NOTE

IMAGINING IMMIGRATION WITHOUT DOMA

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INTRODUCTION

Even though Massachusetts, Connecticut, Iowa, and New Hampshire perform same-sex marriages,1 as do Belgium, Canada, the Netherlands, Norway, South Africa, and Spain,2 a gay American citizen or lawful permanent resident who marries in those jurisdictions cannot sponsor her spouse to immigrate to the United States.3 As a result, over 35,820 same-sex couples must choose between living in their native country alone or being with their spouse abroad.4 Unlike the foreign spouse in a heterosexual couple who can obtain a permanent visa relatively quickly, the foreign member of a same-sex couple has limited options to legally immigrate to the United States. In the best-case scenario, the foreign national might have a parent or sibling who can sponsor her. The wait for a family-based visa sponsored by a parent or sibling

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to immigrate to the United States takes between four and ten years. A second option is to secure an employment visa. Employment visas are contingent on the foreign national’s skill level and labor needs in the United States. Yet, even if a foreign national meets the criteria, the person could wait anywhere between a few months and nine years. The protracted wait and uncertainty of obtaining any type of visa makes it unfeasible for most same-sex binational couples to permanently live in the United States together.

The 1996 Defense of Marriage Act (DOMA) is the main impediment to same-sex couples receiving immigration benefits. DOMA, a federal law, defines “marriage” as a “union between one man and one woman as husband and wife,” and further states that “the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” Explicitly defining marriage as between a man and a woman means that immigration officials can recognize only heterosexual marriages for purposes of granting family visas.

Congress has the ability to bar same-sex marriage immigration through DOMA due to the plenary power doctrine. The plenary power doctrine states that the power to regulate immigration is an inherent power of a sovereign nation; Congress’s ability to “exclude aliens . . . [is not] open to controversy.”

Hence, Congress can exclude a foreigner because of her sexual orientation or because it does not choose to recognize her marriage to an American citizen.

Because of the plenary power doctrine, Congress’s authority to exclude aliens without legally recognized marriages is not open to legal challenge. So this Note focuses on the effect of DOMA on same-sex marriage immigration. This Note asks two questions: (1) Whether DOMA is the only obstacle to same-sex marriage immigration, and (2) Whether, if DOMA were repealed, would Americans who marry foreign nationals of the same sex be able to sponsor their partners for family visas. These questions are not solely theoretical; there are indications that eventually DOMA will be repealed or amended. In Gill v. Office of Personnel Management, a lawsuit filed in a Massachusetts federal district court in March 2009, the plaintiff argues that

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5. This estimation was taken from the most current immigration bulletin by assuming that the foreign national was sponsored by a U.S. citizen parent or sibling and is from one of the six countries which grant same-sex marriages. See 18 VISA BULL. Mar. 2010, available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4659.html.

6. Id.


8. Id.

9. In addition to immigration, DOMA affects all other federal benefits based on marriage. See David W. Dunlap, Congressional Bills Withhold Sanction of Same-Sex Unions, N.Y. TIMES, May 9, 1996, at B15 ("'[DOMA] does not outlaw same-sex marriage.’ But by withholding Federal tax, welfare, pension, health, immigration and survivors’ benefits, the bill would deny gay couples many of the civil advantages of marriage.” (quoting Representative Bob Barr (R-GA)).

