. *Id.* at 724.

36. *Id.* at 724–25, 738–39.

A. The Medical Model: Viewing Transgender As a Disease

The transgender medical model maintains that gender nonconformity is a psychological condition, which requires medical treatment or services.[37] The medical model uses the psychiatric diagnosis of Gender Identity Disorder (GID) to explain gender nonconformity.[38] It is premised "upon the belief that some people suffer from a psychological condition (GID) that causes them to experience great discomfort regarding their assigned gender."[39] The medical model assumes that only two genders exist and perpetuates the norms typically associated with these two genders throughout society.[40] For example, from the early years of childhood, girls are taught to play with dolls or fake kitchen sets; boys are encouraged to build models and pretend to be cowboys or soldiers. In effect, the model creates a rigid gender paradigm to classify people as women or men, originating at birth.[41]

Moreover, the rigid classification system created by the medical model has a particularly harsh effect on lower income trans individuals.[42] Because the medical model focuses on treating trans individuals as "suffering" from a disease, it perpetuates the belief that trans individuals should be treated as this "other" group.[43] As a result, many trans individuals are more likely to live in poverty and suffer from lower quality of life because they tend to face systemic discrimination from society.[44] Poverty makes it difficult to access adequate legal and medical care, inadvertently affecting an immigrant's ability to survive the *Lovo-Lara* inquiry (and have his or her visa petition granted).

However, as a way to work within this medical model, some states will recognize the preferred gender identity of a trans person by reissuing a birth certificate for that individual, thereby ensuring a fit within the medical model's two-gender dichotomy while meeting the *Lovo-Lara*

---

37. Jonathan L. Koenig, Note, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619, 619 (2011); Romeo, *supra* note 32, at 725.

38. Romeo, *supra* note 32, at 724–25 & n.45.

39. *Id.* at 725.

40. *See id.* at 724–25.

41. *Id.* at 724.

42. *Id.* at 722 (noting that low-income trans people do not tend to "occupy positions of privilege in society; therefore, low-income people and people of color are more likely to encounter systems and institutions which subject them to strict gender requirements"); *see also* Spade, *supra* note 25, at 221 ("Access to participation in the U.S. economy has always been conditioned on the ability of each individual to comply with norms of gendered behavior and expression, and the U.S. economy has always been shaped by explicit incentives that coerce people into normative gender and sexual structures, identities, and behaviors.").

43. *See* Romeo, *supra* note 32, at 729.

44. *Id.* at 723.

standard. Still, even in states that reissue birth certificates, there are many barriers one must overcome to obtain a new birth certificate. Trans-applicants must present extensive medical and psychological evidence demonstrating that they meet certain qualifications of their identified gender.[45] Courts that recognize the gender identity of trans litigants also inquire into such intimate and personal details that any reasonable litigant would neither want nor expect the court to scrutinize.[46] For instance, the court in *M.T. v. J.T.* raised the plaintiff's ability (a trans woman) to engage in heterosexual intercourse as a female, noting in particular her vagina's "good cosmetic appearance" to determine that the woman was legally female for the purposes of her marriage.[47] By egregiously dissecting intimate details about an individual's medical changes to determine gender identity, courts further repress and de-humanize the large majority of trans individuals who cannot afford or have no interest in such surgery. [48] Moreover, it is likely that the invasive requests for extensive and intimate details would deter a trans person from applying or being successful in his or her application. The self-identity model, on the other hand, asks why an individual has to apply in the first place to be legally recognized as his or her preferred gender.

B. The Self-Identity Model: Allowing for Non-Conformity

In contrast to the medical model, the self-identity, or self-determination model,[49] helps alleviate the problems discussed above by disregarding the strict two-gender classification model. Legal scholar Franklin Romeo defined the self-determination model as one that "recognizes gender as a fundamental aspect of human life, which every person has the capacity and inherent right to control."[50] As a country that notably preserves an individual's liberty in so many aspects of life, this model seems obviously appealing. As opposed to relying on society's preferred gender constructs, the self-identity model disregards the prede-

45. *See, e.g.*, N.C. GEN. STAT. § 130A-118(b)(4) (2004) (allowing the State Registrar to grant a new birth certificate to an individual when "[a] written request from an individual is received by the State Registrar to change the sex on that individual's birth record because of sex reassignment surgery, if the request is accompanied by a notarized statement from the physician who performed the sex reassignment surgery or from a physician licensed to practice medicine who has examined the individual and can certify that the person has undergone sex reassignment surgery").

46. Romeo, *supra* note 32, at 726–27; *see also* M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976); Kantaras v. Kantaras, 884 So.2d 155 (Fla. Dist. Ct. App. 2004).

