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The Selective Deportation of Same-Gender* Partners: In Search of the "Rara Avis"

VICTOR C. ROMERO**

I. A THOUGHT EXPERIMENT: THE SELECTIVE DEPORTATION OF FOREIGN SAME-GENDER PARTNER OVERSTAYS

In *Adams v. Howerton*,¹ the Ninth Circuit adjudicated an issue that may become an important civil rights concern during this millennium: Is it constitutional for Congress to deny immigration benefits to the foreign same-gender partner of a United States citizen? The panel upheld the constitutionality of interpreting Immigration and Nationality Act (INA) section 201(b), which permits immigration based on certain familial relationships, to limit the conferral of "immediate relative" status to those noncitizen "spouses" involved in a heterosexual, but not homosexual, marriage.² While the statute placed no such explicit limitation on the term "spouse,"³ the court ruled that the INS's implementation decision to limit immigration benefits to heterosexual couples was constitu-

* Like some other commentators, I am persuaded that "same-gender" is preferable to the oft-used term "same-sex" because substituting "sex" for "gender" creates more ambiguity and imprecision. First, the law of equal protection refers to "gender-based" not "sex-based" classification. And second, the term "sex" places undue emphasis on the sexual nature of a same-gender couple's relationship, which, while important, is certainly not paramount. See, e.g., Christopher S. Hargis, *Queer Reasoning: Immigration Policy*, *Baker v. State of Vermont*, and the (Non)recognition of Same-Gender Relationships, 10 LAW & SEXUALITY 211, 211 n.2 (2001).

** Professor of Law, The Pennsylvania State University, Dickinson School of Law. E-mail: <VCRI@PSU.EDU>. My thinking on these issues has been sharpened by fruitful conversations with many of my law school colleagues at Penn State-Dickinson. I have also received important feedback and input from Chris Nugent of the American Bar Association, Gail Pendleton of the National Immigration Project of the National Lawyers Guild, and Pradeep Singla of the Lesbian and Gay Immigration Rights Task Force. Many special thanks to Kevin Johnson and Jay Mootz for their thoughtful comments on a prior draft; Gwenn McCollum for her invaluable research assistance; Dean Peter Glenn for his generous funding of this piece; and most of all, my wife, Corie, and my son, Ryan, as well as my family in the Philippines for their constant love and support of this and many other projects. All errors that remain are mine alone.

1. 673 F.2d 1036 (9th Cir. 1982).

2. Section 201(b), 8 U.S.C. § 1151(b)(2)(A)(i) (2001), provides that ". . . the immediate relatives means the children, spouses, and parents of a citizen of the United States, except that in the case of parents, such citizens shall be at least 21 years of age." The immediate relatives specified in this subsection who are otherwise qualified for admission shall be admitted as such, without regard to the numerical limitations in this chapter. 8 U.S.C. § 1151(b) (2001).

3. In the other code section containing the term, "spouse" appears alongside "wife" and "husband," but is itself not limited to a heterosexual relationship. See 8 U.S.C. § 1101(a)(35) (2001) (stating that "spouse" does not include "a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated").

tionally rational.⁴ Despite the plaintiffs' attempts to have the relevant provisions more strictly scrutinized, the court cited Congress's well-established plenary power over the field, which mandated a much more perfunctory review of the contested legislation.⁵ Nonetheless, the Ninth Circuit noted that there might be limits to Congress's plenary power over immigration:

The scope of this very limited judicial review has not been further defined; the Supreme Court has not determined what limitations, if any, the Constitution imposes upon Congress. Faced with numerous challenges to laws governing the exclusion of aliens and the expulsion of resident and non-resident aliens, the Court has consistently reaffirmed the power of Congress to legislate in this area.⁶

In the almost twenty years since the *Adams* decision, the United States has witnessed a growing tolerance for homosexuality, both within immigration law⁷ and among the public generally.⁸ Notably, last year, Vermont decided to formally recognize same-gender civil unions, leading to the "marriage" of over 3,000 individuals, seventy-eight percent of whom are from other states, Washington, D.C., or other countries.⁹ But

4. *Adams*, 673 F.2d at 1042 ("We hold that section 201(b) of the [Immigration and Nationality] Act is not unconstitutional because it denies the preferences accorded to spouses of heterosexual marriages.").

5. *Id.* at 1041 ("Congress has almost plenary power to admit or exclude aliens, and the decisions of Congress are subject only to limited judicial review.") (internal citations omitted).

6. *Id.* at 1042.

7. Part of the case arguably rested on an outdated Supreme Court decision, *Boutilier v. INS*, 387 U.S. 118 (1967), which upheld the constitutionality of an immigration exclusion ground based on the psychopathology of homosexuality. This exclusion ground was repealed in 1990. See Denise C. Hammond, *Immigration and Sexual Orientation: Developing Standards, Options, and Obstacles*, 77 INTERPRETER RELEASES 113, 116-17 (2000).

8. Justice Stevens noted this attitudinal change in his *Dale* dissent:

Unfavorable opinions about homosexuals "have ancient roots." Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions. A few examples: The American Psychiatric Association's and the American Psychological Association's removal of "homosexuality" from their lists of mental disorders; a move toward greater understanding within some religious communities; Justice Blackmun's classic opinion in *Bowers*; Georgia's invalidation of the statute upheld in *Bowers*; and New Jersey's enactment of the provision [prohibiting sexual orientation discrimination] at issue in this case.

Boy Scouts of America v. Dale, 530 U.S. 640, 669 (Stevens, J., dissenting) (internal citations omitted). Despite this trend, polls by the *Los Angeles Times* in 2000 (38% approval rate versus 40% disapproval rate) and by *USA Today* in 1993 (46% in favor versus 48% opposed) reveal that most Americans still disfavor according civil rights to homosexuals. Poll, available at <http://poll.orpub.com/poll/lpext.dll?f=templates&fn=main-h.htm> (last visited July 18, 2001) (copies on file with the author).

9. Report of the Vermont Civil Union Review Commission, Finding 2 (Jan. 2001), available at <http://www.leg.state.vt.us/baker/cureport.htm> (last visited May 23, 2001). The foreign

despite calls by some to overturn *Adams*,¹⁰ no judicial intervention appears forthcoming, partly because of Congress's plenary power over immigration, and partly due to the 1996 passage of the Defense of Marriage Act (DOMA), which limits the definition of "marriage" to heterosexual unions for federal purposes and permits states not to recognize same-gender unions from other jurisdictions.¹¹ Since *Adams*, the plenary power doctrine and DOMA have combined to create a formidable barrier to any judicial recognition of binational same-gender marriage, gay rights groups have therefore sought to lobby Congress for ways around *Adams*. These efforts include the recently introduced Permanent Partners Immigration Act of 2001, which seeks to create immigration benefits for same-gender partners while leaving the INA definition of "spouse" intact.¹²

Despite these efforts, the recent appearance of Vermont as a haven for same-gender couples – including binational ones – prompts consideration of a different question than that addressed in *Adams*: Would it be constitutional for the INS to choose to deport the foreign same-gender partner overstay of a United States citizen civilly united in Vermont solely because of her sexual orientation? While *Adams* focused on the constitutionality of denying immigration benefits to same-gender partners, this inquiry does not challenge any Congressional action; it asks only whether the INS has the power under the Constitution to selectively deport someone based solely on her sexual orientation.

The following scenario might provide a useful focal point for this discussion. Mexican national Maria Camacho is a foreign student at the University of Vermont.¹³ In her junior year, Maria falls in love with classmate Susan Sanders, a United States citizen. Their relationship grows and the couple decides to celebrate their love by entering into a same-gender civil union under Vermont law after graduation. Realizing that Maria's foreign student visa is about to expire,¹⁴ Susan applies with

countries represented were Canada, England, Venezuela, Mexico, Philippines, Australia, Netherlands, Germany, India, and Guatemala. *Id.* For a survey of the leading cases discussing same-gender union laws, see Robert E. Rains, *The Evolving Status of Same-Sex Unions in Hawaii, Alaska, Vermont and Throughout the United States*, 2000 CONTEMP. ISSUES IN LAW 71 (2000).

10. See, e.g., Hammond, *supra* note 7, at 116-17; Hargis, *supra* note *, at 234-36.

11. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7). On DOMA, see generally Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997).

12. See Permanent Partners Immigration Act of 2001, CIS Bill Tracking Report, 107 H.R. 690 (introduced Feb. 14, 2001).

13. The choice to depict the hypothetical noncitizen as a woman is based on statistical reality. As of December 29, 2000, sixty-five percent of the same-gender unions performed in Vermont were between women. See Report, *supra* note 9, at Finding 2.

14. Typically, foreign students carry the F-1 visa which allows them to stay for the completion of a course of study. See INA § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F) (2001).

the INS to adjust Maria's status from nonimmigrant to immigrant on the basis of their Vermont civil union.¹⁵ The INS demurs, noting that current federal law¹⁶ and relevant case precedent¹⁷ do not confer immigration benefits upon noncitizen same-gender partners. Despite the rebuff, Maria decides to thwart the federal law and sets up to live permanently in Vermont with Susan. She therefore lets her visa expire, reasoning that at least Vermont recognizes that she and Susan have a valid union and she does not believe that the INS would seek to deport her. As more and more same-gender mixed immigration-status couples begin to flock to Vermont, civilly unite, and then thwart the immigration law,¹⁸ however, the INS is left with no choice but to begin deporting Maria and others like her.