DOMA should be struck down because it targets gays and lesbians for
discrimination in its denial of federal benefits for spouses of federal
employees. Gill is currently being litigated in district court, but because of the
importance of the federal questions involved, it could go before the Supreme
Court. Even if Gill does not dismantle DOMA, it represents a concerted legal
effort to challenge the law. Furthermore, President Barack Obama supports
repealing DOMA. While gay rights advocates believe President Obama has
done little in his first year in office to help the gay community, and in fact his
Department of Justice has filed briefs in support of DOMA, he maintains he
is committed to promoting civil rights for gays and lesbians. In October 2009,
for example, the Obama administration filed papers stating that the
administration wishes to repeal DOMA because it “prevents equal rights and
benefits,” but in the meantime the Justice Department is obligated “to defend
federal statutes when they are challenged in court.” Despite Gill and the
Obama administration’s stated desire to repeal DOMA, the statute will not be
dismantled immediately. However, the lawsuit and President Obama’s stance
on DOMA indicate that at some point the law might be amended, overturned,
or repealed. To ascertain whether DOMA is the only impediment to same-sex marriage
immigration, this Note imagines that DOMA’s federal definition of marriage
no longer exists. Assuming that everything else were the same—most states
define marriage as a union between a man and a woman and a few states and

2009); Jonathan Saltzman, Same-Sex Spouses Challenge US Curbs, BOSTON GLOBE, Mar. 3,
spouses_challenge_us_curbs (last visited Mar. 23, 2010); see also Perry v. Schwarzenegger,
No. 3:09-cv-02292 (N.D. Cal. 2010) (challenging the California Proposition 8 banning gay
marriage as violating the federal Constitution); GLAD, DOMA Section 3 Challenge,
of plaintiffs).

12. Kenji Yoshino, State of the Union: Defining Gay Marriage for the Feds, SLATE,

13. See Scott Wilson, Obama Makes Explicit His Objection to DOMA, WASH. POST,
_objec.html.

14. See, e.g., Defendant’s Motion to Dismiss at 18, Smelt v. United States, No.
and sex with minors).

15. Obama Administration: DOMA Anti-Gay Marriage Law Unfair, HUFFINGTON
doma_n_260969.html (quoting Justice Department spokesman Tracy Schmaler).

16. It is important to note that the manner in which DOMA is repealed, if it is ever
repealed, will impact whether same-sex couples can immigrate their spouses to the United
States. For example, if Congress passes federal legislation defining marriage in such a way
to include homosexual couples or if the Supreme Court were to rule that laws discriminating
against people based on their sexual orientation are unconstitutional, then it is likely that
same-sex couples could immigrate their spouses without further legislative action.

17. See NAT’L GAY & LESBIAN TASK FORCE, STATE LAWS PROHIBITING RECOGNITION
foreign countries have full marriage equality—would same-sex couples receive immigration benefits? Asking this question is important to ascertain whether DOMA is the only barrier to same-sex marriage immigration or if there are other obstacles to establishing immigration equality for same-sex couples.

To answer these questions, this Note analyzes how the definition of marriage is evolving and how that changing definition affects same-sex marriage immigration. Part I looks at the key case Adams v. Howerton. Adams developed a two-part test to determine whether a person of the same sex could be considered a spouse for immigration purposes: (1) “whether the marriage is valid under state law,” and (2) “whether that state-approved marriage qualifies” under the Immigration and Nationality Act (“INA”). This test is the central judicial standard for same-sex marriage immigration. 

Emphasizing the second prong of the test, Adams concluded that Congress intended a marriage to be between spouses of the opposite sex and that it did not want to give immigration benefits to same-sex couples. Part I then turns to the analogous case of transsexual marriages to underscore that the difference between transsexual marriages—which receive immigration benefits—and same-sex marriages—which do not—is congressional intent. Part II revisits Adams to see if the test would come out differently today. Even though same-sex marriages are recognized by several states and there have been significant legal and social changes in the same-sex marriage debate, the definition of “marriage” is, at best, ambiguous and Congress’s intent regarding the gay community in the immigration context is unclear.