47. *M.T.*, 355 A.2d at 206.

48. *See* Romeo, *supra* note 32, at 734–35.

49. *Id.* at 739.

50. *Id.* at 738–39.

termined construct and moves towards an approach that allows individuals to define themselves in a way that accurately reflects their gender.[51]

As a result, all similarly situated individuals would be subject to the same freedoms and limitations, rendering arbitrary differences in gender identity as superfluous. For instance, when trans individuals apply for U.S. immigrant visas based on their marriage status, the self-determination model would recognize all opposite-sex marriages (fulfilling DOMA's requirements) so long as one of the parties identified as the opposite sex. In effect, applying this model would grant all married trans couples the same benefits instead of creating an arbitrary line between certain married couples receiving benefits and some couples being denied those same benefits.

III. GENDER IDENTIFICATION: WHY MUST SOCIETY CLASSIFY INDIVIDUALS AS "NORMAL" OR AN "OTHER"?

Gender identification in the law puts individuals into restrictive categories based on society's perceptions of male and female norms. This section questions why our society still clings to this approach despite the disparate impact that it has on certain individuals who do not fit perfectly within these categories. First, this section explains how the same-sex marriage issue and the recent destruction of DOMA should lead to the recognition of all qualified couples,[52] regardless of gender identity. Second, this section analyzes why the *Lovo-Lara* decision fails to adequately recognize and protect the rights of trans individuals. By broadly recognizing marriage regardless of gender, trans individuals will not need to meet the expensive and demanding barriers that the immigration courts currently impose.

A. The Gay Marriage Battle: The Slow Deterioration of DOMA and Opposite-Sex Classifications for Marriage and Its Implications

Over the past few years, courts have slowly begun to reject DOMA as unconstitutional under the Equal Protection Clause.[53] Furthermore, the

---

51. *See* Gabriel Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579, 591 (2010).

52. "Qualified couples" is used to mean those persons that are otherwise recognized by states, such as the requirement most states use that parties must be eighteen years old (unless permitted by limited exceptions). *See, e.g.*, CAL. FAM. CODE § 302 (West 2012).

53. *See* U.S. CONST. amend. XIV, § 1; Windsor v. United States, 699 F.3d 169, 176 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012) (No. 12-307) (holding section 3 of DOMA subject to intermediate scrutiny and deciding the statute violates equal protection and is therefore unconstitutional); *see also* Perry v. Schwarzenegger, 702 F. Supp. 2d 1132 (N.D. Cal. 2010) (denying a stay for

Obama Administration's direction to no longer defend the constitutionality of DOMA in 2011[54] may have paved the way for the *Windsor* decision decided in June 2013, which abolished DOMA under federal law.[55] This section discusses the rationale behind courts' determination that DOMA violates the Equal Protection Clause. This section also explains why this rationale should apply to grant immigration benefits to trans couples.

1. Equal Protection: Laying the Groundwork for the Recognition of All Trans Marriages

The Equal Protection Clause was used in many cases to develop and support ideas of liberty and personhood.[56] Since the 1960s, many different groups have used those Supreme Court decisions to advance rights and freedoms. Some of those cases can also be used to demonstrate that recognizing all marriages between trans individuals is both lawful and necessary.[57]

In *Lawrence v. Texas*, for example, the U.S. Supreme Court determined that Texas could not enforce a statute criminalizing sexual conduct between same-sex persons under the Constitution.[58] The Court reasoned that the Constitution entitles U.S. citizens to certain liberties without government intrusion.[59] The decision emphasized the respect that individuals are entitled to in their private lives and the ability to freely define their own concepts of personhood.[60]

Additionally, the Court determined that the former *Bowers* decision[61] had become antiquated, noting that the states' trend had been to

---

California's Proposition 8 on the basis that an injunction against enforcement of Proposition 8 is in the public's best interest); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (holding DOMA unconstitutional because Section 3 violates the Fifth Amendment's equal protection clause); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (finding that DOMA violates the Massachusetts Constitution).

54. *Obama: DOMA Unconstitutional*, *supra* note 11.

55. United States v. Windsor, 133 S. Ct. 2675 (2013).

56. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

57. *See* Lawrence v. Texas, 539 U.S. 558 (2003); *see also* Romer v. Evans, 517 U.S. 620 (1996).

58. *Lawrence*, 539 U.S. at 562.

