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Premature Celebration: Obergefell Offers Little Immigration Relief to Binational Same-Sex Couples

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Premature Celebration: Obergefell Offers Little Immigration Relief to Binational Same-sex Couples

DARLENE C. GORING*

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"[B]elief that this Executive Action is within his executive authority is not dispositive because the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment."\(^1\)

* Sam D'Amico Endowed Professor of Law and Nolan J. Edwards Professor of Law, Louisiana State University Paul M. Hebert Law Center. This article is dedicated to my late aunt, Geraldine Wallace, and my late mother, Gloria Wallace Goring. The author wishes to thank her colleagues, Joseph Bockrath and John Devlin, for their editorial comments, and Mary Allen for her wonderful research assistance.

INTRODUCTION

The time span between the United States Supreme Court’s approval of the racially divisive separate but equal doctrine in *Plessy v. Ferguson*\(^2\) and the invalidation of laws prohibiting interracial marriage in *Loving v. Virginia*\(^3\) seems insurmountably long when compared to swift judicial and legislative efforts to grant marriage equality to members of the Lesbian, Gay, Bi-Sexual and Transgendered (“LGBT”) community. However, in its haste to provide judicial recognition to same-sex couples, the Supreme Court has created a paradigm in which Congress’ constitutionally delegated power to regulate immigration is at odds with these rapid jurisprudential developments.

The provisions of the Immigration and Nationality Act (“INA”)\(^4\) encourage unification between United States citizens and their alien\(^5\) spouses, and grant favorable immigration benefits to those alien spouses.\(^6\) The opportunity is especially important to aliens who, upon marriage to a United States citizen, become eligible to “fast track” their immigration to the United States, and start their path toward United States citizenship.\(^7\) The value of an opportunity to immigrate to the United States cannot be overstated. The Supreme Court noted in *Schneiderman v. United States*,\(^8\) “it is safe to assert that nowhere in the world today is the right to citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its

\(^2\) *Plessy v. Ferguson*, 163 U.S. 537 (1896).
\(^5\) The term “alien” is defined in the Immigration and Nationality Act (“INA”) Section 101(a)(3) as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3).
\(^6\) Kerry v. Din, 135 S. Ct. 2128, 2136 (2015) (plurality opinion) (“Although Congress has tended to show ‘a continuing and kindly concern . . . for the unity and happiness of the immigrant family,’ . . . this has been a matter of legislative grace rather than fundamental right.”).
\(^7\) *Id.* at 2131. This action was brought by the United States citizen spouse because that alien spouse lacked standing to challenge the DHS’s refusal to issue an immigration visa. (“Naturally, one would expect him—not Din—to bring this suit. But because Berashk is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission.”). *Id.* The Court in *Din* outlined the immigration procedures for an alien seeking an immigration visa. (“Under the Immigration and Nationality Act . . . an alien may not enter and permanently reside in the United States without a visa. § 1181(a). The INA creates a special visa-application process for aliens sponsored by ‘immediate relatives’ in the United States. §§ 1151(b), 1153(a). Under this process, the citizen-relative first files a petition on behalf of the alien living abroad, asking to have the alien classified as an immediate relative. See §§ 1153(f), 1154(a)(1). If and when a petition is approved, the alien may apply for a visa by submitting the required documents and appearing at a United States Embassy or consulate for an interview with a consular officer. See §§ 1201(a)(1), 1202. Before issuing a visa, the consular officer must ensure the alien is not inadmissible under any provision of the INA. § 1361.”) *Id.*
\(^8\) *Schneiderman v. United States*, 320 U.S. 118 (1943).
value and importance. By many it is regarded as the highest hope of civilized man."⁹

Congress has never extended this favorable immigration benefit to alien spouses in binational same-sex marriages.¹⁰ Notwithstanding the lack of legislative action, recent Supreme Court decisions that afford constitutional rights to same-sex couples spurred the executive branch to implement these decisions for the benefit of binational same-sex couples seeking to live together in the United States.

On June 26, 2013, the Supreme Court in United States v. Windsor¹¹ invalidated Section 3 of the Defense of Marriage Act ("DOMA").¹² DOMA was enacted by Congress in 1996 to define marriage under Federal law as a "legal union between one man and one woman, and the term 'spouse' refers only to a person of the opposite sex who is a husband or wife."¹³ Windsor held that § 3 of DOMA is an unconstitutional denial of equal protection under the Due Process Clause¹⁴ of the Fifth Amendment.¹⁵ Windsor’s invalidation of § 3 of DOMA removed the federal statutory barrier that prevented binational same-sex couples from becoming eligible for immigration benefits. However, Congress has not amended the INA following Windsor to address whether binational same-sex marriages would be recognized for immigration purposes, or defined the terms "marriage" or "spouse" to include same-sex relationships.

President Barack Obama attempted to fill the gap regarding the federal definitions of the terms "marriage" and "spouse" by an exer-

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⁹. Id. at 122.
¹⁰. Vy Nhu Hoang Dinh v. United States, 2014 WL 3513379, at *5 (D. Nev. July 14, 2014) ("A U.S. citizen may petition for his spouse (the beneficiary) to be classified as an 'immediate relative' by filing a Form I-130 Petition for Alien Relative . . . . If granted, this classification allows the spouse to 'jump the line' and immediately apply for temporary lawful permanent resident ('LPR') status by filing a Form I-485 Application to Register Permanent Resident or Adjust Status.").
¹³. Id.
¹⁴. The Fifth Amendment to the United States Constitution provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.
¹⁵. Windsor, 133 S. Ct. at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.").
Following Windsor, President Obama directed then Attorney General Eric Holder, through the Department of Justice, to implement "the Windsor decision across the entire federal government." Efforts to implement Windsor included a directive from former Secretary of the Department of Homeland Security ("DHS") Janet Napolitano directing the United States Citizenship and Immigration Service ("USCIS") to "review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse." The invalidation of § 3 of DOMA by the Supreme Court in Windsor was welcomed by thousands of binational same-sex couples who wanted to live together in the United States.

16. See e.g., Memorandum from the Office of the Attorney General to the President of the United States (June 20, 2014).

17. Id.; see also id. at 3 ("At your direction, the Department of Justice immediately began working with other deferral agencies to make the promise of the Windsor decision a reality—to identify every federal law, rule, policy, and practice in which marital status is a relevant consideration, expunge Section 3's discriminatory effect, and ensure that committed and loving married couples throughout the country would receive equal treatment by their federal government regardless of their sexual orientation.").


President Obama’s bold decision to extend federal benefits to United States citizens and binational same-sex married couples was bolstered by the Supreme Court’s landmark decision, on June 26, 2015, to legalize same-sex marriage. In *Obergefell v. Hodges*, the Court held that same-sex couples have a fundamental right to marry that is protected by the Fourteenth Amendment’s guarantees of Due Process and Equal Protection. This decision does not, however, require Congress to recognize binational same-sex married couples eligible for immigration benefits.

An alien spouse in a binational marriage certainly has the right under *Obergefell* to have this marriage legally recognized for all purposes in the United States except within the field of immigration. This decision did not, however, grant alien spouses the right to immigrate to the United States. In fact, alien immigrants have “no constitutionally protected right to an immigrant visa,” regardless of the constitutional rights granted to the United States citizens and lawful permanent residents. The Constitution has no extraterritorial effect, and immigration is only a “privilege granted by the sovereign United States government.” Although the *Obergefell* decision is a tremendous victory for the LGBT community, marriage equality has not been fully realized for binational same-sex spouses seeking to unite with their citizen spouses in the United States.

The unintended consequence of this radical shift in immigration policies is representative of a pattern of immigration reform under-
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taken by the Obama administration that ignores the powers granted to Congress to establish a “uniform Rule of Naturalization.” 28 Notwithstanding President Obama’s noble objectives, the exercise of executive action to implement Windsor within the field of immigration is inconsistent with the constitutional delegation of legislative authority granted to Congress to regulate the field of immigration, and with Congressional plenary power to determine the categories of persons who are eligible to immigrate to the United States. It calls into question the Supreme Court’s longstanding affirmation of Congress’ plenary power 29 to regulate the field of immigration exemplified by Justice Powell’s statement in Fiallo v. Bell, 30 that “over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” 31

It is important to note that the legislative and executive branches of the federal government share power to regulate the country’s immigration policies. 32 However, only Congress can determine the eligibility categories for aliens seeking immigration visas. 33 The role of the

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29. See Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (“In the recent case of Nishimura Ekiu v. U.S., 142 U.S. 651, 12 Sup. Ct. Rep. 336, the court, in sustaining the action of the executive department, putting in force an act of congress for the exclusion of aliens, said: ‘It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the president and senate or through statutes enacted by congress.’”); see also Boutilier v. INS, 387 U.S. 118, 123 (1967) (recognizing Congress’s “plenary power to make rules for admission of aliens and to exclude these who possess those characteristics which Congress has forbidden.”).