As a result of the ambiguities surrounding congressional intent, Part II looks at how U.S. Citizenship and Immigration Services, the agency in charge of granting immigration visas, might interpret the meaning of “marriage” if there were no DOMA explicitly banning same-sex marriage. The agency’s interpretation would depend on the executive branch and whether the president would promote an interpretation of marriage that encompasses same-sex marriage. Given the uncertainties surrounding how courts might interpret the INA, Part III changes gears and explores legislative and administrative options to permit same-sex marriage immigration. The best option would be for Congress to pass a law, such as the Uniting American Families Act (“UAFA”),


18. See NAT’L GAY & LESBIAN TASK FORCE, supra note 1; MOULDING ET AL., supra note 2.
19. Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982).
20. Id. at 1038.
which is currently moving through committee. The UAFA would grant same-sex couples immigration benefits. Finally, this Note concludes that even without DOMA, explicit congressional authorization is necessary to authorize same-sex marriage immigration. While repealing or striking down DOMA would afford the gay community numerous benefits, same-sex marriage immigration requires an explicit affirmative act of Congress. This Note urges proponents of same-sex marriage immigration to focus their efforts on passing legislation to clearly allow same-sex couples immigration equality.

I. THE IMPORTANCE OF CONGRESSIONAL INTENT TO DEFINE “SPOUSE”

Until DOMA explicitly defined marriage as a heterosexual institution, the Ninth Circuit’s two-part test in Adams v. Howerton was the primary roadblock preventing same-sex marriage immigration. The test looks at (1) “whether the marriage is valid under state law,” and (2) “whether that state-approved marriage qualifies” under the INA.22 This Part first analyzes the Adams court’s reasoning to understand the parameters of the test and then looks to transsexual marriages as an analogy of how same-sex marriages would fare under Adams if DOMA did not exist. Both the Adams analysis and the transsexual comparison illustrate that the most important factor is not the legality of the marriage, but Congress’s intent.

A. Adams v. Howerton: The Standard Definition of Spouse Before DOMA

In 1982, the Ninth Circuit held that the term “spouse,” as used in the INA, refers to a person of the opposite sex.23 In Adams, Richard Frank Adams, a male American citizen, and Anthony Corbett Sullivan, a male foreign national from Australia, obtained a marriage license from a county clerk in Colorado. Subsequently, Adams petitioned Immigration and Nationality Services (“INS”)24 to classify Sullivan as an immediate relative of an American citizen, based upon Sullivan’s status as Adams’s spouse. That petition was denied. Since the INA does not define the word “spouse,”25 the Adams court developed a two-step analysis to determine whether a marriage would be recognized for immigration purposes: (1) “whether the marriage is valid under state law,”26 and (2) “whether that state-approved marriage qualifies under the [INA].”27

22. Adams, 673 F.2d at 1038.
23. Id. at 1040.
24. Since 2001, the INS no longer exists. The United States Citizenship and Immigration Services (“USCIS”) now performs the same functions as the INS. To keep the analysis consistent with the decision in Adams, I am leaving the term INS for this Part.
26. Adams, 673 F.2d at 1038.
27. Id.
Even though the Ninth Circuit did not reach the issue of whether the marriage was valid under Colorado law, the court explained that “the mere validity of a marriage under state law [is not] controlling.” Therefore, even if a state validated a same-sex marriage, the INS did not have to grant immigration benefits to a couple from that state. For example, the INS did not recognize legally valid marriages in which the parties did not intend to live together. Thus, the court did not discuss the first prong of the test and instead focused on the second prong, which looks at whether a valid marriage qualifies under the INA.

To determine whether the marriage qualified under the INA, the court first reviewed the executive agency’s interpretation of the Act, and then determined congressional intent. Finding that the INS, the agency charged with the INA’s enforcement, “interpreted the term ‘spouse’ to exclude a person entering a homosexual marriage,” the court turned to the Act itself. Using the rules of statutory interpretation, the court analyzed the common meaning of “marriage” because the “term ‘spouse’ commonly refers to one of the parties in a marital relationship so defined.” Citing both *Webster’s Dictionary* and *Black’s Law Dictionary*, the court found that “‘marriage’ ordinarily contemplates a relationship between a man and a woman.” In addition, since the INA banned homosexuals from entering the United States, the court held that the definition of marriage should be consistent with that exclusion. Reading the provisions together, the court concluded that “Congress intended that only partners in heterosexual marriages be considered spouses.” So, under the second prong of the *Adams* test, the Ninth Circuit found that Congress did not intend the word “spouse” to include same-sex couples because the ordinary meaning of “marriage” involved opposite-sex couples, there was nothing in the legislative history that indicated “spouse” was meant to include someone of the same sex, and Congress intended to exclude homosexuals.