59. *Id.*

60. *See id.*

61. Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia's sodomy statute and determining that the right to privacy does not protect homosexual acts). Significantly, the case stood for the proposition that the Supreme Court, and, by extension, society, did not accept homosexuals. *See* Elizabeth Sheyn, *The Shot Heard Around the LGBT World:* Bowers v. Hardwick *As a Mobilizing Force for the National Gay and Lesbian Task Force*, 4 J. RACE GENDER & ETHNICITY 2 (2009).

relax or abolish laws targeting homosexual conduct since *Bowers* was decided.[62] Similarly, in this context, the states have shown a pattern of moving towards legally recognizing same-sex marriage.[63] The same reasoning employed by Justice Anthony Kennedy in *Lawrence* can also be applied to trans individuals in this situation: the liberties afforded by the Constitution to define one's own concept of personhood,[64] as well as the emerging trend of recognizing marriage regardless of sex, demonstrate that trans individuals should have no barriers to receiving immigration benefits based on marriage, regardless of sexual identity. The challenges imposed by the *Lovo-Lara* decision only impede certain trans individuals from obtaining the same benefits enjoyed by either non-trans or trans individuals with the means and opportunity to satisfy the *Lovo-Lara* requirements.[65] Such disparate impact is not equal treatment, and there is no rationale that supports such an unfair and unequal result.

The Supreme Court's decision in *Romer v. Evans* also provides guidance on this matter.[66] The *Romer* court determined that the amendment to Colorado's state constitution (Amendment 2) overtly discriminated against homosexuals and prevented those individuals from the same protections afforded to heterosexuals.[67] The Court recognized:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. 'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.'[68]

Moreover, the Court determined that Amendment 2 was impermissible because it blatantly denied equal protection to homosexuals only and had no identifiable legitimate purpose or discrete objective.[69] Instead, it only sought to further society's moral condemnation of homosexual conduct.[70] It is evident that the same sort of discrimination is currently occurring in this post-*Lovo-Lara* era. The *Lovo-Lara* decision fur-

---

62. *Lawrence*, 539 U.S. at 573.

63. *See, e.g.*, ME. REV. STAT. ANN. tit. 19, § 701 (2012); WASH. REV. CODE 26.04.010 (2012); CONN. GEN. STAT. ANN. § 46b-21 (2009); VERMONT STAT. ANN. tit. 15, § 8 (2009).

64. *See Lawrence*, 539 U.S. at 574.

65. *See* Lovo-Lara, 23 I. & N. Dec. 746, 749–51 (BIA 2005).

66. *See* Romer v. Evans, 517 U.S. 620 (1999).

67. *See id.* at 624 (noting that Colorado's Amendment 2 had the effect of repealing municipal ordinances that prohibited discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships").

68. *Id.* at 633 (quoting Sweatt v. Painter, 339 U.S. 629, 635 (1950)).

69. *Id.* at 635.

70. *See id.* at 644 (Scalia, J., dissenting).

thers the dominant and oppressive view that marriage should be between a man and a woman because it only recognizes opposite-sex marriages limited to post-operative trans individuals.[71]

By requiring only trans individuals to conform their gender to an identity accepted by the majority of society, it forces society's idea of the appropriate makeup of an opposite-sex marriage onto non-conforming individuals. Those who do not conform cannot reap the same benefits as those who do. This discrimination raises the question: how can the disparate treatment by states be reconciled with the Supreme Court's jurisprudence in cases like *Romer* and *Lawrence*,[72] which suggest that all trans individuals should receive equal treatment given the liberties and protections that the Constitution affords its citizens under the Fourteenth Amendment?

2. Court Decisions Today Demonstrate That Gay Marriage—and Trans Marriage—Must Be Lawful

Goodridge v. Department of Public Health stands as the first case for a court to find DOMA unconstitutional.[73] The *Goodridge* court held that DOMA was unconstitutional under the Massachusetts Constitution because of the vast protections and benefits civil marriage provides to couples, and due to the inadequate reasons that Massachusetts offered to deny civil marriage.[74] The *Goodridge* court noted that civil marriage is central to the way that the Massachusetts Commonwealth operates by creating civilized rules regarding property, medical care, and child custody, amongst other benefits.[75] Interestingly, the court noted that similar Equal Protection Clause arguments—that the right at stake was fundamental—had been used decades ago to overturn anti-miscegenation laws, demonstrating the importance of the right to choose to marry.[76] When

71. The "one man" and "one woman" idea is further limited by what society considers acceptable under the medically influenced definitions discussed in *supra* Part II.

72. These two cases demonstrate that laws must have a legitimate purpose—determining that discriminating against homosexuals is *not* legitimate—and that individual liberty provides U.S. citizens with much freedom to decide how to conduct their personal lives relating to privileges such as marriage. *Romer*, 517 U.S. at 635; Lawrence v. Texas, 539 U.S. 558, 559–60 (2003).

73. 798 N.E.2d 941 (Mass. 2003).

74. *Id.* at 954.

75. *Id.* at 954–57.