31. Galvan v. Press, 347 U.S. 522, 531 (1954) (“[T]hat the formulation of these policies is entrusted to Congress has become about as firmly imbedded in the legislative and judicial tissue of our body politic as any aspect of our government.”).

32. Jean v. Nelson, 711 F.2d 1455, 1465 (11th Cir. 1983) (“Congress and the Executive branch share the immigration power.”) (citing Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892)).

33. Id. at 1466 (“Congress traditionally exercises authority over matters of immigration and exclusion through passage of immigration legislation.”); see also United States ex rel. Knauff v.
The executive branch is to enforce the immigration legislation enacted by Congress. The executive branch has broad, but not unlimited, prosecutorial discretion to enforce immigration policies, specifically regarding deportation and removal of aliens from the country. President Obama’s executive action to expand the category of aliens who may be eligible for an immigration visa based upon binational same-sex marriages falls outside of the scope of his executive authority to regulate immigration.

This research project will attempt to reconcile the immigration landscape following Obergefell and Windsor with the plenary powers granted to Congress to regulate the field of immigration. This Article will argue that President Obama’s efforts to provide immigration benefits to alien spouses in binational same-sex marriages infringes upon Congress’ power to determine the categories of aliens permitted to immigrate to the United States. This Article will also explore whether the implementation of Obergefell and Windsor on behalf of binational same-sex couples contravenes the separation of powers between the two branches of the federal government charged with administration of the country’s immigration policies. This project will argue that in the absence of Congressional legislation that incorporates same-sex marriages and spouses into the immigration paradigm, neither the repeal of DOMA or judicial recognition of same sex marriage will ensure that immigration benefits will remain available to binational same-sex families.

I. JURISPRUDENTIAL RECOGNITION OF SAME-SEX PERSONS

Members of the LGBT community aggressively fought to achieve legislative and common law recognition of their rights. Recognition of LGBT rights changed the social fabric of this country, and paved the way for Congress to relax restrictions on barriers that limited the ability of LGBT aliens to visit and immigrate to the United States.

Shaughnessy, 338 U.S. 537, 543 (1950) (“Normally Congress supplies the conditions of the privilege of entry into the United States.”).
34. Knauff, 338 U.S. at 543.
A. Legal Recognition of LGBT Aliens

Aliens, regardless of their sexual orientation, do not have a constitutional right to enter the United States.\(^{36}\) Admission of aliens into the United States falls within the Congressional authority to establish regulations defining the categories of aliens permitted to enter our borders.\(^{37}\) There is a long history of legislative barriers that prevented LGBT aliens from coming to the United States.\(^{38}\) The provisions of theINA expressly excluded LGBT aliens from coming to the United States.\(^{39}\) Prior versions of theINA classified LGBT aliens as undesirables\(^{40}\) because they were “afflicted with a psychopathic personality, or sexual deviation.”\(^{41}\) As such, homosexuals were “ineligible to receive visas and shall be excluded from admission into the United States.”\(^{42}\)

In\textit{Boutilier v. INS},\(^{43}\) the Supreme Court upheld the deportation\(^{44}\) of a gay man on the ground that he was a homosexual at the time of his entry into the United States. Pursuant to the provisions of theINA, which were later repealed in 1990, the alien was “a homosexual and therefore ‘afflicted with psychopathic personality, and excludable.’”\(^{45}\) Similarly in 1982, the District Court in\textit{Lesbian/Gay Freedom Day Committee v. INS}\(^{46}\) upheld an INS determination that an alien seeking to come to the United States as a “nonimmigrant visitor for

\(^{39}\) Id.; see also Kevin Johnson, The Huddled Masses Myth: Immigration and Civil Rights 140–45 (2004).
\(^{40}\) Johnson, supra note 39, at 140.
\(^{41}\) Boutilier v. INS, 387 U.S. 118, 121–22 (1967).
\(^{43}\) Boutilier, 387 U.S. 118.
\(^{44}\) United States v. Lopez-Vasquez, 227 F.3d 476, 479 n.2 (5th Cir. 2000) (“Before IIRIRA’s enactment in 1996, individuals such as Lopez-Vasquez who were ineligible for admission into the United States and were never admitted into the United States were referred to as ‘excludable,’ while aliens who had gained admission, but later became subject to expulsion from the United States, were referred to as ‘deportable.’ . . . In addition, the IIRIRA [Illegal Immigration and Reform and Immigrant Responsibility Act of 1996] has ‘done away with the previous legal distinction among deportation, removal, and exclusion proceedings . . . . Now, the term ‘removal proceedings,’ refers to proceedings applicable to both inadmissible and deportable aliens.’”).
\(^{45}\) Boutilier, 387 U.S. at 119.
pleasure” was “per se excludable” because he was a homosexual. Citing the statutory exclusion of LGBT aliens dating back to 1917, the District Court concluded that the alien would “be continually barred from entry into the United States as long as a policy of excluding homosexuals per se from entry is in effect.”

As legal recognition and acceptance of the LGBT community increased, Congress removed the statutory barriers that excluded LGBT aliens from coming to the United States. The Immigration Act of 1990 eliminated references to “psychopathic personality” or “sexual deviation” as grounds for visa ineligibility. Although Congress eliminated the exclusion barriers, the INA was not subsequently revised to make favorable immigration benefits readily available to LGBT aliens. For example, Congress enacted legislation that encouraged family unification between United States citizens and their alien spouses, but Congress has never extended this immigration benefit to binational same-sex spouses.

Notwithstanding the elimination of admission barriers, Congress sustained its generally hostile outlook to the growing acceptance of the LGBT community, and enacted legislation that defined marriage as a union between opposite sex couples. This served as an impervious barrier for all members of the LGBT community, including citizens and aliens alike, to gain access to any federal benefits, including marital immigration benefits. The burden then fell on the LGBT community to raise intra-territorial judicial challenges to domestic policies and that discriminated against them and deprived them of constitutional rights.

B. Legal Recognition of LGBT Citizens

The fight to achieve equality for the LGBT community within the United States started in earnest with the Hawaiian Supreme Court’s decision in Baehr v. Lewin, which held that Hawaii’s marriage law that denied marriage licenses to same-sex couples solely on the basis

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49. Id. at 576.
52. See discussion of DOMA infra Part III.
53. Id.
54. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that the denial of marriage licenses to same-sex couples constitutes discrimination on the basis of sex).
of their sexual orientation was an unconstitutional denial of equal protection.\textsuperscript{55} Notwithstanding the holding of \textit{Baehr}, marriage equality was never realized in Hawaii following this decision. DOMA was enacted in direct response to \textit{Baehr},\textsuperscript{56} and soon thereafter, Hawaii amended its constitution in 1998 to prohibit same-sex marriage.\textsuperscript{57}

At the same time that the Hawaiian Supreme Court was considering marriage equality, the United States Supreme Court in \textit{Romer v. Evans},\textsuperscript{58} was considering the constitutionality of an amendment to Colorado's constitution which "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons, or gays and lesbians."\textsuperscript{59} Justice Kennedy authored the opinion for the Court in which he concluded that Amendment 2 violated the Equal Protection Clause of the 14th Amendment by classifying LGBT persons in a manner that was "unequal to everyone else,"\textsuperscript{60} noting that "[a] State cannot so deem a class of persons a stranger to its laws."\textsuperscript{61} Such a classification "impos[ed] a broad and undifferentiated disability on a single named group."\textsuperscript{62}

Following \textit{Romer}, the LGBT community focused its efforts on the eradication of laws that treat members of the LGBT community as "second class citizens."\textsuperscript{63} The fight for legal equality can be divided into two phases. The first phase focused on judicial challenges to legislative efforts to regulate personal relationships between same-sex

\textsuperscript{55} The Court subjected the Hawaiian statute to an evaluation under the strict scrutiny standard in order to "overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights." \textit{Id.} at 68. In so doing the Court held that "on its face and as applied, HRS § 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits, thus implicating the equal protection clause of Article I, section 5." \textit{Id.} at 67.

\textsuperscript{56} See H.R. Rep. No. 104-664, at 18 ("H.R. 3936 [DOMA] is inspired, again, not by the effect of \textit{Baehr} v. Lewin inside Hawaii, but rather by the implications that lawsuit threatens to have on the other States and on Federal law.").


\textsuperscript{58} Romer \textit{v}. Evans, 517 U.S. 620 (1996).

\textsuperscript{59} \textit{Id.} at 624.

\textsuperscript{60} \textit{Id.} at 631–35.

\textsuperscript{61} \textit{Id.} at 635.

\textsuperscript{62} \textit{Id.} at 632.

persons. For example, in *Bowers v. Hardwick* the plaintiffs argued that Georgia’s sodomy statute violated their fundamental rights to engage in private, consensual sexual behavior. The Supreme Court ruled to the contrary, noting that the court was not predisposed to “extend a fundamental right to homosexuals to engage in acts of consensual sodomy.”