B. Transsexual Marriage Highlights the Importance of Congressional Intent

It is useful to compare transsexual marriage to same-sex marriage because transsexual marriage underscores the importance of congressional intent in the *Adams* analysis. Like the hypothetical state of same-sex marriage in this Note, some states recognize transsexual marriages, and there is no federal legislation explicitly denouncing transsexual marriage. In *In re Lovo-Lara*, the Board of Immigration Appeals ("BIA"), the administrative appellate court for

28. *Id.* at 1039.
29. *Id.* at 1040.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 1041.
immigration cases, found that it was compelled to approve a spousal petition for a transsexual woman who married a Salvadorian man in North Carolina. The BIA analyzed the marriage’s validity for immigration purposes under the *Adams* test. First, it found that the North Carolina marriage was valid because the petitioner possessed a female North Carolina birth certificate and North Carolina registered her marriage. Second, the BIA held that the marriage was valid under the INA because the Act “does not define the word ‘spouse’ in terms of the sex of the parties” and DOMA’s language and legislative history indicate that Congress was concerned only with same-sex couples, not transsexual couples. The BIA noted that Congress had not mentioned the case of *M.T. v. J.T.*, which recognized a transsexual marriage, nor had it discussed the various state statutes that provided for the legal recognition of a change-of-sex designation by postoperative transsexuals. As a result, the BIA held that since the federal government did not explicitly dictate whether transsexual marriages were valid for immigration benefits and since the state recognized the marriage, immigration officials could approve spousal petitions for validly performed transsexual marriages.

The BIA’s reasoning in *In re Lovo-Lara* is instructive of what current arguments would look like if there were no DOMA. If there were no explicit federal ban on same-sex marriage, the court’s analysis would emphasize congressional intent. The distinguishing factor between same-sex marriage and transsexual marriage is that even without DOMA, Congress has not been silent in its treatment of homosexuals for immigration purposes. Using the *Adams* framework and the analysis in *In re Lovo-Lara*, the next Part will apply the *Adams* test with particular emphasis on congressional intent.

## II. THE *ADAMS* TEST REVISITED

Since *Adams* was decided in 1982, the attitude towards homosexuals in the United States has changed dramatically. Same-sex marriage is now legal in four states. In *Lawrence v. Texas*, the Supreme Court decriminalized consensual homosexual sodomy. The Immigration Act of 1990 formally removed homosexuality from the list of reasons to deny entry into the country. Most recently, President Obama asked Congress to repeal Don’t Ask Don’t Tell, the law forbidding gays and lesbians from serving openly in the military. Taking

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35. *Id.* at 748.
36. *Id.*
37. *Id.*
39. *Id.*
43. President Barack Obama, State of the Union Address (Jan. 27, 2010) (“This year, I
these legal and social changes into account, this Part analyzes whether the Adams test would come out differently if DOMA were repealed. This Part finds that it is hard to predict whether courts would allow same-sex marriage immigration because both the text and congressional intent are ambiguous.

A. Prong 1: Whether the Marriage Is Valid Under State Law

Though the was not the case in 1982, there are currently states and nations where same-sex marriages are unquestionably valid. In the United States, Massachusetts, Connecticut, New Hampshire, and Iowa allow same-sex couples to marry. Internationally, Canada, South Africa, the Netherlands, Belgium, Spain, and Norway perform same-sex marriages. While the weight of the marriage analysis lies in the second prong—whether the United States Congress would recognize a same-sex marriage for immigration purposes—the fact that valid same-sex marriages exist is a crucial distinction.