While the foregoing story may strike some readers as a most improbable scenario, the narrative appears more credible when viewed from the lens of two recent Supreme Court decisions – *Reno v. American-Arab Anti-Discrimination Committee*¹⁹ and *Boy Scouts of America v. Dale*²⁰ — that curtail the rights of immigrants and homosexuals, respectively. In *AADC*,²¹ in a scenario not unlike the one described above, the INS singled out for deportation six nonimmigrants and two permanent residents because of their membership in the Popular Front for the Liberation of Palestine (PFLP), believed by the government to be an international terrorist organization.²² Though accused of no crimes, the “LA 8”²³ were guilty of terrorism by association; as then-FBI Direc-

15. See generally INA § 245(a), 8 U.S.C. § 1255(a) (2001) (general adjustment of status provision).

16. See DOMA, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7) (limiting definition of marriage to heterosexual unions for purposes of federal benefits); INA § 101(a)(35), 8 U.S.C. § 1101(a)(35) (2001) (including only the terms “spouse,” “wife,” and “husband,” but not providing for “same-gender partner”).

17. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982). See *supra* text accompanying notes 3-8.

18. E-mail from Pradeep Singla, Lesbian and Gay Immigration Rights Task Force, to Victor C. Romero, Penn State-Dickinson School of Law (May 18, 2001) (on file with author). Singla states:

We receive a large number of phone calls/emails from binational same-sex couples who are struggling with U.S. immigration law. Indeed, one of the most frequently asked questions pertains to entering into a civil union in Vermont and seeking recognition of this relationship by INS for immigration benefits. Also, many sexual orientation-based asylum seekers have U.S. citizen partners.

19. 525 U.S. 471 (1999).

20. 530 U.S. 640 (2000).

21. 525 U.S. 471 (1999).

22. *Id.* at 473.

23. For a thorough discussion of this case and other issues involving the targeting of so-called “terrorists” because of their political affiliations, see JAMES X. DEMPSEY & DAVID COLE, *TERRORISM & THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 33-46 (1999) (describing the “LA 8” case).

tor William Webster admitted, "If these individuals had been United States citizens, there would not have been a basis for their arrest."²⁴

On appeal to the Supreme Court, the deportees alleged that they had been selectively targeted by the INS in violation of their First Amendment right to join the PFLP.²⁵ The Court chose to address their constitutional claim only in dicta, ruling instead on statutory grounds. Nonetheless, Justice Scalia's majority opinion used strikingly broad language in addressing the constitutional issue: "As a general matter—and assuredly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."²⁶ After supporting this statement, he went on to qualify: "To resolve the present controversy, we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome."²⁷

The difference between deporting noncitizen overstays who are terrorist affiliates, on the one hand, and those who are same-gender partners, on the other, might strike some as so glaring that the analogy is unconvincing.²⁸ The line between the non-criminal terrorist affiliate and the non-criminal same-gender partner, however, might not be particularly obvious to some. Both types of overstays might be viewed as being engaged in intimate relationships with undesirables – terrorists in one instance, gays or lesbians in another, and their "illegal" immigration status provides the government with a good reason to deport them. Indeed, former INS Commissioner Doris Meissner's November 2000 memorandum on prosecutorial discretion recounts that the agency prosecutes immigration violations to further several goals, including "protecting public safety,"²⁹ promoting the integrity of the legal immigration

24. *Id.* at 35.

25. *AADC*, 525 U.S. at 472.

26. *Id.* at 488.

27. *Id.* at 491.

28. As one colleague put it:

[W]ould the feds really implement a homophobic policy under these conditions? Who would care — the dissenting citizens of Vermont who are trying to avoid having the state be a port of entry for gay non-citizens? My initial reaction would be that there would be no specific targeting by the feds without some push, and I don't see the motivation. Am I too naive?

E-mail from Francis J. Mootz, III, to Victor C. Romero, Penn State-Dickinson School of Law (May 21, 2001) (on file with author).

29. The protection of the heterosexual public from homosexuals is a resonant theme in American legal history both within and outside immigration law. See generally William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1328-29 (2000). Eskridge stated:

Antigay discourse has shifted in the last generation. For most of the twentieth

system, and deterring violations of the immigration law.”³⁰ Just as the deportation of overstaying terrorist affiliates might arguably promote all three goals, in some people’s minds the removal of same-gender partner overstays would be similarly effective. Analogously, DOMA was probably enacted in part because of the perceived threat that there would be a great increase in the number of jurisdictions that might recognize same-gender unions.

While it is true that Commissioner Meissner’s memorandum explicitly leaves the exercise of prosecutorial discretion to the hands of high-level INS officials,³¹ should there be a sizeable number of cases that emerge in future years not only out of Vermont, but from other states that seek to pass similar legislation,³² there might be an impetus to begin deporting same-gender partner overstays. This is especially true if one holds the view that, morally, such persons are not much different from the “LA 8” and that, irregardless, the continued violation of the immigration laws should be stopped through their removal.

While the day of homosexual removals en masse is not upon us, the specific targeting of homosexuals over the last fifteen years highlighted in recent Supreme Court decisions – for sodomy law violations,³³ to prevent homosexuals from enacting protective state legislation,³⁴ and to exclude them from private leadership positions in organizations³⁵ – sug-

century, laws or social norms stigmatizing gay people were justified on the ground that gay people do disgusting things or are diseased or predatory. Intolerance of bad people and their bad acts was the rationale. Since the 1960s, these justifications have been supplemented with arguments that progay changes in law or norms would encourage homosexuality or homosexual conduct. The slogan is “no promotion of homosexuality.” In slang, no promo homo.

See also WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 35-36, 69-70, 132-34, 383-84 (1999) (discussing the exclusion of homosexuals under United States immigration law).

30. Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, to INS Regional Directors et al., at 4 (Nov. 17, 2000), available at <http://www.ins.usdoj.gov/graphiss/lawregs/handbook/discreton.pdf> (last visited Mar. 13, 2002).

31. *Id.* at 5 (“Except as may be provided specifically in other policy statements or directives, the responsibility for exercising prosecutorial discretion in the manner rests with the District Director (DD) or Chief Patrol Agent (CPA) based on his or her common sense and sound judgment.”).

32. Until 1999, Hawaii recognized same-gender marriages pursuant to the state supreme court’s decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). However, a state constitutional amendment limiting marriage to heterosexuals was approved by Hawaii’s voters in 1998, prompting the court to dismiss the suit. See David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19 (2000). Indeed, even the so-called conservative majority of the Supreme Court recently noted that “it appears that homosexuality has gained greater societal acceptance.” *Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000). See also *supra* note 8 (describing greater acceptance of gays over time).

33. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

34. *Romer v. Evans*, 517 U.S. 620 (1996).

35. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

gests that the selective immigration prosecution of homosexuals might not be so farfetched.³⁶ Indeed, Supreme Court opinions on the immigration exclusion of certain select groups, specifically on racial³⁷ and ideological³⁸ grounds, is a well-established source for affirming Congressional plenary power over the field.³⁹ Thus, the specific targeting of same-gender partner overstays captures anti-gay and anti-immigrant sentiment that has long been a part of Supreme Court history, both ancient and recent.

Thinking back to the Camacho-Sanders hypothetical, does the mass deportation of overstaying same-gender partners constitute an outrageous "rara avis" under AADC⁴⁰ or does it constitute a permissible enforcement of immigration law, not unlike the removal of terrorist-sympathizers such as the "LA 8"? Part of the answer to this question might depend on how the Court views not only immigrants in general, but *homosexual* immigrants in specific. To this end, a review of the second important case, *Boy Scouts of America v. Dale*,⁴¹ might be useful.

In *Dale*, the Court held that New Jersey's Law Against Discrimina-

36. One could argue that certain homosexual noncitizens should be deported before the "LA 8" terrorist affiliates where such homosexuals are also criminals under state sodomy statutes. Reviewing the Meissner "prosecutorial discretion" memorandum, it appears that the removal of criminal noncitizens is a high priority for the INS. See Meissner Memo, *supra* note 30, at 6 n.6. Following the Supreme Court's decision in *Bowers v. Hardwick*, the INS could conceivably seek to remove all homosexuals convicted of sodomy statutes based on their commission of a "moral turpitude" crime, a deportable offense. See *Hardwick*, 478 U.S. at 196 (upholding sodomy statutes against due process claim); INA § 237(a)(2)(A)(i), 8 U.S.C.A. § 1227(a)(2)(A)(i) (West Supp. 2001) (noting that conviction of "moral turpitude" crime is a deportable offense). To be fair, former Commissioner Meissner also notes that "[e]ven an operation that is designed based on high-priority criteria, however, may still identify individual aliens who warrant a favorable exercise of prosecutorial discretion." Meissner Memo, *supra* note 30, at 6.

37. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 381 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). For a thorough discussion of the racial implications of these cases, see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998). Professor Kevin Johnson has argued that the racial discrimination in immigration law mirrors the same discrimination evident in other domestic law. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

38. See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). See also Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995).