The Supreme Court’s landmark decision in *Lawrence v. Texas* shifted the focus from examining the constitutionality of the right of “two persons of the same sex to engage in certain intimate sexual conduct,” and redirected the discussion to what became the second phase of the judicial fight for legal equality; the judicial recognition of liberty and privacy rights for the LGBT community that are protected by the Due Process Clause of the Fifth and Fourteenth Amendments.

In *Lawrence*, the Supreme Court acknowledged that same-sex couples have a constitutionally protected liberty interest that “gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” Justice Kennedy noted that the constitutional framers could not have foreseen that the boundaries of the Due Process Clause would expand to protect private, consensual sexual conduct between same sex couples. However, the Court did recognize that “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” Recognition of this constitutionally protected right led the Court to overturn its decision in *Bowers*, holding that “[t]he rationale of *Bowers* does not withstand careful analysis.”

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65. *Id.* at 189.
66. *Id.* at 192.
68. *Id.* at 562.
69. *Id.* at 564, 567 (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).
70. *Id.* at 572.
71. *Id.* at 578 (“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew time can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”); *Id.* at 578–79.
72. *Id.* at 579.
73. *Id.* at 577.
Justice Scalia’s dissent in *Lawrence* foreshadowed the growing “culture war”74 over constitutional recognition of same-sex marriage noting disbelief in the majority’s statement that the decision in *Lawrence* “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”75 Justice Scalia noted that the holding in *Lawrence* is symptomatic of “a Court that is impatient of democratic change,”76 and that sweeping changes “are to be made by the people, and not imposed by a governing caste that knows best.”77 Scalia’s unease that “judicial imposition of homosexual marriage” could be a consequence of the expansion of the liberty interest protected by the Due Process Clause proved to be a legitimate concern.

Twelve years later, Justice Scalia’s prognostication was realized when the Court announced its much anticipated decision in *Obergefell*. Relying upon Fourteenth Amendment guarantees of liberty and equal protection of the laws, the Court held that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”78

*Obergefell* was an action consolidated from four cases filed in “Michigan, Kentucky, Ohio and Tennessee.”79 Each state followed the traditional definition of marriage “as a union between one man

74. See *id.* at 558, 602-03 (Scalia, J., dissenting) (“One of the most revealing statements in today’s opinion is the Court’s grim warning that the criminalization of homosexual conduct is ‘an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.’ It is clear from this that the Court has taken sides in the culture war, departing from its role assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their homes. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as ‘discrimination’, which it is the function of our judgments to deter. So imbued is the Court with the law professor’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously ‘mainstream’; that in most States what the Court calls ‘discrimination’ against those who engage in homosexual acts is perfectly legal . . . .’

75. See *id.* at 604 (Scalia, J., dissenting) (“At the end of its opinion—after having laid waste the foundations our rational-basis jurisprudence—the Court says that the present case ‘does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’ Do not believe it.”).

76. See *id.* at 603.

77. *Id.* at 603-04.


79. *Id.* at 2593.
and one woman." The plaintiffs raised two issues before the Court. First, the Court considered whether the defendant States were in violation of "the Fourteenth Amendment by denying them the right to marry." The Obergefell majority considered four principles that "demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples." First, that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." Second, the right to marry "supports a two-person union unlike any other in its importance to the committed individuals." Third, is "that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." Finally, the fourth principle is that "[m]arriage is a keystone of our social order."

Justice Kennedy authored the majority opinion. He rejected calls to "adopt a cautious approach to recognizing and protecting fundamental rights" of same-sex couples to marry. Instead, the Court reached a groundbreaking and highly controversial decision. Justice Kennedy analogized the discrimination faced by same-sex couples with the burdens imposed on the interracial couple in *Loving*, and the financially delinquent father in *Zablocki v. Redhail*. The majority found a "connection between marriage and liberty" that is grounded in the "fundamental right inherent in the liberty of the person," under the Due Process and Equal Protection of the Fourteenth Amendment.

The second issue that the Court considered in *Obergefell* was whether full faith and credit considerations require states to give full

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80. *Id.*
81. *Id.*
82. *Id.* at 2599.
83. *Id.*
84. *Id.*
85. *Id.* at 2600.
86. *Id.* at 2601.
87. *Id.* at 2606.
88. *Id.* at 2602 ("*Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right to inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.' Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.").
90. *Obergefell*, 135 S. Ct. at 2599, 2604 ("Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution."). *Id.* at 2604.
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recognition “to marriages, lawfully performed in another state.” Justice Kennedy expressed concern for “instability and uncertainty” arising from “recognition bans” on same-sex marriages that were lawfully performed in other states. The Obergefell decision held that “recognition bans inflict substantial and continuing harm on same-sex couples.” As a result, the Court effectively abrogated § 2 of DOMA by holding that “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”

Although this decision illustrates a radical and controversial shift in the fabric of American society, its impact on American immigration policies remains unsettled. The Constitution clearly vests Congress, not the Supreme Court, with the principle responsibility of regulating our nation’s immigration policies. Reliance upon the intra-territorial legalization of same-sex marriage does not provide the immigration benefits that bi-national same-sex couples seek.

II. INVALIDATION OF THE FEDERAL DEFINITION OF MARRIAGE

The federal definition of marriage as a relationship between opposite-sex partners was codified in the Defense of Marriage Act, DOMA, which was signed by then President William Clinton in 1996. This landmark legislation was enacted in response to a perceived “legal assault against traditional heterosexual marriage laws,” following Hawaii’s Supreme Court’s ruling in Baehr. DOMA had two relevant provisions. Section 2 permitted states to “decline to give effect to marriage licenses from another state if they relate to ‘marriage’ between persons of the same sex.” Section 3 of DOMA amended the definitional section of Title 1 of the United States Code by adding

91. Id. at 2593.
92. Id. at 2607.
93. Id.
94. A long-standing maxim of immigration law is that bi-national couples have no constitutionally protected right to live in the United States with an alien spouse. See Udugampola v. Jacobs, 70 F. Supp. 3d 33, 41 (D.D.C. 2014) (“[T]he Constitution protects an individual’s right to marry, and the marital relationship... these constitutional rights are not implicated when one spouse is removed, or denied entry into the United States.”) (citing Udugampola v. Jacobs, 795 F. Supp. 2d 96, 105 (2011)).
97. 28 U.S.C. § 1738C (“No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex.
Section 7 to create a federal definition of 'marriage' and 'spouse' that was limited to "only a legal union between one man and one woman as husband and wife ...". The definitions of the terms marriage and spouse set forth in Section 3 only applied to the interpretation and application of federal laws and regulations. As a result, one consequence of DOMA was the denial of immigration benefits to bi-national same-sex couples that were lawfully married in states or countries that recognized same-sex marriages. Although judicial efforts were initiated on behalf of bi-national same-sex couples, DOMA's clear prohibition stood as a barrier to any forms of immigration relief.

Following the election of President Obama, negative sentiment against DOMA began to grow. The discriminatory, "Don't Ask, Don't Tell" policy banning gays from military service was repealed. Thereafter, President Obama announced that, although his administration would continue to enforce DOMA, he believed that the legislation was unconstitutional, and as a result, the Attorney General and the Justice Department would not defend DOMA on behalf of the United States.

Almost twenty years after its enactment, the constitutionality of DOMA was examined by the United States Supreme Court in Windsor. The plaintiff in Windsor, Edie Windsor, challenged Section 3 of DOMA, which defined marriage for the purposes of controlling federal statutes and regulations as "a legal union between one man and one woman as husband and wife." Under DOMA, the plaintiff could not qualify for a spousal inheritance tax exemption because her same-sex marriage was not recognized. As a result, the Internal Revenue Service accessed a $363,053 tax bill against Windsor because that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

98. 1 U.S.C. § 7 ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").


100. See generally James R. Edwards, Jr., Homosexuals and Immigration: Developments in the United States and Abroad, CTR. FOR IMMIGR. STUD. (May 1999), http://cis.org/Immigration%2526Homosexuals/PolicyTowardHomosexuals.