B. Prong 2: Whether State-Approved Same-Sex Marriage Qualifies Under the INA

In Adams, the court focused on the INA to answer the second prong of its test. The court looked at both the definition of marriage and congressional intent. Since Adams, events, such as the legalization of gay marriage in several states, have impacted the definition of marriage. Additionally, changes in immigration law such as the Immigration Act of 1990, which formally removed homosexuality from the list of permissible bases of denial of admission to the country, reflected Congress’s altered stance towards gays and lesbians. This Part analyzes how a valid same-sex marriage would be treated under the second Adams prong today, and finds that despite significant social and legal changes, it is uncertain how a court would rule.

1. The Definition of Marriage Could Be Considered Ambiguous

“Spouse” remains undefined in the INA, requiring courts to consider the meaning of “marriage” to decide whether the members of a same-sex couple could be considered spouses. It is “a fundamental canon of statutory
construction’ that, ‘unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.’” 48 Just as the Adams court consulted the Merriam-Webster’s Dictionary and Black’s Law Dictionary to define marriage, this Note also turns to those sources in their contemporary formats. The 2009 Merriam-Webster’s Online Dictionary includes both heterosexual and same-sex relationships in its definition of marriage:

(1): the state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law (2): the state of being united to a person of the same sex in a relationship like that of a traditional marriage. 49

Black’s Law Dictionary defines marriage as “[t]he legal union of a couple as spouses.” 50 This dictionary further defines a husband as a “married man” 51 and a wife as a “married woman.” 52 However, Black’s Law Dictionary also defines “same-sex marriage.” A “same-sex marriage” is “[t]he ceremonial union of two people of the same sex; a marriage or marriage-like relationship between two women or two men.” 53 These definitions of the word “marriage” indicate that while the traditional notion of a heterosexual marriage predominates, same-sex marriages could be considered part of the definition of “marriage.” Based on these definitions, a court could find that “marriage” is an ambiguous term.

However, this reading of the text is not conclusive. Strict textualists, like Justice Scalia, use a “narrow dictionary definition of a crucial word” or they rely on “contemporaneous usage” definitions to ascertain the plain meaning of the key word. 54 In this case, a narrow reading of the dictionary definitions would exclude secondary definitions, and, given how homosexuals were treated when the INA was enacted in the 1950s, it is certain that contemporaneous definitions did not contemplate “marriage” to include same-sex marriages. 55

Thus, relying solely on the text, at best there is an argument that the statute’s meaning is ambiguous, and, at worst, it could be argued that “marriage” applies solely to heterosexual couples. As a result, a court would either turn to legislative intent to clarify the ambiguous text or it would rule against same-sex couples by arguing that the text clearly prohibits same-sex

(last visited Apr. 4, 2010); BLACK’S LAW DICTIONARY 1533 (9th ed. 2009). Just like the analysis in Adams, this Note focuses on whether “marriage” contemplates the possibility of same-sex spouses.

48. Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir. 1982) (citing Perrin v. United States, 444 U.S. 37, 42 (1979)).
50. BLACK’S LAW DICTIONARY 1059 (9th ed. 2009).
51. Id. at 810.
52. Id. at 1735.
53. Id. at 1061.
54. 3 SUTHERLAND STATUTORY CONSTRUCTION § 65A:10 (6th ed. 2009).
55. See Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir. 1982).
immigration. Thus, even at the plain text stage, it is uncertain how a court would rule.