39. For a recent examination of the Supreme Court's major plenary power cases from *Chae Chan Ping* through AADC, see Victor C. Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Doctrine*, 4 NYU J. LEGIS. & PUB. POL'Y 343, 348-62 (2000) [hereinafter Romero, *On Elián*].

40. Elsewhere in the opinion, Justice Scalia noted that even in the criminal law field, the selective prosecution claim was a "rara avis." *Reno v. AADC*, 525 U.S. 471, 489 (1999).

41. 530 U.S. 640 (2000).

tion did not compel the Boy Scouts to retain a homosexual assistant scoutmaster.⁴² Despite the New Jersey statute's specific bar against sexual orientation discrimination,⁴³ the Boy Scouts' First Amendment right to expressive association trumped the state's interest in protecting homosexuals. As a private entity, the Boy Scouts was free to deny a leadership position to a practicing homosexual because to do otherwise would "at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."⁴⁴ The majority cautiously chose not to endorse the Boy Scouts' anti-homosexual message: "We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong"⁴⁵

While not an immigrants' rights case like *AADC*, *Dale* is the Supreme Court's latest statement on the equally contested issue of gay rights. Indeed, five of the six⁴⁶ justices who signed on to the *AADC* majority opinion – Rehnquist, Scalia, Thomas, Kennedy, and O'Connor – were the same five who sided with the Boy Scouts in *Dale*. Taking *AADC* and *Dale* together, one might think that Ms. Camacho and Ms. Sanders in the opening hypothetical would receive little support from these five justices. After all, if these five justices are not likely to sympathize with either deportable noncitizens (as in *AADC*) or homosexuals (as in *Dale*), how likely is it that they would side with Maria Camacho, a deportable, homosexual, noncitizen?

As mentioned earlier, conventional wisdom might suggest that Ms. Camacho and Ms. Sanders should seek relief from Congress by having it amend the immigration code to allow for same-gender sponsorship.⁴⁷ To the extent that immigration and naturalization are the province of the federal government, any relief for same-gender partners must be sought in the halls of Congress, not in the courts, so the argument goes. This is a powerful argument, and indeed, one which the author has recently made himself.⁴⁸ Indeed, it is an especially useful argument considering

42. *Id.* at 659.

43. N.J. STAT. ANN. §§ 10:5-4 - 10:5-5 (West Supp. 2000).

44. *Dale*, 530 U.S. at 653.

45. *Id.* 661.

46. Justice Stevens did not join the majority opinion, but filed a concurrence agreeing with Scalia's constitutional "outrageous" test in *AADC*. See *AADC*, 525 U.S. at 501 (Stevens, J., concurring).

47. See *supra* text accompanying note 12.

48. See generally Romero, *On Elián*, *supra* note 39, at 345 n.16 ("Many of the [author's] prior pieces advocate changes in the way the judiciary protects immigrants' rights, whereas this Article looks to the political branches of government for effective policy reform.").

In February 2001, Representative Jerrold Nadler of New York introduced the Permanent Partners Immigration Act of 2001, which aims to confer immigration benefits for foreign partners in same-gender relationships with United States citizens. See CIS Bill Tracking Report, H.R. 690,

that this deportation scenario is fictional. Having the law changed to allow immigration benefits for same-gender partners would render the foregoing hypothetical moot.⁴⁹

This article, however, will take a different path. Even though there have been no reported cases of selective deportations based on sexual orientation, *AADC* and *Dale* make exploration of the Camacho-Sanders hypothetical worth while. The modest goal of this article is to wage a preemptive strike: By examining the possibility that such selective deportations might occur in this context, the hope is that advocates of putative deportees would have a litigation resource or, better still, that the INS never adopt such a policy at all.

Thus, Part II explores the contours of the majority's statement⁵⁰ in *AADC* and takes seriously the opening story to suggest that Ms. Camacho has a strong constitutional argument not to be selectively deported because of her homosexual status, despite the apparently anti-homosexual pronouncements in *Dale*. A review of its noncitizen and gay rights jurisprudence reveals that, despite its deference to the political branches under most circumstances, the Court will not hesitate to strike down legislative or executive action in cases of extreme discriminatory treatment. Whether the vehicle for such judicial intervention is called "equal

107 Bill Tracking H.R. 690. While many in the immigration law field believe that a legislative solution such as H.R. 690 would be preferable to a judicial one, even this law's advocates believe that, at best, H.R. 690 will serve only as a useful springboard for discussion of this issue, but will not pass in the current Congress. See E-mail from Gail Pendleton, National Immigration Project of the National Lawyers Guild, to Victor C. Romero, Penn State-Dickinson School of Law (May 17, 2001) (on file with author). Pendleton states:

Under immigration law, INS recognizes marriages if they are valid in the jurisdiction in which they took place BUT not if there's an overriding public policy concern. I think the general consensus is that there are only two ways to fix this — get rid of [the Defense of Marriage Act] or explicitly recognize in the INA itself that partnerships are bases for immigrating. Rep. Jerry Nadler has introduced such a bill which should serve as leverage for discussing the issue, even if the likelihood of its passage is slim under current political conditions.

(emphasis in original).

49. On the other hand, Angela Kelley, Deputy Director of the National Immigration Forum, believes that it is highly unlikely that any major pro-immigrant reform coming out of the now-Democratic Senate will be approved by President Bush. See *Immigration Impact of Sen. Jeffords's Party Switch Under Debate as Leadership Changes Hands*, 78 INTERPRETER RELEASES 921, 922 (2001) ("While the Bush administration is likely to oppose many [pro-immigrant] measures, spelling ultimate defeat, Senators will nonetheless be forced to go on records with their pro- or anti-immigration views, Ms. Kelley said, and that record may be increasingly important as the 2004 presidential election approaches.").

50. Whether Part III of Justice Scalia's opinion is dictum is the subject of debate. Compare *Reno v. AADC*, 525 U.S. 471, 510 (1999) (Souter, J., dissenting) (describing opinion as dicta) with David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of Reno v. AADC*, 14 GEO. IMMIGR. L.J. 363, 383 (2000) ("The Supreme Court in *AADC* intended categorically to bar selective enforcement as an *in limine* defense to deportation, absent a claim of undefined outrageous misconduct by INS. This ruling is not dictum . . .").

protection” or “due process,” the result is that, even on a conservative Court such as the present one, there will likely be five votes in favor of the individual rights claimant, despite her being a gay noncitizen. Thus, the “outrageous” test articulated by Scalia in *AADC* is but another version of a “minimal protection” test. Under this scheme, the Court will strike down legislative or executive action only if two things are present: (1) it views the plaintiff as a having been unfairly deprived of a right open to all, and who asks only for “equal,” as opposed to “special,” treatment; and (2) it can identify no legitimate governmental interest to preserve majority sentiment, expressed either through legislative policy, executive action, or a core constitutional value. Although there are doctrinal arguments to suggest otherwise, on balance, a majority of the Court should find that the selective deportation based on sexual orientation offends common notions of decency and justice, thereby rendering such an act “outrageous.”

Part III concludes with a brief revisit to *Adams*, placing the same-gender immigration benefits debate within a larger international context and arguing that sooner or later, the United States government will have to address the larger issue of same-gender partnerships and their inferior status vis-à-vis traditional, heterosexual marriages.

II. WHAT CONSTITUTES “OUTRAGEOUS”? A REVIEW OF RECENT CASES ON GAY AND IMMIGRANTS’ RIGHTS

In drafting this article, I have shared the hypothetical about mass deportations of foreign same-gender partner overstays with many people, both lawyers and non-lawyers, to test its relevance and to examine gut reactions to the story. Most believe that the INS would never engage in such an act because they would have no particular incentive to do so, despite the overstays’ continued unlawful presence. Underlying this argument, I suspect, is a belief that such a scenario would be ludicrous – that it would be un-American to deport homosexual overstays just because we could, especially if they were part of a legal same-gender union under state law. However, when asked to indulge my paranoia and consider the hypothetical at face value, the same people assume that most United States residents would affirm the INS’s decision, even if the deportees were selectively targeted because of their homosexuality, on two related grounds: first, that the federal government has virtually unlimited power over immigration matters; and second, that the real issue is the noncitizen’s “illegal” status, and not her sexual orientation. Ms. Camacho’s sexual orientation should not excuse her violation of a valid law.

From this admittedly most unscientific of surveys, I detect a dis-

connect. Although, many believe that the selective deportation of foreign same-gender partner overstays would be highly unlikely, there is also consensus that the federal government would have the power to carry out such a directive.

It is this disconnect that I plan to explore in the context of the following statement from *AADC*: "To resolve this present controversy, we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome."⁵¹ If, in a sense, the opening narrative is "outrageous" because it offends our idea of how America treats visitors within its boundaries, why is it no less "outrageous" should the government actually carry out this scenario? Put differently, if the thought of deporting same-gender partner overstays en masse offends our sensibilities, why would the Supreme Court approve such a project?