103. Id.

104. Id.
she did not qualify as a "surviving spouse" notwithstanding her marriage in Canada to her long-term companion and domestic partner.105

The Court in Windsor considered the role played by the federal government in regulating marital relationships. The Court acknowledged the long-standing precept that the regulation of marriage is an area traditionally relegated to state governments.106 The Court noted that "by history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate states."107 The regulation of marriage by State government was not a grant of absolute authority. The Court recognized that in appropriate circumstances, the federal government "in enacting discrete statutes, can make determinations that bear on marital rights and privileges."108 Examples where the federal government enacted regulations pertaining to marriage include federal life insurance beneficiary designations, immigration eligibility based upon marriage to United States citizens and Social Security benefit determinations.109

The Court recognized that the federal government can regulate the definition of marriage "in order to further federal policy," however, the provisions of DOMA reached impermissibly into areas that were historically regulated by the states.110 DOMA "because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage."111 As Justice Scalia predicted in his dissenting opinion in Lawrence v. Texas,112 the Windsor decision noted that states, have a legitimate interest in protecting and recognizing the dignity of marital relationships that are consistent with the formation of consensus respecting the "way the members of a discrete commu-

105. Id.
106. State regulation of marriage is also tempered by the constitutional guarantees afforded to persons. See Goodridge v. Dep’t of Pub. Health, 798 N.E. 2d 941, 957 (2003) (“It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a ‘civil right.’ The United States Supreme Court has described the right to marry as ‘of fundamental importance for all individuals’ and as ‘part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.’”) (internal citations omitted).
107. Windsor, 133 S. Ct. at 2689–90 (“The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State’s classifications have in the daily lives and customs of its people. DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriage.”); Id. at 2693.
108. Id. at 2690.
109. Id.
110. Id.
111. Id. at 2692
nity treat each other in their daily contact and constant interaction with each other"\cite{113} or the enduring personal bonds created by members of the community.

The Supreme Court concluded that the consequence of DOMA was to "injure the very class NY seeks to protect."\cite{114} In so doing, DOMA violated "basic due process and equal protection principles applicable to the federal government."\cite{115} As a result, the Court held that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."\cite{116} The outcome of *Windsor* was that it invalidated Section 3 of DOMA, thus eliminating the federal definition of marriage. *Windsor*, however, left Section 2's full faith and credit provisions untouched.\cite{117} The *Windsor* decision to invalidate Section 3 of DOMA, left no federal statutory definition of marriage to govern the interpretation of federal codes and regulations. Also, in the absence of a federal definition of marriage, the question remained as to how to define marriage and spouse for the purposes for immigration laws.

*Windsor*’s invalidation of DOMA removed the statutory bar that prevented bi-national same-sex couples from seeking immigration benefits. President Obama attempted to fill the gap regarding the federal definitions of marriage and spouse by an exercise of his executive authority. Following *Windsor*, President Obama directed then Secretary of Homeland Security Janet Napolitano to issue a letter directing the USCIS to "review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse."\cite{118}

\begin{thebibliography}{99}
\bibitem{113} *Windsor*, 133 S. Ct. at 2692.
\bibitem{114} *Id.* at 2693.
\bibitem{115} *Id.*
\bibitem{116} *Id.* at 2695.
\bibitem{117} Lisa Guillien, *Recognition of Existing Same-Sex Marriages*, NOLO: LAW FOR ALL, http://www.nolo.com/legal-encyclopedia/recognition-same-sex-gay-marriage-32294.html ("However, the Court did not address Section 2 of DOMA, which allows states to ignore valid same-sex marriages entered into in other states, or whether Section 2 would impact federal recognition. For example, the Court did not address whether the IRS (or other federal agencies) would recognize the marriages of same-sex married couples living in non-recognition states.").
\bibitem{118} Napolitano, *supra* note 19.
\end{thebibliography}
III. RECOGNITION OF BI-NATIONAL SAME-SEX SPOUSE FOR IMMIGRATION PURPOSES

A. Adams v. Howerton

The provisions of the INA offer a significant number of immigration benefits that are dependent upon marital status.\textsuperscript{119} For example, the most favored immigrant visa categories is for immediate relatives of United States citizens, INA § 201(b)(2)(A)(i)\textsuperscript{120} defines immediate relative as "the children, spouses, and parents of a citizen of the United States."\textsuperscript{121} This immigration category requires consideration of two additional categories. The term "spouse" is not defined in the INA. INA § 101(a)(35) only prohibits proxy marriages where the parties "are not physically present in the presence of each other, unless the marriage shall have been consummated."\textsuperscript{122}

The INA does not set forth a federal definition of marriage.\textsuperscript{123} The word "spouse" as defined in § 101(a)(35) of the INA is of limited assistance in this regard. The INA specifically excludes recognition of proxy marriages, which are marriages "where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated." The statutory language in § 101(a)(35) does not, however, address whether same-sex marriages will be recognized for immigration purposes. In the absence of a statutory definition for marriage, or guidance regarding whether same sex marriages warrant eligibility for immigration benefits, immigration officials sought guidance from common law jurisprudence.

\textsuperscript{119} See In re Zeleniak, 26 I. & N. Dec. 158, 159 (B.I.A. 2013) (noting that the repeal of Section 3 of DOMA afforded same-sex persons the opportunity to apply for a variety of immigration benefits "including, but not limited to, sections 101(a)(15)(K)(fiancé and fiancée visas), 203 and 204 (immigrant visa petitions), 207 and 208 (refugee and asylee derivative status), 212 (inadmissibility and waivers of inadmissibility), 237 (removability and waivers of removability), 240A (cancellation of removal), and 245 (adjustment of status) . . . ."); see also U.S. Citizenship and Immigration Servs., Same Sex Marriage Frequently Asked Questions ("Under the U.S. immigration laws, eligibility for a wide range of benefits depends on the meanings of the terms ‘marriage’ or ‘spouse.’ Examples include (but are not limited to) an alien who seeks to qualify as a spouse accompanying or following to join a family-sponsored immigrant, an employment-based immigrant, certain subcategories of nonimmigrants, or alien who has been granted refugee status or asylum. In all of these cases, a same-sex marriage will be treated exactly as an opposite sex marriage.").
\textsuperscript{121} Id.
\textsuperscript{122} Id. § 1101 (a)(35).
\textsuperscript{123} The INA does offer guidance regarding the definition of marriage. INA § 216(d)(1), 8 U.S.C. § 1186a (2012), defines the term “qualifying marriage” for the purpose of receiving a conditional PRA status as a result of a marriage to a United States citizen or LPR if the marriage is less than 24 months before the petitioning alien obtains the status.
Until portions of this decision were abrogated by Obergefell, the case of Adams v. Howerton,124 was the controlling precedent on this issue. In Adams, a bi-national same-sex couple that was purportedly married in Colorado, sought an immigrant visa for the putative alien as an immediate relative spouse of a United States citizen.125 The Ninth Circuit proffered a two-prong test to determine whether their marriage was eligible for recognition in accordance with the provisions of the INA.126 The first prong of the test required the Court to consider “whether the marriage is valid under State law.”127 Questions regarding the validity of marriages for immigration purposes are determined by examining “the law of the place of celebration.”128 The Court did not reach the issue of whether “Colorado law permit[ted] homosexual marriages,” because the Ninth Circuit decided the cases solely on the basis of the second prong of the test which required the Court to consider “whether state-approved marriage qualifies under the Act.”129

The second prong of the analysis required the Ninth Circuit to examine Congressional intent underlying the enactment of section 201(b).130 The Court noted that “the intent of Congress governs the conferral of spouse status under Section 201(b), and a valid marriage is determinative only if Congress so intends.”131 Upon finding no Congressional consideration of same-sex marriages in the legislative history of section 201, the Ninth Circuit held that “Congress intended

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125. Adams asserted that the INS’s application of Section 201(b) only to heterosexual couples violated the Equal Protection Clause. Citing Congress’ undisputed plenary power to govern immigration, the Court noted that Congressional decisions are subject only to “limited judicial review.” Adams, 673 F.2d at 1042. The Ninth Circuit resolved the Equal Protection challenge by holding that “Congress’s decision to confer spouse status under section 201(b) only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirement.” Id.
127. Adams, 673 F.2d at 1038.
128. Id. at 1038–39.
129. Id. at 1038.
130. Id. at 1039.
131. Id. The evaluation of Congressional intent required the Court to examine several factors, including the ordinary meaning of the terms ‘spouse’ and ‘marriage.’ The Court also considered the Legislative history of the term ‘spouse.’ Noting that there is “nothing in the [INA], the 1965 amendments or the Legislative history suggests that the reference to ‘spouse’ in section 201(b) was intended to include a person of the same sex as the citizen in question.” The Ninth Circuit also examined the INS’s interpretation of the term ‘spouse.’ Recognizing that “substantial deference” is ordinarily accorded to the interpretations of the enforcing agency, the Ninth Circuit held that the INS had also interpreted the term “spouse” to “exclude a person entering a homosexual marriage.” Id. at 1040.
that only partners in heterosexual marriages be considered spouses under section 201(b)." The Ninth Circuit in Adams, refused to expand the definition of spouse to include the same-sex member of a bi-national couple, relying in part, on the commonly understood definition of spouse. The Ninth Circuit noted that:

Congress has not indicated an intent to enlarge the ordinary meaning of those words. In the absence of such a congressional directive, it would be inappropriate for us to expand the meaning of the term 'spouse' for immigration purposes. [citation omitted] Our role is only to ascertain and apply the intent of Congress.