2. Recent Congressional Intent Towards Same-Sex Marriage Is Unclear

While there is a long history of congressional exclusion of homosexuals from the United States, recent changes to immigration laws signal that Congress is no longer opposed to their entry. The 1952 Immigration and Nationality Act prohibited persons with "psychopathic personalities from entering the United States." 56 The "legislative history of the Act indicate[d] beyond a shadow of a doubt that the Congress intended the phrase ‘psychopathic personality’ to include homosexuals." 57 Congress reaffirmed the homosexual exclusion by adding new language prohibiting the entry of persons “afflicted with . . . sexual deviation,” such as homosexuality, to the INA in 1965. 58 However, in 1990 Congress changed its policy of excluding homosexuals by amending the Act so that lesbians and gays would no longer be excluded based on their sexual orientation. 59 The 1990 Act indicates that Congress is gradually dismantling the barriers for gays and lesbians to migrate to the United States. 60 Despite the positive trend, it is plausible that Congress would continue to deny immigration benefits if DOMA were abolished since homosexuals are denied rights in other federal contexts, including the inability to openly serve in the military. 61 Since Congress’s intent is unclear and since the definition of marriage could be considered ambiguous, courts analyzing whether to grant same-sex marriage immigration benefits would have to turn to agency’s interpretation of marriage.

C. CIS Might Allow Same-Sex Marriage Immigration

When there is ambiguity in a statute, courts must defer to the administrative agency charged with carrying out the legislation if its interpretation of the statute “is based on a permissible construction of the statute.” 62 In this case, the definition of “marriage” and congressional intent is unclear, so courts would likely defer to the agency’s interpretation. The United

57. Id. at 120.
60. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000) (“[T]he implications of a statute may be altered by the implications of a later statute.” (internal citations omitted)).
States Citizenship and Immigration Services ("CIS") is the administrative agency that processes visas. For immigration cases, deference to CIS is particularly appropriate because "[CIS] officials must exercise especially sensitive political functions that implicate questions of foreign relations." While substantial deference is often given to CIS, courts will reverse an administrative decision if the court considers the interpretation unreasonable. Thus, while immigration officials are granted substantial deference, if CIS were to interpret the INA to allow same-sex partners to sponsor their spouses, courts might either defer to the administrative agency or courts might declare the interpretation unreasonable and reinterpret the statute.

Currently, because of DOMA’s clear definition of marriage, CIS denies same-sex partners the immigration benefits normally extended to heterosexual spouses. Interestingly, the agency allows some same-sex couples to obtain non-immigrant visas, such as visitor visas. In those cases, both members of the couple are foreign nationals. The non-immigrant visas are granted to both spouses if one member of the couple is in the United States on a non-immigrant visa and the partner wishes to join her spouse. The current policy illustrates that CIS considers some same-sex marriages valid for some immigration purposes. Therefore, in the absence of an explicit definition of marriage, a civil-rights friendly administration might direct CIS to construe the INA to allow all same-sex couples to receive full immigration benefits.

If DOMA did not exist, the question would then become whether courts would uphold CIS’s decision to interpret the INA to allow same-sex couples immigration benefits. In order to decide whether that interpretation is permissible, a court would apply the *Chevron* test. The first step is to determine whether the statute’s plain terms “directly address the precise question at issue.” As discussed above, “marriage” is an ambiguous term. It could be read to mean only heterosexual unions or it might include homosexual relationships. Where there is ambiguity and the agency develops a reasonable interpretation, “*Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the

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64. See e.g., Taing v. Chertoff, 526 F. Supp. 2d 177 (D. Mass. 2007) (overturning a USCIS decision that a widow of an American citizen was no longer considered a spouse under the INA’s provisions because the court disagreed with the agency’s interpretation of the statute).
65. ImmigrationEquality, *Non-Immigrant Visas A-V*, http://www.immigrationequality.org/template.php?pageid=30 (last visited Mar. 23, 2010) ("B-2 . . . visas are available for a stay of up to six months for persons entering the United States for reasons of leisure or pleasure such as: tourism, amusement, visiting friends or relatives, rest, medical treatment and activities of a social or service nature. The B-2 visa can also be utilized by a non-spousal partner (including a same-sex partner) of a principal E, H, or L visa holder for the duration of that person’s stay."). (emphasis added).
court believes is the best statutory interpretation." If there were no DOMA, CIS could legally define “marriage” to include same-sex marriages.