A. *Reno v. AADC*: What Is "Outrageous" Conduct?⁵²

In *Reno v. AADC*, the Supreme Court stated that, generally, noncitizens could not assert a First Amendment selective prosecution claim to challenge their otherwise valid deportation order.⁵³ In *AADC*, the INS sought to deport eight noncitizens (two of whom were permanent residents) because of their affiliation with the Popular Front for the Liberation of Palestine (PFLP), which the government described as a terrorist organization.⁵⁴

In the convoluted lower court litigation, the government contended that while the First Amendment would protect the rights of United States citizens to affiliate with groups such as the PFLP, the same protection does not extend to noncitizens. As then-FBI Director William Webster admitted, "If these individuals had been United States citizens there would not have been a basis for their arrest." Several variations of this argument were presented in the federal district and appeals courts, but the courts soundly rejected them each time. The lower courts agreed with the noncitizens that the First Amendment required that they not be selectively targeted for deportation solely because of their political affiliations.⁵⁵

The Justice Department pursued an appeal to the Supreme Court, which resolved the First Amendment issues in its opinion although it

51. *AADC*, 525 U.S. at 491.

52. The following narrative of *AADC* is taken in large part from the same case description in a prior writing. See Romero, *On Elián*, *supra* note 39, at 359-60.

53. *AADC*, 525 U.S. at 491-92.

54. *Id.* at 473.

55. See DEMPSEY & COLE, *supra* note 23, at 35, 39-41.

initially declined to do so because the parties left them unbriefed. Despite the fact that the case was resolved on statutory grounds, the Court nonetheless opined on the selective prosecution argument. It sided with the government and noted that the First Amendment typically did not prevent the INS from choosing whom to deport among noncitizens illegally present: “[A]n alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.”⁵⁶ Writing for the majority, Scalia reasoned that allowing such claims would unnecessarily hamper the operations of the executive branch as it seeks merely to enforce the immigration rules set by Congress:

Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted. And in all cases, deportation is necessary in order to bring to an end an ongoing violation of United States law. The contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing.⁵⁷

Without specifying a concrete example, the Court did note, however, that there may be rare cases in which the alleged basis of discrimination is so outrageous that the balance tips in the noncitizen’s favor: “To resolve the present controversy, we need not rule out the possibility of the rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome.”⁵⁸

Scalia noted that selective enforcement claims are generally disfavored in the criminal context and should be even further discouraged in deportation proceedings for at least three reasons. First, allowing the full adjudication of all selective deportation claims will lead to delays, which allow the deportee to continue to remain in the United States in violation of the law.⁵⁹ Second, greater scrutiny of INS action will chill law enforcement by leading to the disclosure of sensitive foreign-policy

56. *AADC*, 525 U.S. at 488.

57. *Id.* at 491.

58. *Id.*

59. *Id.* at 490. But see David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of Reno v. AADC*, 14 *GEO. IMMIGR. L.J.* 363, 365 (2000). Martin stated:

I agree with [Professor Neuman] that LPRs [legal permanent residents] are not engaged in continuing violations simply because they have ostensibly committed an act that could give rise to deportability. Hence in the case of an LPR, the concept of continuing violation does not fit. Neuman could strengthen the point by discussing the administrative practice applying the INA’s own definition of “lawfully admitted for permanent residence.” Under that and other INS practice one remains lawfully admitted for permanent residence until a final administrative determination that

objectives.⁶⁰ And third, unlike in criminal prosecutions, deportations seek only to hold the noncitizens to the terms of their admission; deportation is not punishment, and hence, constitutional safeguards may properly be relaxed in this context.⁶¹

Although the Court's justices voted eight to one in favor of upholding the INS's deportation decision on statutory grounds (even if for different reasons), they were split on the proper constitutional analysis. Five of the justices – Rehnquist, Thomas, O'Connor, Kennedy, and, in a separate opinion, Stevens – subscribed to Scalia's notion that, absent outrageous government conduct, noncitizens were barred from raising selective enforcement as a constitutional defense to deportation. Two others – Ginsburg and Souter – set forth separate opinions which expressed a greater willingness to consider selective deportation claims. Breyer was the only one not to express his view on the constitutional availability of selective deportation claims.⁶²

To summarize, the justices were split six to two in favor of the general bar, with one abstention. Despite the fact that Scalia's analysis has not been developed further in subsequent cases and is arguably dictum,⁶³ a solid majority of the Court accepts Scalia's test, even though two – Ginsburg and Souter – might prefer stronger judicial review of selective deportation claims. It is worth exploring, therefore, how our same-gender partner overstay might fare under such a test.

For someone who usually takes care to only address issues squarely before the Court, Justice Scalia's selective deportation discussion not only was unnecessary to the resolution of the case, but was also an issue

changes the status; the mere existence of antecedent facts upon which such a determination might rest works no change itself.

60. *AADC*, 525 U.S. at 491.

61. *Id.*

62. Justice Breyer filed no opinion in *AADC*, limiting his involvement to joining Ginsburg's statutory analysis, but not her thoughts on selective deportation. Nonetheless, Breyer showed a firm rejection of stereotypes albeit in the gender-context, in *Miller*:

Since either men or women may be caretakers, and since either men or women may be "breadwinners," one could justify the gender distinction only on the ground that more women are caretakers than men, and more men are 'breadwinners' than women. This, again, is the kind of generalization that we have rejected as justifying a gender-based distinction in other cases.

Miller v. Albright, 523 U.S. 420, 488 (1998) (Breyer, J., dissenting). Breyer and his pro-gay rights positions in *Evans* and *Dale* suggest that he might still rule against the selective deportation of a same-gender partner, unless he views the rights asserted in that context to be more about immigration and less about the protection of homosexuals. *See infra* Part II(C)(1).

63. *AADC*, 525 U.S. at 510 (Souter, J., dissenting) (describing Scalia's test as "dictum"). *But see* Martin, *supra* note 50, at 383 ("The Supreme Court in *AADC* intended categorically to bar selective enforcement as an in limine defense to deportation, absent a claim of undefined 'outrageous' misconduct by INS. This ruling is not dictum . . .").

the parties did not brief.⁶⁴ That he would go out of his way to rule on this issue suggests that the types of claims he might consider “outrageous” might be limited, indeed.⁶⁵ Justice Stevens’s opinion supports the idea of a limited exception, further distinguishing between punishment in the criminal justice context and the less adverse consequences of deportation. Stevens asserted that while Congress could not punish innocent persons because of their membership in a terrorist organization, he had “no doubt that the Attorney General may give priority to the removal of deportable aliens who are members of such an organization,” per Scalia’s analysis.⁶⁶ If the other four justices in the majority agree with Scalia and Stevens, our hypothetical same-gender partner overstay appears to have a tough road ahead, given what looks like a rather narrow window of relief.

While Justice Ginsburg focused mostly on the statute’s construction, she devoted part of her concurrence to Scalia’s selective enforcement analysis. While initially concluding that this issue was not before the Court, Ginsburg stated that she was “not persuaded that selective enforcement of deportation laws should be exempt” from judicial scrutiny, citing the Court’s review of selective prosecution cases in the criminal law context.⁶⁷ While Scalia drew a distinction between criminal proceedings and civil deportation hearings (which he argued counseled against judicial intervention in selective deportation claims),⁶⁸ Ginsburg stressed the hardships wrought by deportation, including separating families.⁶⁹ This suggests that Justice Ginsburg is more likely than the majority to recognize a broad selective deportation claim beyond creating special exemptions for “rare cases.”

Justice Souter’s dissenting opinion also expressed displeasure with the Court’s discussion of the unbriefed selective deportation claim, quickly dismissing it as dictum.⁷⁰ While he too believed that the differences between criminal and immigration law do not obviate the need for a selective deportation defense, Souter disclaimed, siding with the

64. Scalia was taken to task on this point by both Ginsburg and Souter. See *AADC*, 525 U.S. at 497 (Ginsburg, J., concurring), 511 (Souter, J., dissenting).

65. As will be developed *infra*, Scalia’s consistent anti-gay rights voting record in *Evans*, *Hurley*, and *Dale*, as well as his deference to Congress in *Miller* and *Nguyen*, imply that he would probably not regard claims made by same-gender partner overstays as exceptional. See *infra* Part II(C)(1).

66. *AADC*, 525 U.S. at 501 (Stevens, J., concurring).

67. *Id.* at 497 (Ginsburg, J., concurring).

68. *Id.* at 491 (“While the consequences of deportation may assuredly be grave, they are not imposed as a punishment.”) (internal citations omitted).

69. *Id.* at 498 (Ginsburg, J., concurring) (citing GERALD NEUMAN, *STRANGERS TO THE CONSTITUTION* 162 (1996)).

70. *Id.* at 510-11 (Souter, J., dissenting).

noncitizen on this issue: "I do not assume that the Government would lose the argument."⁷¹ Like Ginsburg, Souter would probably be more receptive to a selective deportation claim than Scalia and his colleagues in the majority.