The Ninth Circuit specifically relied upon the Plenary Powers doctrine and looked to Congress to determine whether the alien spouse was eligible for an immigration visa. The Court in Adams noted that the legality of the bi-national same-sex marriage was "insufficient to confer spouse status for the purpose of federal immigration law." It is Congress "that determine[s] the conditions under which immigration visas are issued."

Adams was accepted as controlling precedent for over 30 years until three pivotal developments: the Windsor decision; President Obama’s directive to the DHS to "review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse;" and the Obergefell decision that same-sex couples have a fundamental right to marry that is protected by the “Due Process and Equal Protection Clauses of the Fourteenth Amendment.” Notwithstanding this dynamic change in the definition of marriage, the statutory framework of the INA, which does not expressly recognize bi-national same-sex marriages remains unchanged.

An unsettled question remains regarding whether the decisions in Obergefell and Windsor have any controlling impact on federal immi-
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gration policies that determine whether bi-national same-sex marriages will be eligible for immigration benefits. First, the holding in *Adams* that bi-national same-sex couples are not eligible for immigration benefits was not overruled by either *Obergefell* or *Windsor*. The Supreme Court in *Windsor* specifically mentions that "Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges."[140] Justice Kennedy further added "Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue."[141] Second, President Obama's Executive Action to implement *Windsor* was not codified in any Congressional legislation or Executive Order, thus calling into question whether this executive action is constitutionally permissible.[142] Finally, the *Obergefell* decision legalizing same-sex marriages, including bi-national marriages, addressed the first prong of the *Adams* test, but the Court did not and more importantly, is not authorized by Article I of the Constitution[143] to expand the scope of immigration policies to determine that bi-national same-sex spouses are eligible for immigrant visas.

B. Matter of Oleg. B. Zeleniak

During the brief period between the United States Supreme Court's decision in *Windsor* invalidating Section 3 of DOMA, and the Court's legalization of same-sex marriages in *Obergefell*, President Obama issued an Executive Action to implement *Windsor* to make bi-national same-sex marriages eligible for immigration benefits.[144] The DHS was then instructed to interpret the term "spouse" to include bi-

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140. *Windsor*, 133 S. Ct. at 2690.
141. *Id.* at 2690 ("Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages 'entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant' will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes.").
143. U.S. Const. art. I, § 8, cl. 4.
144. An explanation of an 'executive action' is set forth in United States v. Juarez-Escobar, 25 F. Supp. 3d 774, 783 (W.D. Pa. 2014) ("Executive Actions do not have a legal definition. Executive actions have been used by Presidents to call on Congress or this Administration to take action or refrain from taking action ... Executive Actions are not published in the Federal Register.").
national same-sex marriages, and that bi-national same-sex spouses and their children were also eligible to apply for immigration benefits.

The instructions issued by the DHS followed the reasoning of Adams that "the validity of a particular marriage is determined by the law of the State where the marriage was celebrated." The instructions provided that:

As a general matter, the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes. Just as USCIS applies all relevant laws to determine the validity of an opposite-sex marriage, we will apply all relevant laws to determine the validity of a same-sex marriage. The domicile state's laws and policies on same-sex marriages will not bear on whether USCIS will recognize a marriage as valid.\textsuperscript{145}

The Board of Immigration Appeals ("BIA") had an opportunity to apply the DHS's interpretation of Windsor in The Matter of Oleg B. Zeleniak.\textsuperscript{146} In Zeleniak, a bi-national same sex couple sought an immigrant visa for the alien spouse of a United States citizen.\textsuperscript{147} The United States citizen filed a petition for Alien Relative (Form I-130)\textsuperscript{148} on behalf of his alien same-sex spouse, but the petition was denied.\textsuperscript{149} The parties appealed the ruling and during the pendency of the appeal, the Supreme Court issued its ruling in Windsor and overturned Section 3 of DOMA.

Utilizing a modified version of the two-prong test that was first established in Adams, the BIA noted that "the Director has already determined that the Petitioner's February 24, 2010, marriage is valid under the laws of Vermont, where the marriage was celebrated."\textsuperscript{150}

\textsuperscript{145} Napolitano, supra note 19.
\textsuperscript{146} In re Zeleniak, 26 I. & N. Dec. 158, 158 (B.I.A. 2013).
\textsuperscript{147} Id. See generally Kerry v. Din, 135 S. Ct. 2128, 2131 (2015) ("Under the Immigration and Nationality Act (INA), (citation omitted), an alien may not enter and permanently reside in the United States without a visa. § 1181(a). The INA creates a special visa-application process for aliens sponsored by 'immediate relatives' in the United States. §§ 1151(b), 1153(a). Under this process, the citizen-relative first files a petition on behalf of the alien living abroad, asking to have the alien classified as an immediate relative; see §§ 1153(f), 1154(a)(1). If and when a petition is approved, the alien may apply for a visa by submitting the required documents and appearing at a United States Embassy or consulate for an interview with a consular officer; see §§ 1201(a)(1), 1202. Before issuing a visa, the consular officer must ensure the alien is not inadmissible under any provision of the INA § 1361.").
\textsuperscript{149} Zeleniak, 26 I. & N. Dec., at 158.
\textsuperscript{150} Id. at 160.
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However, the BIA did not follow the holding in *Adams*. In *Zeleniak*, the BIA concluded that the *Windsor* decision “removed Section 3 of the DOMA as an impediment to the recognition” of binational same-sex marriage for immigration purposes. In *Zeleniak*, the BIA remanded the visa petition back to the Director for an “inquiry [regarding] whether the petitioner has established that his marriage to the beneficiary is bona fide.”

There are several problems with this analysis. There is no reference made by the BIA in *Zeleniak* to *Adams* or more specifically, to the second prong of the *Adams* test which focuses the inquiry not on the validity of the marriage, but on whether Congress intended to recognize such marriages for immigration purposes. This analysis ignored the plenary powers of Congress to determine the immigrant visa eligibility criteria for aliens, and presumed, without any Congressional guidance, that binational same-sex marriages and alien spouses are eligible for immigration benefits.

The *Obergefell* decision abrogated the portion of the Ninth Circuit’s decision in *Adams* that questioned the legality of same-sex marriages, but the precedential value of *Adams* as it pertains to determining whether binational same-sex marriages are eligible for immigration benefits remains unanswered. Although there is no question that *Windsor* invalidated the federal definition of marriage, the *Windsor* decision did not invalidate the long-standing plenary powers doctrine which specifically authorizes Congress, not the Executive or judiciary to determine whether aliens qualify for immigration benefits. To date, Congress has not spoken on this issue. As noted by the Ninth Circuit in *Adams*, Congress has not indicated an intent to enlarge the

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151. *Id.* The BIA remanded the matter for a determination of whether the alien “would qualify[y] as a spouse under the Act, which includes the requirement that the marriage must be bona fide.” *Id.* at 158. See 8 C.F.R. § 204.2(a) (2007). *See generally* Bark v. Immigration & Naturalization Serv., 511 F.2d 1200 (9th Cir. 1975) (noting that to determine the validity of a marriage for immigration purposes, immigration courts have looked to the holding in *Bark*) (holding that petitioner must establish a life together at the time of the marriage. Marriages that failed to meet this standard are commonly referred to as sham or fraudulent marriages). Immigration courts have longstanding jurisprudence to guide the analysis regarding the validity of a marriage. *See generally* Phillis, 15 I. & N. Dec. 385, 386 (B.I.A. 1975) (citing *Zeleniak*, 26 I. & N. Dec., at 158) (“Although a marriage may be given legal effect in the United States or abroad, we are not required to recognize it for the purpose of conferring immigration benefits where the marriage was entered into for the purpose of evading the immigration laws”); In re Laureano, 19 I. & N. Dec. 1, 2 (B.I.A. 1983) (holding that marriages entered into the purpose of evading or “circumventing immigration laws” have not been recognized as enabling an alien spouse to obtain immigration benefits) (citing *Zeleniak*, 26 I. & N. Dec., at 158); In re McKee, 17 I. & N. Dec. 332, 334–35 (B.I.A. 1980) (adopting the same legal analysis regarding the test to determine the validity of a marriage for immigration purposes).
ordinary meaning of those words. In the absence of such a congres-
sional directive, it would be inappropriate for us to expand the mean-
ing of the term ‘spouse’ for immigration purposes.” 152 Certainly the
executive and judiciary can make educated guesses about whether
Congress will amend the INA to extend marital benefits to binational
same-sex spouses, but Article I, section 8, clause 4 of the Constitu-
tion 153 expressly entrusts Congress with the power to regulate immi-
gration. The Ninth Circuit in Adams acknowledged that Congress’
plenary power over immigration constrained the Court from con-
ducting a more exacting evaluation of the parties’ claims. Noting that,
“Congress has almost plenary power to admit or exclude aliens . . .
and the decisions of Congress are subject only to limited judicial re-
view.” 154 The Ninth Circuit recognized that the Supreme Court had
previously upheld “the broad power of Congress to determine immi-
gration policy” even when constitutional challenges are raised regard-
ing immigration policies. 155 Citing Mathews v. Diaz, 156 the Ninth
Circuit in Adams relied upon the longstanding principle that “Con-
gress regularly makes rules that would be unacceptable if applied to
citizens.” 157 As evidenced by the significance of the Obergefell deci-
sion, the impact of regulations that discriminate against same-sex
couples is certainly relevant when deciding intra-territorial disputes.
But within the field of immigration, judicial decisions that resolve con-
stitutional challenges raised by United States citizens and lawful per-
manent residents are not dispositive.