A court would then turn to the second step in *Chevron*: whether it is “a reasonable policy choice” for the CIS to interpret “marriage” to include same-sex marriages. The policy question is debatable. On one hand, forty states have enacted mini-DOMAs which define a marriage as a union between a man and a woman, illustrating a strong anti-gay marriage sentiment. On the other hand, there is a distinction between sanctifying same-sex marriages and granting fundamental civil benefits. For example, CIS already recognizes foreign-national same-sex marriages for some immigration purposes. Additionally, some states that passed mini-DOMAs also created civil unions or domestic partnerships to give same-sex couples many of the civil benefits conferred upon married couples, confirming that there is a difference between the gay marriage debate and the gay rights debate. Given the complexities surrounding same-sex marriage and gay rights, it is likely that the agency’s decision either to extend or deny immigration benefits to same-sex couples would be upheld as a reasonable policy choice.


68. *Chevron*, 467 U.S. at 845.


70. See NAT’L GAY & LESBIAN TASK FORCE, supra note 1; NAT’L GAY & LESBIAN TASK FORCE, supra note 17.
In sum, it is uncertain whether a court would allow same-sex marriage immigration if there were no DOMA. Courts could construe the plain meaning of the INA to be ambiguous or could just as reasonably hold that the plain meaning of the INA excludes same-sex couples. Similarly, if a court turned to the CIS to see how the agency interpreted the statute, it would likely uphold the decision to allow or deny same-sex couples immigration benefits because either decision is a reasonable interpretation of the statute and a reasonable policy choice. Given the leeway within legal standards, popular sentiment would likely be factored into the judicial decisions. As discussed earlier, same-sex marriage is currently a bitterly contested issue. Without clear congressional guidance, courts might steer away from controversial decisions and find that the INA does not allow same-sex marriage immigration. Courts shy away from divisive issues to protect their “sociological legitimacy. . . . [The Supreme Court] has seldom remained dramatically at odds with aroused public opinion for extended periods.”  

Similarly, if same-sex marriage were commonly accepted, courts might reflect public opinion and hold that same-sex couples could obtain immigration benefits. There are so many factors that would affect a court’s decision that it is not possible to ascertain whether Adams would come out differently today.

As this Note has shown, DOMA is not the only barrier to same-sex marriage immigration. Without an explicit definition of marriage including same-sex couples, and without legislation providing for same-sex immigration benefits, the courts and CIS have tremendous discretion to decide whether same-sex couples can receive immigration benefits. The next Part explores options advocates could pursue to provide for same-sex immigration with or without DOMA.

III. SOLUTIONS FOR SAME-SEX MARRIAGE IMMIGRATION

Explicit congressional approval for same-sex marriage immigration is the clearest and most comprehensive solution. The best option is for Congress to amend the INA to specifically allow same-sex marriage immigration. If Congress is unwilling to act, then, as a stopgap measure, CIS could construe the statute so that “marriage” encompasses same-sex marriages. Repealing DOMA would be a positive step, but it is not sufficient to allow same-sex immigration. Some form of legislative or executive action is necessary.

A. Congress Should Pass the Uniting American Families Act

On February 12, 2009, Congressman Jerrold Nadler (NY-D) introduced the

Uniting American Families Act (“UAFA”). The UAFA would amend the INA to add the words “permanent partner” wherever the INA contains the word “spouse.” The UAFA designates a “permanent partner” as “an individual 18 years of age or older” who “(A) is in a committed, intimate relationship with another individual 18 years of age or older in which both parties intend a lifelong commitment; (B) is financially interdependent with that other individual; (C) is not married to or in a permanent partnership with anyone other than that other individual.” Also, by using the phrase “permanent partner” instead of “spouse,” it recognizes jurisdictions that do not perform gay marriages, but do have civil unions or registered partnerships. This provision would allow couples united by civil unions or domestic partnerships in Vermont, California, New Jersey, New Hampshire, Oregon, Washington, and the District of Columbia also to qualify for immigration benefits. Taking into account the contentious debate over same-sex marriage, the UAFA is limited to immigration—it does not affect DOMA or legalize same-sex marriage in the United States.