Leading commentary on the *AADC* case construes the majority's rejection of selective deportation claims as being rooted in a desire to limit remedies available to acknowledged deportees. Professors Gerald Neuman, David Cole, and David Martin all agree that the best analysis of Scalia's opinion is one which gives credence to the Court's fear that if deportees were successful in establishing a selective enforcement claim, they might be entitled to permanent injunctive relief from removal, an arguably unjust result when the noncitizen concedes deportability.⁷² A fairer response, Professor Neuman argues, would be to remand the case "for an exercise of enforcement discretion untainted by the [constitutionally] impermissible motive."⁷³ Such reconsideration would properly balance the constitutional interests of the noncitizen against the government's desire to halt an admitted immigration violation.⁷⁴ But even under this analysis, the INS and Department of Justice retain much unfettered power to proceed against deportable noncitizens as they wish, constrained only by the yet-to-be-defined standard of "outrageous"

71. *Id.* at 511 (Souter, J., dissenting).

72. Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 345 (2000) ("[T]o the extent that the majority's concerns about continuing frustration of immigration policy are well-founded, they might . . . be accommodated by adopting a narrower remedy for retaliatory deportation proceedings."); David Cole, *Damage Control? A Comment on Professor Neuman's Reading of Reno v. AADC*, 14 GEO. IMMIGR. L.J. 347, 359 (2000). Cole states:

A better approach would be to stress the Court's explicit concern with remedy. The Court seemed particularly driven by its belief that acknowledging a selective enforcement defense would sanction an ongoing violation of law by allowing an alien unlawfully here to remain. Similarly, it was troubled by the delays in the immigration process that adjudicating such a claim might occasion, delays that would likely arise only if an injunction against the deportation proceedings were available. These concerns suggest that the Court's holding may be better understood as precluding a particular form of remedy—an injunction against deportation—for discriminatory enforcement of the immigration laws.

See also Martin, *supra* note 50, at 365 ("To say that the Constitution does not support a judicial remedy of the kind claimed in *AADC* for alleged selective enforcement makes far more sense than implying that the Constitution has no bearing whatever on these enforcement decisions."). For a broader analysis of the First Amendment implications of *AADC*, see Maryann Kamali Miyamoto, *The First Amendment After Reno v. American-Arab Anti-Discrimination Committee: A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183 (2000).

73. Neuman, *supra* note 72, at 345.

74. Professor Martin believes that the majority's position on selective enforcement is a desirable one which will permit the already overworked INS and DOJ to function more, not less, effectively by "free[ing] up a more humane use of enforcement discretion by the [DOJ] and [INS] in the future." Martin, *supra* note 50, at 365.

conduct.⁷⁵

Furthermore, although the *AADC* plaintiffs and the lower courts based their selective deportation claim on the First Amendment, the Supreme Court's constitutional analysis was broader in scope.⁷⁶ Justice Scalia's reasoning in *AADC* did not even mention the noncitizens' speech or associational rights as being bases of a valid constitutional claim, focusing instead on the more ambiguous term "outrageous" governmental action. As Professor Cole notes, "the decision is about selective enforcement claims in particular, and not about the First Amendment rights of aliens more generally."⁷⁷

Scalia's selective deportation analysis, agreed to by five other justices, appears to defer broadly to the government to enforce immigration laws as it sees fit, constrained only by a vague standard of "outrageous" conduct. At best, we know that the selection of admittedly deportable noncitizens based on their suspected terrorist affiliations is not outrageous. But we know little beyond that.

This article attempts to give content to Scalia's test by contending that "outrageous" selective enforcement is one in which the government intends to oppress an individual or group based on a disadvantaged status, rather than an objective desire to enforce the immigration laws. Put another way, the "outrageous" test is but another version of a "minimal protection" test akin to equal protection or due process "rational basis" scrutiny. Under this scheme, the Court will strike down legislative or executive action only if: (1) it views the plaintiff as a having been unfairly deprived of a right open to all, and who asks only for "equal," as opposed to "special," treatment; and (2) it can identify no legitimate governmental interest to preserve majority sentiment, expressed either through legislative policy, executive action, or a core constitutional value. This analysis is based on a review of the Court's more recent writings in the area of gay and immigrants' rights – both constitutional and subconstitutional – concluding that while the Court is sometimes

75. Professors Neuman and Cole have speculated that targeting certain individuals because of their speech or race may constitute "outrageous" behavior. See Neuman, *supra* note 72, at 346 ("Immigration officials should not be permitted to target aliens, even undocumented aliens, for removal because they participated in demonstrations against Proposition 187, or because they complained of mistreatment in a detention facility."); Cole, *supra* note 72, at 360 ("[Outrageous] suggests that the Court was seeking to forestall a parade of horrors: an INS plan to selectively deport all black aliens, or all immigrants who have supported the Democratic party."). Neither, however, has explored the selective deportation scenario explored in this article (nor has anyone else, to this author's knowledge).

76. See Neuman, *supra* note 72, at 314 ("Although it is possible that members of the majority do believe that the First Amendment does not significantly constrain federal deportation power, that is not what the opinion says, and may not be a necessary implication of its reasoning.").

77. See Cole, *supra* note 72, at 348.

willing to protect the constitutional rights of homosexuals and noncitizens, it is generally reluctant to do so absent particularly discriminatory governmental conduct and the absence of a legitimate, countervailing interest. The “outrageous” test outlined in *AADC* is but a variant of the constitutional and subconstitutional analyses employed in the cases described below.

The remainder of Part II unfolds in three sections. Reviewing the gay rights cases, Section B demonstrates that while an unprotected class, homosexuals appear to be granted constitutional protection from egregious discriminatory government conduct based on their sexual orientation when they do not claim any special substantive rights or impinge upon the constitutional rights of others. Analogously, Section C’s analysis of the immigration cases reveals that, while the Court is generally reluctant to interfere with the political branches’ immigration power, it will protect the rights of noncitizens to be free from extreme governmental misconduct, unless the government has a legitimate reason for discriminating against a particular group. Based on the foregoing, Section D attempts to define the contours of Scalia’s *AADC* test, applying the two factors described above – the targeting of a disadvantaged group balanced against any countervailing federal or constitutional interest – to the case of our hypothetical same-gender partner overstay.

B. *The Court’s Recent Opinions on Gay Rights*

Effectively comprehending the Court’s gay rights jurisprudence⁷⁸ requires us to compare two sets of cases – *Bowers v. Hardwick*⁷⁹ and *Romer v. Evans*,⁸⁰ on the one hand – and *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,⁸¹ and *Boy Scouts of America v. Dale*,⁸² on the other. In each case, we see the Court struggle with conceptions of substantive due process, equal protection, and First Amendment rights that might provide us with bases for measuring the scope of the rare “outrageous” selective prosecution case hypothesized by Justice Scalia.

78. On the history and development of gay rights in the United States, see generally ESKRIDGE, *supra* note 29; DAVID A.J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* (1999); DUDLEY CLENDINEN AND ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* (1999).

79. 478 U.S. 186 (1986).

80. 517 U.S. 620 (1996).

81. 515 U.S. 557 (1995).

82. 530 U.S. 640 (2000).

1. HARDWICK & EVANS: SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION AS APPLIED TO GAY RIGHTS

Michael Hardwick's appearance before the Supreme Court was the result of a concerted effort to find a test case to challenge the legality of state sodomy laws. The police arrested Hardwick for engaging in sex with another man in the privacy of his apartment after being discovered there by a Georgia police officer who had been invited in by a friend. The officer was there to serve a warrant on Hardwick for public drinking, an offense for which Hardwick had already paid a fine, unbeknownst to the officer. Although originally arrested and temporarily jailed under the state's sodomy law, Hardwick's charges were quickly dropped, but not before an ACLU attorney had persuaded Hardwick to file suit challenging the Georgia law.⁸³

As the case wound its way up to the Supreme Court, one of the leading issues was whether the Court would be willing to extend its conception of constitutional protection of private conduct against charges of immorality by a substantial number of the populace. During the late 1960s and early 1970s, the Court protected a wide range of private activity under the rubric of Fourteenth Amendment "substantive due process," including the choice to use contraception⁸⁴ and the right of abortion.⁸⁵ Thus, one key question was whether the Court would protect from governmental sanction the right to consensual sexual activity conducted in the privacy of one's home.

In a five-to-four decision, the Court answered in the negative. *Bowers v. Hardwick* stands for the proposition⁸⁶ that the due process clause of the Fourteenth Amendment does not provide homosexuals a constitutional right to engage in sodomy, thus affirming a state's right to criminalize such conduct.⁸⁷ Joined in the majority by Justices Burger, Powell, Rehnquist, and O'Connor, Justice White noted that homosexual sodomy was not a substantive liberty right "deeply rooted in this Nation's history and tradition."⁸⁸ On the contrary, laws prohibiting such

83. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 513-14 (1994) (discussing background facts of *Hardwick* case). For a discussion of the facts from Michael Hardwick's perspective, see PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* 392-403 (1988).

84. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

85. *Roe v. Wade*, 410 U.S. 113 (1973).

86. Although recently, Professor Marc Spindelman has called for a reexamination of the traditional holding of *Hardwick*, using a modified analogy to the miscegenation controversy in *Loving v. Virginia*, 388 U.S. 1 (1967). Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359 (2001).

87. *Bowers*, 478 U.S. at 196.