76. *Id.* at 958 ("As both *Perez* and *Loving* make clear, the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare. . . . In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. . . . [H]istory must yield to a more fully developed understanding of

applying the rational basis test,[77] the court did not find any rational relationship between the disqualification of same-sex couples from civil marriage and the state's proffered justifications of the protection of public health, safety, or general welfare.[78]

As the *Goodridge* court makes clear, marriage today is a civil right, and due to the "legal, financial[,] and social benefits" that it affords to those who are able to choose to marry,[79] DOMA unfairly denies such advantages to a portion of the community for no rational reason.[80] Additionally, in *Gill v. Office of Personnel Management*, the court employed similar reasoning—also using rational basis review to analyze the Equal Protection Clause arguments—to conclude that DOMA was unconstitutional because it denied federal benefits to citizens.[81] Importantly, the court found that DOMA could not pass constitutional muster due to its marriage-based classification:

> By premising eligibility for benefits on marriage, Congress has made the determination that married people make up a class of similarly-situated individuals different in relevant respects from the class of non-married people. Cast in this light, the claim that the federal government may also have an interest in treating all same-sex couples alike, whether married or unmarried, plainly cannot withstand constitutional scrutiny.[82]

Finally, the Supreme Court decided in *Windsor* that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment [Due Process Clause] of the Constitution."[83] The Court analyzed the tradition and history of the states' ability to regulate marriage, recognizing that the "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'"[84] The Court concluded that, by imposing its federal definition of marriage, DOMA's "principal purpose is to impose inequality, not for other reasons like governmental efficiency. . . . And DOMA contrives to

---

the invidious quality of the discrimination." (citing Perez v. Sharp, 198 P.2d 17, 27 (Cal. 1948); Loving v. Virginia, 388 U.S. 1, 12 (1967))).

77. Rational basis review is the lowest standard of review when determining the constitutionality of statutes under the Equal Protection Clause. Under rational basis review, "the Equal Protection Clause requires only that the classification drawn by the statute be rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 432 (1985).

78. *Goodridge*, 789 N.E.2d at 968.

79. *Id.* at 948, 957.

80. *Id.* at 967–68.

81. *See* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 376, 387 (D. Mass. 2010).

82. *Id.* at 394–95.

83. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

84. *Id.* at 2691 (quoting Sosna v. Iowa, 419 U.S. 393, 494 (1975)).

deprive some couples married under the laws of their state, but not other couples, of both rights and responsibilities."[85]

All of these cases held that DOMA was unconstitutional because it provided certain privileges and protections to some people at the exclusion of others based on their marriage classification. By categorically denying the right to choose to marry to all same-sex couples, DOMA thereby violates the Equal Protection Clause as incorporated through the Fourteenth Amendment.[86] The impact of *Lovo-Lara* can be analogized in the same way. Although the 2005 decision sought to recognize trans marriages that adequately conformed to the one woman and one man confines dictated by DOMA, the court's decision restricted recognition to the small percentage of trans individuals that could meet their state's requirement to get a new birth certificate after having undergone sexual reassignment surgery.[87] This rule does not align with the recent same-sex marriage cases.

Marriage plays an important role both as a defining moment in an individual's life as well as conferring widespread governmental benefits on a couple. Due to its importance, it is entirely unreasonable to allow some trans individuals to obtain these privileges while others are denied those same benefits. The enactment of DOMA was "rooted in persistent prejudices against persons who are (or who are believed to be) homosexual."[88] That prejudice and the burden imposed by DOMA no longer stands.[89] Yet the *Lovo-Lara* decision similarly disqualifies classes of persons from marriage because they do not fit within the state-approved definition of marriage—which only perpetuates those prejudices described by the *Goodridge* court. Equal protection laws require those biases to be held unconstitutional, and as such, marriage should not establish requirements regarding the parties' genders. Just as same-sex couples should be allowed to legally marry, so too should trans couples.

Enacting statutes that define marriage as an act between two persons,[90] and not specifying any gender, will permit all trans couples to marry regardless of any unnecessary court burden. The line that separates trans couples that meet the *Lova-Lara* requirements from those that do not is needless. This distinction only reflects the tired opinion of the majority of society—or arguably, not even the majority, but rather the more

85. *Id.* at 2694.

86. *See Gill*, 699 F. Supp. 2d at 394–95; *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 967–69 (Mass. 2003).

87. Lovo-Lara, 23 I. & N. Dec. 746, 748–49 (BIA 2005).

88. *Goodridge*, 798 N.E.2d at 968.

89. *Windsor*, 133 S. Ct. at 2695.