The judiciary does give substantial deference “where a statute has
been interpreted by the agency charged with its enforcement . . . .” 158
That judicial deference, is not however, absolute. A Court will with-
hold deference where “there are compelling indications” the agencies
interpretation is wrong. 159 In this matter, the DHS’s decision to af-
ford immigration benefits to binational same-sex couples may not be

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152. Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir. 1982), abrogated by Obergefell v.
154. Adams, 673 F.2d at 1041.
155. Id. at 1041–42. (“Faced with numerous challenges to laws governing the exclusion of
aliens and the expulsion of resident and non-resident aliens, the Court has consistently reaf-
firmed the power of Congress to legislate in this area.”).
157. Id. at 80.
158. Adams, 673 F.2d at 1040.
159. New York Dep’t of Social Servs. v. Dublino, 413 U.S. 405, 421 (1973); see also Silway-
Rodriguez v. Immigration & Naturalization Serv., 975 F.2d 1157, 1160 (5th Cir. 1992).
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wrong or even inconsistent with Congressional intent. However, since Congress has not spoken to this issue, there is no way to determine what the Congressional intent would be. As Justice Scalia observed in *Lawrence v. Texas*, sweeping societal changes "are to be made by the people, and not imposed by a governing caste that knows best." ¹⁶⁰

IV. PLENARY POWER DOCTRINE

Although the Supreme Court in *Obergefell* determined that same-sex couples have a constitutionally protected right to marry, the Court has not abrogated the plenary power doctrine in that decision. The invalidation of section 3 of DOMA by the Court in *Windsor* paved the way for President Obama to direct the DHS to issue a directive to recognize binational same-sex marriages in the same manner that heterosexual marriages are treated. However, the *Windsor* decision had no impact on the continued viability of the plenary power doctrine. The implementation of these decisions was accepted as an exercise of executive authority but the practical effect of the change was to broaden the definition of the statutory definitions of the terms 'spouse' and 'marriage' found in the INA, and ignore longstanding jurisprudence that recognizes Congress' plenary power to regulate the field of immigration.

The field of Immigration law differs significantly from other areas of law regulated by the federal government.¹⁶¹ First, the constitutional underpinnings of federal immigration law are founded in the inherent sovereign powers of the nation.¹⁶² As early as 1888, the Supreme Court in *Chae Chan Ping v. United States (Chinese Exclusion Case)*,¹⁶³ held that "[t]he power of exclusion [admission] of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment

¹⁶⁰. See *Lawrence v. Texas*, 539 U.S. 558, 603–04 (Scalia, J., dissenting).
¹⁶¹. See generally *Jean v. Nelson*, 711 F.2d 1455, 1465 (8th Cir. 1983) ("Although the Constitution fails to delegate specifically the power over immigration, the Supreme Court recognized almost a century ago that the political branches have plenary authority over immigration matters as an inherent concomitant of national sovereignty.").
¹⁶². *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to preservation, to forbid the entrance of foreigners within its dominions, or to admit term only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.").
of the government, the interests of the country require it, cannot be
granted away or restrained on behalf of any one.” 164 This broad grant
of power is shared between the legislative and executive branches of
the federal government. 165 As the Eleventh Circuit noted in Jean v. Nelson, 166 “Congress and the Executive branch share the immigration
power . . . . It may be exercised by the Executive and the Senate
through the execution of treaties, id., through the legislative powers of
Congress . . . and in part by the Executive branch acting alone, as a
function of its plenary authority over foreign relations.” 167 Second,
Congress is the branch of government that “traditionally exercises au-
thority over matters of immigration and exclusion through passage of
immigration legislation.” 168 Article I, Section 8, Clause 4 of the Con-
stitution grants to Congress the authority to “establish an uniform
Rule of Naturalization.” 169 The Supreme Court has interpreted this
constitutional provision as a broad, unqualified grant of plenary
power to Congress to regulate the admission and removal of aliens
from the United States. 170 In Fiallo v. Bell, 171 the Supreme Court
reasserted the principle that “‘over no conceivable subject is the legis-
lative power of Congress more complete than it is over’ the admission
of aliens.” 172 The exercise of Congress’ plenary power authorizes
Congress to enact legislation that could “exclude aliens altogether, or
 prescribe the terms and conditions upon which they may enter and
stay in this country.” 173 The authority of Congress to enact immigra-

164. Id. at 603, 609 (“That the government of the United States, through the action of the
 legislative department, can exclude aliens from its territory is a proposition which we do not
 think open to controversy.”); see also Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893)
 (“The right of a nation to expel or deport foreigners, who have not been naturalized, or taken
 any steps towards becoming citizens of the country, rests upon the same grounds, and is as abso-
lute and unqualified, as the right to prohibit and prevent their entrance into the country.”).
165. See Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) (“In summary, plenary Congres-
sional power to make policies, and rules for exclusion of aliens has long been firmly established
. . . Congress has delegated conditional exercise of this power of the Executive.”).
167. Id. at 1465–66.
168. Id. at 1466; see also United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898) (“The
power, granted to Congress by the Constitution, ‘to establish an uniform rule of naturalization,’
was long ago adjudged by this court to be vested exclusively in congress.”).
170. For a thorough analysis of the plenary power doctrine see Janel Thankul, The Plenary
Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection,
and American National Identity, 96 CALIF. L. REV. 553 (2008); Stephen H. Legomsky, Immigra-
172. Id. at 792.
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tion legislation is consistent with Article I, § 1 which clearly authorizes Congress to enact federal laws.\footnote{174} The allocation of authority to Congress to enact legislation regulating immigration of alien spouses is unquestioned. The Supreme Court in Kerry v. Din\footnote{175} noted “as soon as Congress began legislating in this area it enacted a complicated web of regulations that erected serious impediments to a person’s ability to bring a spouse into the United States.”\footnote{176} Noting specifically that familial immigration is “a matter of legislative grace rather than fundamental right,” the Supreme Court has consistently upheld Congressional legislation governing the immigration of alien spouses.

The fact that Congress enacts legislation that governs marital relationships, an area traditionally governed by State law, does not serve an impediment to its constitutional validity. The Supreme Court has recognized Congress’ plenary power to “enact discrete statutes . . . that bear on marital rights and privileges.”\footnote{177} Citing INA section 216(b)(1),\footnote{178} which makes sham marriages ineligible for immigration benefits, the Court noted that Congressional regulations intersect “state domestic relations and federal immigration law” illustrate “discrete examples [that] establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy.”\footnote{179}

Historic administration of immigration laws and policies offer only a minimal opportunity for judicial review.\footnote{180} When called to evaluate questionable immigration policies, federal courts defer to Congress’ plenary immigration powers.\footnote{181} The Supreme has consistently recognized limited judicial review of Congress’ exercise of its

\begin{footnotes}
\footnote{174. U.S. Const. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . . .”)}
\footnote{175. Kerry v. Din, 135 S. Ct. 2128 (2015)}
\footnote{176. Id. at 2135–36 (“Even where Congress has provided special privileges to promote family immigration, it has also ‘written in careful checks and qualifications.’”)}
\footnote{177. United States v. Windsor, 133 S. Ct. 2675, 2690 (2013)}
\footnote{178. 8 U.S.C. § 1186a(b)(1) (2014)}
\footnote{179. Windsor, 133 S. Ct. at 2690}
\footnote{180. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (“The Chinese Exclusion Case”) (“If . . . [the] legislative department, considers the presence of foreigners of a different race . . . to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary.”)}
\footnote{181. Nevada Lifestyles, Inc., 3 O.C.A.H.O. 463 (U.S. Dep’t of Just. Oct. 16, 1992) (“At the heart of that sentiment lies the ‘plenary power’ doctrine, under which the court has declined to review federal immigration statutes for compliance with substantive constitutional restraints. In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review . . . immigration provisions.”)}
\end{footnotes}
plenary power to regulate immigration.\textsuperscript{182} As the Court held in \textit{Fiallo v. Bell}, the immigration categories enacted by Congress are “policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress.”\textsuperscript{183}

V. CANON OF CONSTITUTIONAL AVOIDANCE – EXCEPTION TO CHEVRON DEFERENCE

Generally, the agency charged with enforcing a statute, such as the INA, has the authority to interpret terms that are not statutorily defined.\textsuperscript{184} The DHS is the agency charged with enforcing the INA.\textsuperscript{185} As the Supreme Court in \textit{New York Dept. of Social Services v. Dublino},\textsuperscript{186} held substantial deference is accorded to agency determinations “unless there are compelling indications that it is wrong . . . .”\textsuperscript{187} It is questionable whether the DHS’s decision\textsuperscript{188} to broadly interpret the term ‘spouse’ as defined in INA § 101(a)(35) to include aliens in binational same-sex couples would warrant judicial deference. Federal courts use the two-part test established by the Supreme Court in \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.}\textsuperscript{189} to

\textsuperscript{182} See \textit{Fiallo v. Bell}, 430 U.S. 787, 796 (1997); see also \textit{Harisiades v. Shaughnessy}, 342 U.S. 580, 596–97 (1952) (Frankfurter, J., concurring) (“The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside of the power of this Court to control.”).