88. *Id.* at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.)).

acts "have ancient roots."⁸⁹ Further, White confirmed the majority's reluctance to expand the concept of substantive due process to recognize new rights "without express constitutional authority," invoking the historical wrangling over unenumerated socioeconomic rights during the 1930s.⁹⁰ Finally, the Court rejected Hardwick's claim that prevailing public sentiment about the immorality of homosexuality was irrational, leaving intact the sodomy laws of then some twenty-five states.⁹¹

The four dissenters⁹² questioned the Court's narrow characterization of the issue before it, broadly depicting the right at stake as "the right to be let alone."⁹³ From that premise, both Justice Blackmun's and Stevens's dissents focused, albeit in slightly different ways, on the legacy of privacy carved out by the Court's precedents in the realm of personal choice that they believe protected the "right to engage in nonreproductive, sexual conduct," even if it offends others.⁹⁴

The deeply divided Court was not aided by revelations that Justice Powell had originally sided with the dissenters in conference, but later switched his vote to side with the majority in upholding the Georgia sodomy law.⁹⁵ Powell attempted to soften the decision's blow by writing a concurrence raising the possibility of an Eighth Amendment objection had Hardwick's sodomy prosecution gone forward.⁹⁶

When questioned four years later about his decision in *Hardwick*, Powell reflected that he "probably made a mistake in that one," noting that his subsequent reading of the opinions in the case suggested to him that the dissenters had the better argument.⁹⁷ As Powell's biographer, Professor John Jeffries, explains, "As startling as his change of heart may have seemed, it was really no more than his continuing unease at

89. *Id.*

90. *Id.* at 194-95. The controversy over substantive due process during the post-*Lochner* New Deal period has been the source of much debate both within and outside the legal literature. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 14-15 (1980) (analogizing the debates over *Lochner* to the 1970s controversies over *Roe v. Wade*); DAVID M. O'BRIEN, *STORM CENTER* 313 (4th ed. 1996). O'Brien stated:

In *Lochner*, a majority read into the Fourteenth Amendment a "liberty of contract" in order to strike down economic legislation. Although the Court later abandoned the doctrine of "liberty of contract," *Lochner* continues to symbolize the original sin of constitutional interpretation – that is, the Court's creation and enforcement of unenumerated rights.

91. *Bowers*, 478 U.S. at 196.

92. Of Justices Blackmun, Marshall, Brennan, and Stevens, the *Bowers* dissenters, only Justice Stevens still serves on the Court.

93. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (citing *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting)).

94. *Id.* at 203-08 (Blackmun, J., dissenting), 216-18 (Stevens, J., dissenting).

95. JEFFRIES, *supra* note 83, at 522-24.

96. See *Bowers*, 478 U.S. at 197-98 (Powell, J., concurring).

97. See JEFFRIES, *supra* note 83, at 530.

choosing between sodomy as a crime and sodomy as a fundamental right. He had never come to rest on that question"⁹⁸ Powell would have preferred to split the difference, not recognizing a homosexual's right to engage in sodomy, but not allowing for the criminal persecution of gays. Clearly, Justice Powell feared the slippery slope. Professor Jeffries further notes:

After all, if homosexuals had a constitutional right to engage in sex, would they not also have the right to object to any form of regulation or restriction disadvantaging them for having done so? Would gays then have a constitutional right to serve in the military or in the intelligence agencies? Would they have a right to teach in public school or work in day care centers? Would there be a constitutional requirement that the law allow homosexual adoption or same-[gender] marriage?⁹⁹

It was a further slide along that same slippery slope that likely gave rise to the litigation in *Romer v. Evans*, the Court's next major foray into the arena of gay rights. On the heels of successful local initiatives to provide protection from sexual orientation discrimination in such cities as Denver and Boulder, the citizens of Colorado decided to amend their constitution to prohibit any state or local governmental body from taking steps to protect gays and lesbians.¹⁰⁰ Pro-"Amendment 2" advocates described the law as a way to ensure that gays and lesbians did not receive special privileges from the government, arguing that civil rights statutes should be reserved for the truly deserving, such as racial minorities.¹⁰¹ Some of the supporting rhetoric likened gay rights legislation to special protections for white males:

For example: Young-Caucasian-males-without-disabilities aren't a protected class. Claims of discrimination are not accepted on the basis of being a Caucasian-male-without-disabilities. But does this

98. *Id.*

99. *Id.* at 518.

100. *Romer v. Evans*, 517 U.S. 620, 623-24 (1996). Colorado's "Amendment 2" reads:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

This Section of the Constitution shall be in all respects self-executing.

Id. at 624.

101. See EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS* 96-97 (1999) (describing rhetoric distinguishing racial discrimination from sexual orientation discrimination). For more on the *Evans* decision, see generally Symposium, *Romer v. Evans*, 6 WM. & MARY BILL RTS. J. 89 (1997); Symposium, *Gay Rights and the Courts: The Amendment 2 Controversy*, 68 U. COLO. L. REV. 287 (1997).

mean that someone belonging to this group has no legal recourse? Of course not. Just ask a Caucasian male, Allen Bakke. If he hadn't had legal recourse, there wouldn't be a famous Supreme Court reverse-discrimination case named after him.¹⁰² For Bakke to get that recourse, however, we didn't have to make Caucasian-males a specially protected class, or declare them, as a group, immune from discrimination. That would have destroyed the whole meaning of civil-rights. And so will protected status for homosexuals. . . . Once more for the record: anti-discrimination laws were written to protect specially protected classes—groups who've proven they need help.¹⁰³

In response, oppositionists had difficulty diffusing the force of the "special rights sound bite" unleashed by the law's supporters. As one anti-Amendment 2 activist remarked, "[T]here is no good phrase or slogan to counter 'special rights.' It takes fifteen minutes of real discussion to undo the damage that phrase does."¹⁰⁴

Amendment 2 passed by a narrow margin: 53.4 percent voted for it, while 46.6 percent voted against it.¹⁰⁵ Ironically, polls conducted by the *Denver Post* before and after the vote suggest that most Coloradans did not believe in discriminating against homosexuals in the areas of employment and housing, for example, which Amendment 2 would have allowed.¹⁰⁶

Just as Justice Powell's *Hardwick* concurrence struggled over how to protect homosexuals from criminal prosecution without conferring upon them new constitutional entitlements, the Colorado voters faced a similar dilemma: Would approval of Amendment 2 promote gay rights beyond providing them with the protection from prosecution we believe they should receive? It is in this factual context that this next debate over gay rights came before the Supreme Court.

In *Evans*, six justices struck down Colorado's Amendment 2 on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment. Specifically, Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer joined Justice Kennedy's opinion declaring that even though homosexuals are not a constitutionally protected class, the Amendment's avowed purposes fail to pass even the deferential rational basis standard:

Amendment 2 fails, indeed defies, even [the rational basis test.] First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional

102. See *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

103. See GERSTMANN, *supra* note 101, at 108.

104. *Id.* at 105.

105. *Id.* at 12.

106. *Id.* at 99-102.

and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.¹⁰⁷

More specifically, the Court thought Amendment 2's unprecedented blanket denial of access to legal protection imposed upon homosexuals thwarted the very purpose of equal protection jurisprudence,¹⁰⁸ and that the avowed rationales for the provision bore no rational relationship to a legitimate state purpose other than to discriminate against homosexuals *qua* homosexuals.¹⁰⁹

Joined by Chief Justice Rehnquist and Justice Thomas in dissent, Justice Scalia viewed the battle over Amendment 2 as pure politics with which the Court should not have involved itself. In his view:

The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.¹¹⁰

More pointedly, Scalia chastised the majority for not even mentioning *Bowers v. Hardwick*, which he characterized as the "the case most relevant to the issue before us today. . . ."¹¹¹ He framed the issue

107. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

108. *Id.* at 633.

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

Id. (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

109. *Id.* at 635.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . ."

Id. (quoting *Civil Rights Cases*, 109 U.S., 3, 24 (1883)).

110. *Id.* at 636 (Scalia, J., dissenting).

111. *Evans*, 517 U.S. at 640.

squarely: "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact laws merely *disfavoring* homosexual conduct."¹¹²

One can distinguish *Hardwick* and *Evans* on doctrine and on fact. Doctrinally, *Hardwick* is a due process case, while *Evans* sounds in equal protection. Factually, the Georgia sodomy law in *Hardwick* was to be applied only to homosexual conduct, while Amendment 2 in *Evans* was to be extended to status. Yet, the *Evans* majority's failure to point out these differences and the apparent incongruity of results which Justice Scalia suggests make for an uneasy peace. Worse still, the availability of both *Hardwick* and *Evans* as valid Supreme Court precedent make prognostication on future gay rights rulings difficult. Perhaps this is what the Supreme Court intended. As Professor William Eskridge explains:

Judges are no longer constrained by *Hardwick* in equal protection cases and can follow *Evans's* lead if they choose to do so. But judges desiring to reject challenges to antigay policies can follow *Hardwick* and limit *Evans* to its unusual facts. This lack of authoritative guidance is probably what the Supreme Court expected after *Evans*: state courts and lower federal courts would struggle with issues of sexual orientation discrimination on a case-by-case basis, less constrained by Supreme Court precedent because of the *Hardwick* versus *Evans* choice now available.¹¹³

While the availability of *Evans* certainly blunts *Hardwick's* impact, the latter is still viable precedent for courts inclined to uphold anti-homosexual laws. Further, in the context of our hypothetical selective deportation of same-gender partner overstays, *Hardwick* and *Evans*, by themselves, provide more limited guidance because they review state, rather than federal, restrictions on gay rights. An INS decision to deport will be viewed with considerably more deference than a state statute, even for constitutional purposes, because of the plenary power and *Chevron* doctrines, which confer virtually limitless discretion upon Congress and administrative agencies, respectively.¹¹⁴ Before exploring an answer to the opening hypothetical, it might be useful to first examine the justices' views in *Hardwick* and *Evans* for some hint as to how they might vote.