90. *See, e.g.*, WASH. REV. CODE § 26.04.010(1) (2012).

boisterous—that sex (and consequently marriage) should be confined to that between a man and a woman. Courts have yet to explain why gender reassignment surgery is the appropriate boundary for trans marriage recognition in the immigration context, and it is unlikely that any attempted explanation would be adequate regardless.

B. Lovo-Lara *Is Insufficient in Recognizing Trans Marriages Predicated on the Fight for Gay Marriage*

1. The Impact of *Lovo-Lara* on Trans Immigrants

At first glance, the *Lovo-Lara* decision was a breakthrough for trans couples and transgender rights because it recognized certain trans marriages in the immigration context.[91] This Comment does not aim to diminish the fact that the court found a way to accept visa petitions by trans immigrants and immigrants with a trans partner who is a U.S. citizen, so long as one of the parties met the necessary conditions that their birth state required to obtain a new birth certificate.[92] Furthermore, in light of the strict definition of marriage required by then-existing DOMA, *Lovo-Lara*'s legal recognition of trans marriages can be considered an accomplishment for the trans equality movement; it meant that those couples were afforded the same benefits and protections as those of non-trans married couples.

The *Lovo-Lara* decision also impacted the way that the CIS treated the visa process for trans couples' applications. In response to the BIA's *Lovo-Lara* decision, the CIS's Associate Director issued new interoffice memoranda in both 2009 and 2012 to implement new CIS procedures for recognizing trans marriages.[93] Under the CIS's 2012 policy, the organization will issue a document reflecting an individual's preferred gender if the individual presents (1) an amended birth certificate, passport, or court order reflecting the new gender; or (2) medical certification of the change in gender from a licensed physician or doctor of osteopathy.[94] In addition to the lengthy medical certification required under subsection two,[95] the applicant may also be asked to submit to the CIS acceptable

91. *Lovo-Lara*, 23 I. & N. Dec. 746.

92. *See id.* at 751.

93. *See* 2012 CIS Memo, *supra* note 10.

94. *Id.* at 3.

95. *Id.* For the medical certification, the licensed physician is required to include language stating that the individual "has had appropriate clinical treatment for gender transition" and that the licensed physician "*has either treated* the applicant in relation to the applicant's change in gender *or has reviewed and evaluated the medical history of the applicant in relation to the applicant's change in gender* and that he/she has a doctor/patient relationship with the applicant." *Id.* (emphasis in orig-

evidence of identity in the new gender, including a recent facial photograph.[96]

Presumably, this picture will be used to judge the candidate's likeness to his or her identified gender, which presents several problems. First, there is no need to submit a photograph as proof of gender beyond making the process more difficult for trans applicants—as encompassed by the self-determination model, such photographic proof is unnecessary because the individual's choice determines his or her gender. Second, the CIS officers should not have the authority or discretion to dictate whether a person will be recognized as his or her preferred gender based strictly on medical proof and physical likeness. The implications of the CIS officer's decision may ultimately affect whether the applicant's visa will be granted or denied by the CIS.[97] Although it is appalling that the CIS can inquire into such personal and sensitive matters without question, applicants readily comply to become a U.S. legal permanent resident because they have no other options.

Another problem associated with both the *Lovo-Lara* decision and the subsequent CIS memorandum is that both require extensive medical proof to recognize an individual in his or her new gender for legal purposes unless a reissued birth certificate is produced.[98] Aside from the humiliation likely suffered by having to submit such intimate and sometimes embarrassing[99] documentation, the process is also undoubtedly costly and time-consuming for the trans individual, requiring resources that the individual may not have.[100] In regard to the extensive medical procedures required, those individuals who cannot access the sexual reassignment surgery or appropriate clinical treatment[101]—for whatever reasons, cost, personal choice, or otherwise—will be largely ineligible for the benefits granted to those who do have the surgery. As a result, the

---

inal). However, the memorandum fails to define "appropriate clinical treatment," and the CIS rules do not require proof of sex reassignment surgery to issue the requested document. *See id.*

96. *Id.*

97. *See id.* at 2.

98. *See* Lovo-Lara, 23 I. & N. Dec. 746 (BIA 2005); *see also* 2012 CIS Memo, *supra* note 10, at 3.

99. Embarrassing is used only in the sense that it would be embarrassing for an individual to have certain—otherwise private—medical records shared with and scrutinized by strangers.

100. The cost of sex reassignment surgery alone can cost upwards of $20,000, without including the ongoing cost of hormonal therapy and risks associated with the surgery. Susan Brink, *Imagining Chelsea Manning: The Science of Sex Changes*, NAT'L GEOGRAPHIC (Aug. 22, 2013), http://news.nationalgeographic.com/news/2013/08/130822-bradley-manning-chelsea-sex-change-hormone-therapy/.