\textsuperscript{183} \textit{Fiallo}, 430 U.S. at 798; see \textit{Nguyen v. Immigration & Naturalization Serv.}, 533 U.S. 53, 72–73 (2001) (noting that “wide deference [is] afforded to Congress in the exercise of its immigration and naturalization power.”). The Court upheld § 309(a) of the INA which permitted unwed mothers to confer citizenship status on their illegitimate children under conditions that were substantially more favorable than those imposed upon fathers of illegitimate children. The Supreme Court upheld the clearly gender-based discriminatory statute, holding that the gender distinction did not violate the equal protection clause).

\textsuperscript{184} \textit{Adams v. Howerton}, 673 F.2d 1036, 1040 (9th Cir. 1982), abrogated by Obergefell v. Hodges, 135 S. Ct. 2584 (2015).


\textsuperscript{186} \textit{N.Y. State Dep’t of Soc. Servs. v. Dublino}, 413 U.S. 405 (1973).

\textsuperscript{187} \textit{Id.} at 421.

\textsuperscript{188} See \textit{In re Zeleniak}, 26 I. & N. Dec. 158, 159 (B.I.A. 2013) (concluding that following \textit{Windsor}, section 3 of DOMA is no longer “an impediment to the recognition of lawful same-sex marriages”).

\textsuperscript{189} \textit{Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.}, 467 U.S. 837 (1984). In reaching the decision by a 6-0 vote, Justice John Paul Stevens, writing the opinion for the court, established a two-part test commonly referred to as the “Chevron Test” to determine whether judicial deference is warranted when reviewing the interpretation of a statute by an administrative agency. The \textit{Chevron} Test provides that:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has di-
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determine whether judicial deference is appropriate to an interpretation of an ambiguous statute by an administrative agency.\textsuperscript{190} Deference will be afforded to an agency's interpretation where such interpretation is "permissible" or "reasonable."\textsuperscript{191}

However, judicial deference is not applicable for "an agency's interpretation of a statute if it 'presents serious constitutional difficulties.'"\textsuperscript{192} The canon of constitutional avoidance as set forth by the Ninth Circuit in \textit{Kim Ho Ma v. Ashcroft},\textsuperscript{193} provides that, "[a]lthough we recognize that, in general, the Attorney General interpretation of the immigration laws is entitled to substantial deference ... \textit{Chevron} principles are not applicable where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe."\textsuperscript{194}

The DHS's broad interpretation of the INA's definition of "spouse" to include recognition same-sex binational marriages falls squarely within this exception. In \textit{Diouf v. Napolitano},\textsuperscript{195} the Ninth Circuit, citing \textit{Kim Ho Ma},\textsuperscript{196} weighed granting \textit{Chevron} deference to a DHS's interpretation of regulations that permitted prolonged detention of aliens in removal proceedings.\textsuperscript{197} The Ninth Circuit analyzed this issue by applying the canon of constitutional avoidance to deter-

\begin{footnotesize}
\begin{enumerate}
\item[191.] \textit{Chevron, U.S.A., Inc.}, 467 U.S. at 842–43 (stating that an agency's regulation contains a reasonable interpretation of an ambiguous statute).
\item[192.] Nat'l Mining Ass'n v. Kemptmore, 512 F.3d 702, 711 (D.C. Cir. 2008) ("But we do not abandon \textit{Chevron} deference at the mere mention of a possible constitutional problem; the argument must be serious.").
\item[193.] \textit{Kim Ho Ma v. Ashcroft}, 257 F.3d 1095 (9th Cir. 2001).
\item[194.] \textit{Id.} at 1105, n.15; see also \textit{Diouf v. Napolitano}, 634 F.3d 1081, 1090 (9th Cir. 2011).
\item[195.] \textit{Diouf v. Napolitano}, 634 F.3d 1081, 1089 (9th Cir. 2011).
\item[196.] \textit{Kim Ho Ma}, 257 F.3d at 1105 n.15.
\item[197.] \textit{Diouf}, 634 F.3d at 1089 ("The government argues that we should accord \textit{Chevron} deference to these regulations, which address the issue of prolonged detention under § 1231(a)(6) by providing for one or more 'post-order custody reviews' by DHS employees, but not for an independent determination of the need for continued detention by a neutral decision-maker such as an immigration judge.").
\end{enumerate}
\end{footnotesize}
mine whether deference to the DHS's detention policies raised "constitutional problems."\(^{198}\)

In *Diouf*, the Court determined that the government's interpretation of the regulation raised "serious constitutional concerns"\(^{199}\) because the regulation infringed upon the alien's procedural due process rights and could lead to "an erroneous deprivation of liberty."\(^{200}\)

Applying the canon of constitutional avoidance to evaluate the DHS's decision to implement *Windsor* by expanding the definitions of "marriage" and "spouse" to include binational same sex couples, leads to the conclusion that the DHS extrapolated this analysis beyond the point where judicial deference would be warranted.\(^{201}\) Constitutional concerns are certainly raised regarding the infringement on Congress' plenary power to determine the categories of aliens eligible for immigration visas. Additionally, federalism questions are raised when the federal government attempts to define the definition of marriage, an area that has been traditionally defined by state laws.\(^{202}\)

The INA section 1103(a)(1) provides in pertinent part that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."\(^{203}\) The federal judiciary has concluded that this grant of authority means "Congress left the interpretation of [the INA] to the BIA and interpretation of its application to state and federal laws to federal courts."\(^{204}\) However, there is a

\(^{198}\) *Id.* at 1088-89 ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the court."). *See generally* Brian G. Slocum, *Canons, The Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 411 (2007).

\(^{199}\) *Diouf*, 634 F.3d at 1091.

\(^{200}\) *Id.* at 1091–92.

\(^{201}\) Former United States Attorney General Alberto R. Gonzales and Immigration attorney David N. Strange strongly criticized President Obama's executive action that "extended federal immigration benefits to the same-sex foreign spouse[s] of United States citizens." Gonzales and Strange argued that:

Under the Constitution, as the decisions in *Windsor* and *Adams* recognize, Congress has almost total power over immigration, and its decisions in this realm are subject to limited judicial review. Where there is only a rational basis for Congress's exercise of power, whether articulate or not, courts must uphold the immigration laws that Congress enacts. In our view, the DOMA decision does not appear to override the Ninth Circuit's 1982 ruling.


\(^{202}\) *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) (“Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.”).


\(^{204}\) Cisneros-Guerrera v. Holder, 774 F.3d 1056, 1058 (5th Cir. 2014).
significant difference between interpreting the parameters of INA statutes and regulations, and implementing policies that expand the eligibility categories for immigrant visa applicants to include binational same-sex alien spouses without constitutional impact or directive. The former is permissible, the latter is not.

VI. EXECUTIVE ACTION VIOLATES THE “TAKE CARE CLAUSE”

An evaluation of President Obama’s Executive Action directing the DHS to recognize bona fide marriages between binational same-sex couples under section 1101(a)(35) raises concerns regarding whether this executive action violates the “Take Care” Clause of the Constitution. The Take Care Clause, as it is commonly referred to, is set forth in Article II, Section 3 of the United States Constitution. It provides, in pertinent part, that the executive “shall take Care that the Laws be faithfully executed.” In one of its earliest immigration decisions, the Supreme Court in the Chinese Exclusion Case described the scope of the executive’s authority as “[t]he president is charged with the duty and invested with the power to take care that the laws be faithfully executed.” President Obama’s executive action expanded the categories of aliens who may become eligible for immigrant visas; an area that is exclusively within the Congress’ legislative authority. Although it is correct that the terms ‘marriage’ and ‘spouse’ as defined in the INA do not expressly prohibit recognition of binational same-sex couples, prior to President Obama’s executive action implementing Windsor, the provisions of the INA pertaining to marital relationships were historically interpreted in opposite gender ways.