Since it is Justice Scalia's *AADC* opinion on what might constitute an "outrageous" selective deportation that ultimately concerns us, let us

112. *Id.* at 641 (emphasis in original).

113. ESKRIDGE, *supra* note 29, at 172.

114. For a recent review of the persistence of the plenary power doctrine and the applicability of the *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), doctrine to the *Elián González* case, see generally Victor C. Romero, *On Elián*, *supra* note 39, at 381-85.

start with him. Although not a participant in *Hardwick*, Scalia's dissent in *Evans* suggests that he might be reluctant to afford any "special rights" to deportable same-gender partners in light of a long-standing deference to legislative fiat in the area of immigration.¹¹⁵ Just as Scalia was willing to defer to Colorado's democratic process which led to Amendment 2's passage, he might likewise be willing to leave foreign policy matters to the better judgment of the federal political branches, especially in the case of a non-suspect class such as homosexuals.¹¹⁶ Then again, Scalia must have had something in mind when he set forth his "outrageous" theory; the open question is whether the selective deportation of a non-suspect class by a federal government otherwise properly exercising its immigration power is sufficiently "outrageous."

Like Scalia, Kennedy did not participate in *Hardwick*, although he penned the majority opinion opposite Scalia's dissent in *Evans*. Kennedy's words reveal a justice who is willing to protect a non-suspect class even under the normally deferential "rational basis" test.¹¹⁷ Would

115. In *Evans*, Scalia chastizes the majority for failing to cite *Hardwick*, which he believed controlled the outcome in *Evans* because homosexuals did not deserve "special protections." See *Romer v. Evans*, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting). Scalia stated:

If it is constitutionally permissible for a state to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct. (As the Court of Appeals for the District of Columbia Circuit has aptly put it: "If the Court [in *Bowers*] was unwilling to object to State laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Padula v. Webster*, 822 F.2d 97, 103 (1987).) And *a fortiori* it is constitutionally permissible for a State to adopt a provision *not even* disfavoring homosexual conduct, but merely prohibiting all levels of State government from bestowing *special protections* upon homosexual conduct. (emphasis in original).

116. In another context, Justice Scalia wrote the following in a decision upholding Oregon's refusal of unemployment benefits to Native Americans who were fired because of their use of peyote, a controlled substance, in a religious ritual: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Div. Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990). While Justice Scalia joined a subsequent opinion by Justice Kennedy in which the Court struck down a law that was specifically enforced against a particular religious group, *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), the discrimination involved in that case burdened a fundamental religious right under the First Amendment, an issue which was not true in *Evans* or in the opening narrative. For more on *Smith* and *Lukumi*, see generally Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563 (1998) (discussing *Smith-Lukumi* as applied to state prohibition of polygamous marriages).

117. See *Romer v. Evans*, 517 U.S. 620, 630-631 (1996) ("In the course of rejecting the argument that Amendment 2 is intended to conserve resources to fight discrimination against suspect classes, the Colorado Supreme Court made the limited observation that the amendment is not intended to affect many anti-discrimination laws protecting nonsuspect classes, *Romer II*, 882 P.2d at 1346, n.9. In our view that does not resolve the issue. In any event, even if, as we doubt,

he be willing to protect the same class of individuals when the federal government exercises its well-established power over immigration by conducting a selective, but otherwise legitimate, removal of a same-gender partner overstay? This is difficult to answer at this juncture, but a review of several other cases in the gay rights and immigration rights areas suggest perhaps an affirmative answer, which will be fully developed below.¹¹⁸

Like Scalia and Kennedy, four other justices on the current Court were not sitting when *Hardwick* was issued: Justices Thomas, Breyer, Ginsburg, and Souter did not participate in the 1986 decision. Unlike Scalia and Kennedy, however, these four did not issue opinions in *Evans* either. At best, we can take note of their alliances – Thomas sided with Scalia in the *Evans* dissent; Breyer, Ginsburg, and Souter joined Kennedy in the majority. Although not an uncommon alignment, this configuration does not tell us how each of these individuals would rule on the constitutionality of our selective deportation narrative. But it does provide us a small piece to what is admittedly a complex puzzle.¹¹⁹

That leaves us with the three justices who participated in both *Hardwick* and *Evans*: Rehnquist, Stevens, and O'Connor. During the ten years between *Hardwick* and *Evans*, the Court saw the ascendancy of Justice Rehnquist to the Chief's position. Rehnquist authored opinions in neither of the two cases, but voted with the majority in *Hardwick* and the dissent in *Evans*, suggesting his reluctance to grant much constitutional protection to homosexuals.

Justice Stevens provides us with more guidance and some useful language. His opinion in *Hardwick* and his decision to sign on to Blackmun's dissent suggest his willingness to extend the same substantive due process rights to homosexuals engaged in private, consensual sex acts already enjoyed by heterosexuals.¹²⁰ More importantly, his discussion of the selective application of a neutral sodomy law against homosexuals

homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint."').

118. See *infra* Part II.(B) & (C).

119. In *AADC*, Justice Souter's objection to Scalia's discussion of the selective deportation issue stemmed as much from the fact that the issue was unbriefed as to the substance of the opinion. *Reno v. AADC*, 525 U.S. 471, 511 (1999) (Souter, J. dissenting) ("No doubt more could be said with regard to the theory of selective prosecution in the immigration context, and I do not assume that the Government would lose the argument. That this is so underscore the danger of addressing an unbriefed issue that does not call for resolution even on the Court's own logic.").

120. *Bowers v. Hardwick*, 478 U.S. 186, 214-20 (1986) (Stevens, J., dissenting).

provides an insight into how he might view the selective deportation of same-gender partner overstays:

A policy of selective application must be supported by a neutral and legitimate interest — something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case. The Court has posited as a justification for the Georgia statute “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.” But the Georgia electorate has expressed no such belief — instead, its representatives enacted a law that presumably reflects the belief that all sodomy is immoral and unacceptable. Unless the Court is prepared to conclude that such a law is constitutional, it may not rely on the work product of the Georgia Legislature to support its holding. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.

Nor, indeed, does the Georgia prosecutor even believe that all homosexuals who violate this statute should be punished. This conclusion is evident from the fact that the respondent in this very case has formally acknowledged in his complaint and in court that he has engaged, and intends to continue to engage, in the prohibited conduct, yet the State has elected not to process criminal charges against him.¹²¹

Stevens’s language implies a strong reluctance to condemn the selective enforcement of criminal laws against homosexuals, especially where the laws themselves are generally not enforced against known offenders. As applied to the context of the same-gender partner overstay, Stevens might very well disapprove of the same selective discrimination even within the context of a civil deportation proceeding.¹²² Moreover, his decision to join the *Evans* majority, albeit *sans* opinion, strengthens the assumption that he would be sympathetic to a same-gender partner’s selective prosecution claim.

Unlike the anti-gay rights Rehnquist or pro-gay rights Stevens, Justice O’Connor switched positions from an anti-gay rights ruling in *Hardwick* to a pro-gay rights stance in *Evans*. Because she did not pen any of the seven opinions in either of the two cases, however, the reasons for her switch are at best, subject to speculation.¹²³ At one level, she might have been persuaded that the doctrinal and factual differences

121. *Id.* at 219 (Stevens, J., dissenting) (emphasis in original) (citations omitted).

122. Although he concurred with the majority in *AADC*, Justice Stevens’s opinion was based on his construction of the statute and not on the selective prosecution grounds discussed here. *AADC*, 525 U.S. at 498-501 (Stevens, J., concurring in judgment).

123. Chief Justice Rehnquist remained in the anti-gay rights camp while Justice Stevens sided with the pro-gay rights faction in both decisions.

between the cases¹²⁴ distinguished the two sufficiently such that, despite Scalia's protest, the *Evans* majority did not even have to mention *Hardwick*. Indeed, a recent report of her views during the *Hardwick* justices' conference suggest that O'Connor may have regarded the plaintiff's claim narrowly: "The right of privacy's source is the Fourteenth Amendment's guarantee of personal liberty. But this right is not absolute and does not extend to private, consensual homosexuality. The state's legislative power to enact this [anti-sodomy] law is not unconstitutional as exercised."¹²⁵ At another level, perhaps Justice O'Connor was merely practicing the pragmatism that characterized Justice Powell's jurisprudence without the same discomfort the earlier justice apparently had with the issue of gay rights.