101. *See* 2012 CIS Memo, *supra* note 10, at 3.

outcome favors more privileged transgender people and furthers the preexisting class divide in society.[102]

Moreover, as research indicates, this exclusion tends to affect a large portion of the trans community because of the "cycle of poverty" described by the Sylvia Rivera Law Project (SRLP).[103] Pooja Gehi describes that the cycle of poverty stems from the "systematic discrimination and marginalization that trans people are likely to face throughout their lives" for not conforming to the normal gender roles society assigns.[104] Due to this poverty cycle, most trans individuals are vulnerable and disadvantaged compared to the rest of society.[105] These disadvantages make it more difficult for trans individuals to access basic commodities such as education, employment, and healthcare.[106] When the court imposed the gender reassignment standard, it prevented the majority of these individuals from receiving the benefits thought to be conferred in the *Lovo-Lara* decisions.

Furthermore, when courts require sexual reassignment surgery, they reinforce the transgender medical model by indicating that gender identity can only be recognized in conformance with medical definitions. And courts have consistently defined transgender using mechanical, restrictive medical language that does not allow for an individual to determine his or her own identity.[107] In effect, courts carry the power of construing what is acceptable in terms of recognizing marriages involving a trans spouse.

The poverty cycle further affects a trans individual's ability to change the status quo. The small minority of trans individuals that can afford a sexual reassignment surgery[108] will be rewarded with citizenship and likely will not question the status quo or challenge the CIS's applica-

---

102. *See* Arkles, Gehi & Redfield, *supra* note 51, at 591.

103. *Flowchart: Poverty & Homelessness*, SYLVIA RIVERA L. PROJECT, http://srlp.org/wp-content/uploads/2012/08/disproportionate_poverty_1.pdf [hereinafter *Flowchart*]; *see also* Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315, 324 (2009).

104. Gehi, *supra* note 103, at 324.

105. *Id.*

106. *See Flowchart*, *supra* note 103.

107. *See, e.g.*, *In re* Marriage of Simmons, 825 N.E.2d 303, 308 (Ill. App. 2005). In *Simmons*, the court refused to recognize the petitioner as a male despite his male physical appearance because of his "clear, normal female external genitalia and breast tissue." *Id.* One expert witness testified that the petitioner was still a female after enduring a hysterectomy and oophorectomy because those surgeries were not intended to be part of the sex reassignment process. This expert also indicated that the petitioner would need "a vaginectomy, reduction mammoplasty, metoidoiplasty, scrotoplasty, urethroplasty, and phalloplasty" before he could be considered completely sexually reassigned. *Id.* at 309.

108. *Flowchart*, *supra* note 103.

tion requirements because they already received their legal status. Those who cannot afford the requisite medical changes will not be offered legal, permanent residence; nor do those individuals have the means to lobby to change those standards required by the CIS applications in the first place. Thus, the CIS can legally require such proof and force applicants to provide such documentation without anyone questioning the system.

In part, because access to reassignment surgery is so limited, the CIS and the immigration courts must not treat those that choose not to pursue this course differently. However, by implementing the *Lovo-Lara* requirements, the CIS and the BIA routinely force individuals to change their identity to one that is more socially acceptable. As a result, these organizations will not offer individuals who cannot afford or do not want to undergo the requirements of *Lovo-Lara* the benefits received by those who do conform to mandated gender roles. By imposing these stringent standards, states and the federal government deny rights to trans individuals in violation of the Fourteenth Amendment's Equal Protection Clause.[109] In effect, only some trans couples obtain benefits because of these qualifications as to what is legally recognized as the opposite sex or because the state in which the couple resides recognizes same-sex marriage. These similar gender identity problems do not exist for those individuals who identify as the gender they are assigned at birth, given society's predetermined gender norms.

2. Applying the Equal Protection Cases to Trans Rights

Although gender based classifications are reviewed under intermediate scrutiny,[110] the precise issue of gender identity classification has not explicitly been raised before the Court.[111] The next section analyzes the classification under both intermediate scrutiny and rational basis review to exemplify that, under either method of review, the disparate treatment

109. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

110. *E.g.*, United States v. Virginia, 518 U.S. 515, 555 (1996). Intermediate scrutiny requires an important government interest and substantial connection between the problem and the solution. Craig v. Boren, 429 U.S. 190, 211 (1976).

111. The *United States v. Windsor* decision sheds the most light on this matter. In its opinion, the Court noted President Obama's conclusion that "heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation." 133 S. Ct. 2675, 2683–84 (2013). The Court also noted that the Court of Appeals for the Second Circuit applied the heightened scrutiny standard. *Id.* at 2684. While not expressly adopting the heightened equal protection scrutiny, the Court did not expressly reject the standard either. *See generally id.*

of trans individuals created by the *Lovo-Lara* decision violates the Equal Protection Clause.