206. U.S. CONST. art. II, § 3.
207. Id.; see Todd Garvey, Cong. Research Serv., The Take Care Clause and Executive Discretion in the Enforcement of Law R43708 (2014).
208. U.S. CONST. art. II, § 3.
210. Id.
211. See Fiallo v. Bell, 430 U.S. 787, 792–94 (1977); Harisiades v. Shaughnessy, 342 U.S. 580, 596–97 (1952) (“The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.”).
In this situation, President Obama’s executive action directly impacts Congress’ legislative authority to define the categories of aliens who may become eligible to immigrate to the United States, and exceeds the scope of authority delegated to the executive branch of government. As expressed in *Utility Air Regulatory Group v. EPA*\(^{212}\) by the Supreme Court, “[w]hile ‘the power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law’s administration,’ it does not include ‘the power to unilaterally enact legislation.’”\(^{213}\)

A similar question regarding the constitutionality of President Obama’s efforts to implement immigration reform was raised in *United States v. Juarez-Escobar*.\(^{214}\) In *Juarez-Escobar* the District Court examined the Executive Action implemented by President Obama on November 20, 2014.\(^{215}\) The Executive action announced new border enforcement policies that “would prioritize deportation on ‘actual threats to our society.’”\(^{216}\) In *Juarez-Escobar*, the District Court questioned “whether the nature of the Executive Action is executive or legislative” because the Executive action had “an impact on any subsequent removal or deportation” decisions made by the Department of Homeland Security.\(^{217}\)

To determine the constitutionality of President Obama’s Executive Action, the District Court relied upon the Take Care Clause to consider whether the Executive action violated the separation of powers mandated by the United States Constitution.\(^{218}\) The court noted that “‘[u]nder our system of government in the United States, Congress enact laws and the President, acting at time through agencies, ‘faithfully execute[s]’ them.’”\(^{219}\) The District Court found that the Executive Action “cross[es] the line” by infringing upon the legislative authority of Congress to determine immigration policies for aliens re-

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213. *Id.* at 2446.
215. *Id.* at 778–80 (explaining this criticism of President Obama’s governance is similar to the concerns raised about his executive action to implement immigration reform). *See generally id.* at 786 (“Further, President Obama’s belief that this Executive Action is within his executive authority is not dispositive because the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment.”).
216. *Id.* at 787.
217. *Id.* at 780.
219. *Id.*
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siding in the United States. As a result, the Court held that "President Obama's unilateral legislative action violates the separation of powers provided for in the United States Constitution as well as the Take Care Clause, and therefore, is unconstitutional."221

A similar argument was made by 26 States that filed an action to enjoin implementation of President Obama's November 20, 2014 Executive Action. Republican supporters of Texas v. United States, "accused Obama of improperly bypassing Congress" to enact immigration reform. The November 20, 2014 Executive Action at issue, commonly referred to as Deferred action for Parents ("DAPA"), sought to expand the President's exercise of prosecutorial discretion by expanding the Deferred Action for Children ("DACA") program to include parents of American and lawful permanent residents who are illegally residing in the United States. The United States

220. Juarez-Escobar, 25 F. Supp. 3d at 785-86 (citing Youngstown v. Sawyer, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.").

221. Id. at 786 ("The President must 'take Care that the Laws be faithfully executed... he may not take executive action that creates laws. U.S. Const., art. II, § 3.").

222. Arpaio Reply Br. 4.

223. Texas v. United States, 787 F.3d 773, 743 (5th Cir. 2015).


225. See U.S. Citizenship and Immigration Serv., Executive Actions of Immigration, www.uscis.gov/immigrationaction (last visited Dec. 1, 2015) ("On November 20, 2014, the President announced a series of executive actions... These initiatives included: Allowing parents of United States citizens and lawful permanent residents to request deferred action and employment authorization for three years, in a new Deferred Action for Parents of Americans and Lawful Permanent Residents program, provided they have lived in the United States continuously since January 1, 2010, and pass required background checks."); Texas, 787 F.3d at 769 (issuing an order temporarily suspending implementation of DAPA).

226. See U.S. Citizenship & Immigration Serv., Consideration for Deferred Action for Childhood Arrivals (DACA), www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca (last visited Dec. 1, 2015) ("On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal. They are also eligible for work authorization. Deferred action is a use of prosecutorial discretion to defer removal against an individual for a certain period of time. Deferred action does not provide lawful status."); see also American Immigration Council, Deferred Action for Childhood Arrivals: A Resource, American Immigration Council, www.immigrationpolicy.org/just-facts-deferred-action-childhood-arrivals-resource-page (last visited Dec. 1, 2015) ("In June of 2012, the Obama administration announced that it would accept requests for Deferred Action for Childhood Arrivals (DACA), an initiative designed to temporarily suspend the deportation of young people residing unlawfully in the United States as children, meet certain education requirements and generally match the criteria established under legislative proposals like the DREAM ACT.").
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raised a number of challenges\textsuperscript{227} to the DAPA program, including that implementation of DAPA "violated the President's constitutional duty to 'take care that the Laws be faithfully executed. U.S. Const. Art. II, § 3."\textsuperscript{228}

This issue becomes even more difficult when immigration policy crosscuts the traditional definition of marriage. Immigration jurisprudence draws a clear distinction between the right of heterosexual American citizens to marry the person of their choosing and the privilege of conferring an immigration benefit on an alien spouse. The former is protected by the Constitution, the latter is not. Federal courts have clearly held that "while an American citizen has the constitutional right to marry whomever she chooses, she does not have a constitutional right to have that person live in the United States.\textsuperscript{229} The question of whether same-sex couples have a constitutionally protected right to marry was resolved by the Supreme Court in \textit{Obergefell}.\textsuperscript{230} That decision does not definitely resolve this issue within the field of immigration law.

Congress, not the executive, has the sole authority to enact immigration legislation that can expand the INA's definitions of the terms 'marriage' and 'spouse' to include binational same-sex couples. Clearly, the executive branch may exercise prosecutorial discretion when enforcing immigration policies. However, the executive branch exceeds the scope of power delegated to it by the Constitution when it unilaterally expanded the immigration visa categories to include spouses in binational same-sex marriages.

\textbf{CONCLUSION}

The holding in \textit{Obergefell} that same-sex marriage is constitutionally protected does not, a fortiori, lead to the conclusion that immigration policies must change accordingly. It is certainly conceivable that a newly-elected, conservative executive could rescind President Obama's executive action, and refuse to grant binational same-sex couples access to immigration benefits. The historic jurisprudential and legislative framework of immigration law recognizes and accepts

\begin{itemize}
    \item \textsuperscript{227} \textit{Texas}, 787 F.3d at 743 (noting that states raised a number of challenges to the DAPA program including that the "DAPA's implementation violated APA").
    \item \textsuperscript{228} \textit{Id.} (deciding on other grounds and the District Court did not address the States' "constitutional claims under the Take Care Clause/Separation of Powers doctrine").
    \item \textsuperscript{230} \textit{Obergefell v. Hodges}, 135 S. Ct. 2584, 2608 (2015).
\end{itemize}
that a clear legal distinction exists between intra-territorial and extra-territorial immigration policies. In *Fiallo v. Bell*, the Supreme Court cites to its holding in *Mathews v. Diaz*, for the principle that "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'"  

Notwithstanding the Supreme Court's decision, an alien spouse in binational same-sex marriage has no standing to challenge Congress' refusal to grant them an immigration visa based upon their marital status. As Justice Brewer stated in his dissenting opinion in *Fong Yue Ting*, "[t]he Constitution has no extra-territorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions."  

Curative legislative reform is the most effective and efficient means of addressing this problem. During the 113th Congressional session, and more recently the 114th Congressional session, California Senator, Dianne Feinstein introduced a bill entitled "The Respect for Marriage Act ("RMA") to address this issue. RMA creates a general neutral federal definition of marriage. RMA provides that a federal marriage is one that:

For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a State.

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231. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has affected an entry into the United States and one who has never entered runs throughout immigration law . . . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders.").


233. *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015) (This action was brought by the United State citizen spouse because that alien spouse lacked standing to challenge the DHS's refusal to issue an immigration visa. "Naturally, one would expect him—not Din—to bring this suit. But because Berashk is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission.").


236. S. 29, 114th Cong. § 7 (2015). However, the holding of Obergefell renders this provision unnecessary.
As long as the plenary powers doctrine remains an integral part of constitutional jurisprudence, Congress will retain its legislative authority to determine eligibility standards for an immigrant’s visa. As a result, eligibility determinations for binational same-sex couples will remain unsettled, and subject to political uncertainty. The passage of RMA will address this problem, and pave the way for binational same-sex couples to apply for immigration visas, and seek the benefits derived from family reunification in the United States; a benefit that is one of the foundational cornerstones of our nation’s immigration policy.

238. KEVIN JOHNSON, THE HUDDELD MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS 147 (2004) ("Changing the family-based immigration provisions to permit the immigration of partners of person of the same-sex requires a reconceptualization of ‘family’ for the purposes of the immigration laws.").