While the UAFA is a narrow bill that would grant the gay community a basic and very limited right, it is a politically challenging bill to pass. Congressman Nadler has been introducing versions of the UAFA since 2001. As of December 2009, it had only 118 co-sponsors in the House and twenty-three in the Senate. The UAFA has garnered such little support due to the general controversy surrounding immigration reform. Some immigration reform advocates worry about including the UAFA in the immigration reform debate because “[t]he last thing the national immigration debate needs is another politically divisive issue” further complicating immigration reform efforts. Another reason the UAFA has floundered is the concern that the bill would “foster immigration fraud because it would be difficult for immigration officers to determine whether same-sex couples had an established

73. Id.
75. NAT’L GAY & LESBIAN TASK FORCE, supra note 1.
76. Noemi E. Masliah & Lavi S. Soloway, Yes, Same-Sex Couples Can Get Married In Five Countries and Massachusetts—No, They Are Still Not I-130 Eligible, in IMMIGRATION & NATIONALITY LAW HANDBOOK 590, 595 (Richard J. Link et al. eds., 2007) (“This is the first piece of legislation that would grant same-sex couple recognition under federal law, and it does so without giving legal effect to same-sex marriages.”).
relationship." The problems the UAFA has encountered demonstrate that it is unlikely that Congress will expressly condone same-sex marriage immigration in the near future. However, despite its challenges, advocates should continue to lobby for the UAFA, or a similar bill, to establish clear congressional intent to allow same-sex marriage immigration.

B. CIS Could Approve Same-Sex Marriage Immigration as a Temporary Measure

If there were no DOMA, CIS would have the discretion to approve same-sex marriage petitions. As discussed in Part II.C, courts would likely uphold CIS’s decision to grant immigration benefits to same-sex couples. While waiting for Congress to pass a law granting same-sex marriage immigration, a president could direct the agency to extend immigration benefits to same-sex marriages.

Relying on CIS to allow same-sex marriage immigration is a risky strategy because future administrations may reverse the agency’s decision. In the face of congressional ambiguity, the *Chevron* doctrine requires only that an agency’s decision be based on “a permissible construction of the statute.” If there is no statute explicitly allowing same-sex marriage immigration, it is possible that an administration opposed to gay rights could construe the INA to define marriage as a heterosexual institution and deny same-sex couples immigration benefits. Unlike courts, which are bound by *stare decisis*, administrative agencies have the “right to modify or even overrule” their own established precedent. Unless a court were to find CIS’s interpretation to exclude same-sex couples from receiving immigration benefits unreasonable, there would be no way to enforce same-sex marriage immigration in a different administration. Therefore, relying on a pro-gay rights administration to direct CIS to allow same-sex marriage immigration if DOMA were repealed is an uncertain strategy that should be used only as a temporary measure while Congress passes a statute allowing same-sex marriage immigration.

CONCLUSION

DOMA is not the only barrier for married same-sex couples trying to live together in the United States. If DOMA were repealed today, same-sex couples would still not have immigration benefits. The lack of any congressional clarity is the main roadblock preventing same-sex marriage immigration. The only

81. Id.
82. See discussion of the *Chevron* doctrine, supra Part II.C.
solution is to have Congress pass legislation explicitly granting same-sex marriage immigration benefits. Any other method is insufficient. Therefore, same-sex immigration advocates should focus on obtaining legislation allowing same-sex marriage immigration, so that same-sex couples can have the same opportunities as heterosexual couples to live with their loved ones in the United States.