If gender identity classifications were accorded intermediate scrutiny review, the Supreme Court's jurisprudence illustrates that the *Lovo-Lara* case would not likely pass constitutional muster. To withstand intermediate review, the challenged classification must serve an important government interest and must have a substantial connection to the achievement of that interest.[112] The classification must also be distinguished as facially neutral or facially discriminatory.[113] Facially discriminatory classifications are those that identify the disadvantaged party in the text of the legislation.[114] A facially neutral classification does not make a discriminatory distinction on its face, so challengers must prove both a disparate impact and discriminatory purpose on the affected group.[115] There is a strong argument that the *Lovo-Lara* decision is facially discriminatory because the decision impacts only those persons who do not want to marry into the traditional opposite-sex marriage. For purposes of analysis, however, the following discussion will demonstrate that, even assuming the decision is facially neutral, the decision still fails under intermediate scrutiny review.

In *Feeney*, the Court determined that a state law giving preference to hiring war veterans was gender-neutral because it impacted both men and women, even though it had a substantially discriminatory impact against women.[116] Unlike in *Feeney*, the state marriage laws that restrict same-sex marriage are not gender-neutral because they impact only this "other" group—those who do not traditionally fit within the male or female category. Thus, those laws show a disparate impact against only gay and trans individuals who are prohibited from marriage unless they conform to traditional gender categories.

While comparing *Lovo-Lara* to *Feeney* demonstrates that a disparate impact exists, a party must also prove discriminatory purpose by demonstrating that the federal government enacted or maintained a statute because of an anticipated discriminatory effect.[117] In the instant (theoretical) case, litigants must prove that the state statute requiring issu-

---

112. *Craig*, 429 U.S. at 197–98.

113. United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938); Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

114. *E.g.*, Romer v. Evans, 517 U.S. 620, 624 (1996).

115. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (stating that discriminatory purpose implies "that the decisionmaker . . . selected or reaffirmed a particular action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

116. *Id.* at 272.

117. *See* McClesky v. Kemp, 481 U.S. 279, 298 (1987).

ance of a new birth certificate to validly recognize that person's marriage was enacted to discriminate against those with a different gender identity. This result seems clear because states originally enacted such statutes to ensure that only heterosexual relationships would be recognized by the state, and they have been largely maintained throughout the years because of society's assumed disapproval of any relationship that does not conform to the "one man, one woman" standard.[118] The barrier imposed on anyone that does not meet this moral standard is reflected in the requirement that a person must undergo extensive gender reassignment surgery before the state will recognize his or her gender identity.

From the discussion above, it seems clear that a *Lovo-Lara* challenger would easily be able to show a discriminatory impact and purpose. The analysis then turns to whether the classification serves an important governmental objective and whether the legislation is substantially related to that objective.[119] Even though DOMA can no longer be used to deny non-citizen applicants rights, a similar impact still exists because *Lovo-Lara* is predicated on a state approach method. By allowing states to regulate marriage, differences still exist as to how marriage is defined—thus affecting only some trans couples.

Moreover, the definition of marriage as "between one man and one woman" is based on moral standards, similar to marriage restrictions used prior to the Civil Rights Era in an attempt to prohibit interracial marriages.[120] Just as the moral condemnation of interracial marriage was not an important—or even legitimate—government interest,[121] neither is this prohibition on marriage between same sex or transgender couples. While DOMA is substantially related to that objective, the objective is illegitimate.[122] As a result, the *Lovo-Lara* decision should not pass constitutional muster under intermediate scrutiny.

While *Lovo-Lara* would fail under intermediate scrutiny, the Court may instead determine that gender identity only has to meet rational basis review based on the *Romer v. Evans* decision.[123] Under rational basis

---

118. *See* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 388 (D. Mass. 2010) (citing Aff. of Gary D. Buseck, H.R. REP. NO. 104-664, at 12–18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 ("The House Report identifies four interests which Congress sought to advance through the enactment of DOMA: (1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources.")).

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

120. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967).

121. *See generally id.*

122. United States v. Windsor, 133 S. Ct. 2675 (2013).

123. Romer v. Evans, 517 U.S. 620, 640 (1996) (holding that sexual orientation receives rational basis review).

review, the Court has stated that laws are constitutional unless the government's action is "clearly wrong, a display of arbitrary power, not an exercise of judgment."[124] Even though rational basis is a more difficult standard of review, challengers will still be able to meet it and prove that the *Lovo-Lara* decision is clearly wrong. Allowing trans marriages to be legally recognized only if one undergoes sexual reassignment surgery is a display of arbitrary power because it draws a meaningless distinction between those trans individuals who can attain reassignment surgery and the large majority of trans people who cannot.[125] The requirement that trans marriages be recognized only after a person has medically altered his or her gender does not make sense and preserves the traditional, discriminatory notion that gender is rigid and assigned at birth. Instead, individuals should be allowed to define themselves, in alignment with this country's respect for freedom and choice.[126] Why can the government determine how a person identifies himself or herself, deciding that those who receive a certain surgery can legally change their gender, while those who do not receive the surgery are denied the same benefits? Such a denial seems contradictory to the fundamental nature of the freedom to marry.[127]

IV. AFFORD EQUAL PROTECTIONS TO ALL TRANS INDIVIDUALS

With evidence demonstrating *Lovo-Lara*'s failure to meet the intermediate scrutiny and rational basis standards of review, the case today is an impediment towards equal rights for trans individuals. The court's decision recognized only some trans marriages—where one partner had the means to obtain a sexual reassignment surgery and the residential state recognized it as legally changing one's gender—as valid in the immigration context.[128] The effect of this rule is to *further* marginalize the large majority of trans individuals who cannot achieve such a surgery,[129] while simultaneously acknowledging the rights of more privileged trans people.

The United States supposedly stands for the equal protection of its citizens and against the arbitrary line drawing that excludes similarly

---

124. Mathews v. DeCastro, 429 U.S. 181, 185 (1976) (quoting Helvering v. Davis, 301 U.S. 619, 640 (1937)).

125. *See Flowchart*, *supra* note 103.

126. Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

127. *See id.*

128. Lovo-Lara, 23 I. & N. Dec. 746, 748 (BIA 2005).

129. *See, e.g.*, *Flowchart*, *supra* note 103.

situated individuals from the same liberties and freedoms.[130] Thus, logically, all married trans couples that seek to obtain immigration benefits should be given those benefits regardless of the party's ability to undergo sexual reassignment surgery or the state's definition of marriage. That way, all similarly situated individuals (who are allowed the freedom to self-identify) will be treated equally along with all other married couples that are eligible for those same benefits. In order to afford equal protections to all citizens, states must adopt statutes that include broader language,[131] such as language used in the self-identity model. The use of broader language will stop denying protections to certain individuals who do not meet the costly, time-consuming, and demanding requirements currently imposed by states.

The federal government must adopt broad language that affords equal access to visa benefits for all trans individuals and couples. By doing so, the government will further the notions of personhood and liberty inherent in the Supreme Court's equal protection cases.[132] Under the jurisprudence of the Supreme Court, the *Lovo-Lara* decision cannot stand.[133] The *Lawrence* court determined that the right to define one's own concept of existence and personhood is promised by the Fourteenth Amendment.[134] Recognizing all trans marriages and treating *all* trans individuals equally will only further those protections afforded by the Constitution.

V. CONCLUSION

The *Lovo-Lara* case only furthers discrimination against trans individuals by forcing them to conform with the majority view of gender classification or risk being deported. Trans individuals are more likely to face poverty and discrimination, and these obstacles prevent them from earning an adequate income;[135] therefore, it is unlikely that every trans

130. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571 (2003) ("Our obligation is to define the liberty of all, not to mandate our own moral code.") (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).

131. For example, under Washington State's revised statute defining marriage, "marriage is a civil contract between *two persons* who have attained the age of eighteen years, and who are otherwise capable." WASH. REV. CODE § 26.04.010(1) (2012) (emphasis added).

132. *See, e.g.*, *Lawrence*, 539 U.S. at 578–79 (determining that liberty, promised by the Constitution, entitles adults with respect for their private lives and "a right to engage in their conduct without intervention of the government").

133. *See, e.g.*, *Lawrence*, 539 U.S. 558; *see also* Romer v. Evans, 517 U.S. 620 (1996).

134. *See Lawrence*, 539 U.S. at 578.

135. *Flowchart*, *supra* note 103; *see also Trans Immigrants Disproportionately Subject to Deportation and Detention, Suffer Special Gender-Related Harms in These Processes*, SYLVIA

individual who would like to qualify as being in an opposite sex marriage for immigration status is able to overcome those burdens. Further, as a trans individual, being deported back to his or her native country could mean a death sentence.[136] Recognition of all trans marriages is the only way to treat all trans individuals equally under the language of the Fourteenth Amendment and in accordance with U.S. principles of freedom and opportunity.

RIVERA L. PROJECT, http://www.againstequality.org/wp-content/uploads/2009/10/disproproportionate-deportation.pdf (last visited Jan. 15, 2014).

136. *See* Rosello, *supra* note 6.