In sum, this brief review of the Court's Fourteenth Amendment gay rights jurisprudence provides us with the following, very tentative, array with respect to how the individual justices might rule on whether the selective deportation of a same-gender partner was "outrageous" under Justice Scalia's *AADC* opinion: Justices Scalia, Rehnquist, and Thomas would likely be unsympathetic; Justices Kennedy, Stevens, Breyer, Souter, and Ginsburg would likely be sympathetic. Justice O'Connor is the only justice whose gay rights position "changed" between *Hardwick* and *Evans*, and is therefore the most difficult to predict.

2. HURLEY & DALE: FIRST AMENDMENT LIMITS ON GAY RIGHTS

Aside from its Fourteenth Amendment substantive due process and equal protection decisions in *Hardwick* and *Evans*, respectively, the Court has twice examined the First Amendment rights of groups who wish not to express pro-homosexual beliefs.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,¹²⁶ a unanimous Supreme Court overturned a Massachusetts court's decision to enforce the state's anti-discrimination law by requiring parade organizers to allow a gay, lesbian and bisexual organization to participate. Since 1947, the South Boston Allied War Veterans Council has applied for, and been granted, the right to stage Boston's annual St. Patrick's Day parade, an event that had previously been organized by the city. In 1993, the Council denied GLIB, an organization of gay, lesbian, and bisexual descendants of Irish immigrants, permission to march in the parade as an organization, although it did not discriminate against individual members from participation.¹²⁷

124. See *supra* note 111 and accompanying text.

125. See DEL DICKSON, *THE SUPREME COURT IN CONFERENCE (1940-1985)* 824 (2001).

126. 515 U.S. 557 (1995).

127. *Id.* at 557, 560-66.

In a single, unanimous opinion by Justice Souter, the Court held that the Council's decision to exclude GLIB was constitutionally protected from government coercion under the First Amendment. After finding that the parade constituted a protected expressive activity, the Court reasoned that the Council's action to exclude GLIB because of its disagreement with the latter's message was constitutionally permissible. "[W]hatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."¹²⁸ The Court also emphasized the difference between government regulating acts versus speech: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."¹²⁹

As in *Hurley*, the *Dale* Court was asked to review a state court's decision to enforce its anti-discrimination law in favor of a homosexual against a private organization. Unlike the unanimity with which the Court decided *Hurley*, however, a closely divided Court produced the five-to-four split in *Dale* for which Chief Justice Rehnquist's majority opinion appeared next to dissents by Justices Stevens and Souter, the author of *Hurley*.

In *Boy Scouts of America v. Dale*,¹³⁰ Justices Scalia, Thomas, Kennedy, and O'Connor joined the Chief Justice's opinion holding that the Boy Scouts could not be required by New Jersey's anti-discrimination law to re-admit James Dale as an assistant scoutmaster. Dale, a long-time scout and adult member, was expelled from the Boy Scouts when it found out he was gay and a gay rights activist. The New Jersey Supreme Court ruled that the state public accommodations anti-discrimination law mandated that the Boy Scouts reinstate Dale.¹³¹ The court also stated that the *Hurley* case was inapposite since Dale's participation in the Boy Scouts would "not compel the Boy Scouts to express any message" to which they demurred.¹³²

Chief Justice Rehnquist and four others disagreed with the New Jersey court. Indeed, the majority found *Hurley* controlling:

Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not "promote homosexual conduct as a legitimate form of behavior." As the presence of GLIB in Boston's St. Patrick's

128. *Id.* at 575.

129. *Id.* at 579.

130. 530 U.S. 640 (2000).

131. *Id.* at 646.

132. *Id.* at 647.

Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's (sic) choice not to propound a point of view contrary to its beliefs.¹³³

The Court then balanced this burden on the Boy Scouts' First Amendment rights against New Jersey's desire to protect homosexuals from discrimination. The court concluded that enforcement of the state statute would materially interfere with the Boy Scout's constitutional rights.¹³⁴ Rehnquist noted that the state's interests did not permit such a "severe intrusion," a result which was apparently anticipated by the *Hurley* opinion.¹³⁵

Justices Stevens and Souter, *Hurley's* author, each filed a dissenting opinion. Both Ginsburg and Breyer joined each of the opinions; Souter joined Stevens's opinion, but Stevens did not join Souter's.

Justice Stevens's six-part dissenting opinion focused largely on distinguishing *Hurley* in two key respects: First, Stevens engaged in a lengthy review of the record in this case, concluding that the Boy Scouts' allegations that its deep-seated belief that homosexuality is not "morally straight" is supported not by the underlying facts but only by bald statements in their briefs.¹³⁶ And second, while he conceded that the Boy Scouts have a right not to have Dale advocate homosexuality in his role as an assistant scoutmaster, Stevens disagreed with the majority's conclusion that Dale's very presence in a scoutmaster's uniform sends a message the Boy Scouts do not want to express:

Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any fact sheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.¹³⁷

133. *Id.* at 654.

134. *Id.* at 659.

135. *Id.* at 659 n.4. Rehnquist noted:

We anticipated this result in *Hurley* when we illustrated the reasons for our holding in that case by likening the parade to a private membership organization. [*Hurley*,] 515 U.S., at 580, 115 S.Ct. 2338. We stated: "Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 580-581, 115 S.Ct. 2338.

136. *Dale*, 530 U.S. at 684-85 (Stevens, J., dissenting).

137. *Id.* at 695.

Thus, Stevens concluded that the only viable justification for the majority's opinion is that "homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment."¹³⁸

Justice Souter's dissent began with an affirmation of the first five parts of Stevens's piece, but then disavowed allegiance to the sixth part, which focused on society's growing acceptance of homosexuals. Joined by Breyer and Ginsburg, Souter asserted that there is no constitutional significance to Stevens's observations: "The fact that we are cognizant of this laudable decline in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case."¹³⁹ Thus, Souter limited the grounds for his opposition to the fact that the Boy Scouts have not made "sexual orientation the subject of any unequivocal advocacy."¹⁴⁰ Stevens highlighted this point in his dissent to distinguish the case from *Hurley*.

Following *Hurley*, a gay rights activist might be encouraged that *Dale* was not a unanimous opinion. Examining the Court's language regarding the relevance of anti-gay stereotypes in First Amendment jurisprudence, however, it is clear that, save for Justice Stevens, the Court's members believe that public pro- or anti-homosexual rhetoric plays no role in the Court's constitutional analysis of a free expression claim. This is evident not just in the passage from Souter's opinion quoted above, but also in Chief Justice Rehnquist's admonition that greater societal tolerance of homosexuality "is scarcely an argument for denying First Amendment protection to those who refuse to accept these views."¹⁴¹ To the extent that the seven other justices – all but Stevens – signed on to either Rehnquist's or Souter's statements suggest that there is little sympathy on the Court for considering popular trends, even if they are supported by democratically enacted, anti-discrimination legislation. Indeed, as Rehnquist opines, "[T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."¹⁴²

Although Justice Souter might agree with Rehnquist about the irrelevance of anti-gay sentiment in analyzing a First Amendment claim, he appears to welcome the idea that negative stereotypes are fading from view. Specifically, he applauds the "laudable decline"¹⁴³ in such think-

138. *Id.* at 696.

139. *Id.* at 701 (Souter, J., dissenting).

140. *Id.*

141. *Id.* at 660.

142. *Id.*

143. *Id.* at 701 (Souter, J., dissenting) ("The fact that we are cognizant of this laudable decline

ing. To the extent that Justices Breyer and Ginsburg also signed on to the Souter opinion, it is not unfair to suggest that they might likewise agree with his assessment. Justice Stevens clearly supports this belief, as demonstrated by Part VI of his opinion.¹⁴⁴ Finally, given Kennedy's pro-gay rights stance in *Evans* and O'Connor's vote switch from *Hardwick* to *Evans*, it is possible that these two swing voters would likewise applaud the decline of invidious sexual orientation stereotyping, especially given their apparent distaste for negative gender stereotypes, as will be explored below.¹⁴⁵

Thus, despite the fact that three of the four opinions reviewed here might, at first blush, be described as anti-gay rights, there might be sufficient sentiment on the Court for protecting homosexuals more than is to be expected. Specifically, a majority of the Court – Justices Stevens, Souter, Breyer, Ginsburg, O'Connor, and Kennedy – may be unwilling to tolerate much stereotypical, animus-based discrimination against homosexuals outside the confines of a First Amendment debate.

Further, the Court itself has stated that issues of discrimination are properly raised within the context of the Fourteenth Amendment, as opposed to being grounded elsewhere in the Constitution. In *Whren v. United States*,¹⁴⁶ for example, the Court rejected the plaintiffs' assertions that they were constitutionally protected from racially-motivated traffic stops by the Fourth Amendment's provisions for reasonable searches and seizures. Instead, the Court stated that any selective prosecution claims should be brought as alleged violations of the Fourteenth Amendment's Equal Protection Clause.¹⁴⁷ Interestingly, the Court in

in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case.”).

144. *Id.* at 700 (Stevens, J., dissenting). Stevens wrote:

That such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts nor the Court disputes. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers. As Justice Brandeis so wisely advised, “we must be ever on our guard, lest we erect our prejudices into legal principles.” If we would guide by the light of reason, we must let our minds be bold. I respectfully dissent.

Id. (citations omitted).

145. See *infra* Part II(C) for a discussion of O'Connor's and Kennedy's views with respect to gender stereotypes in *Miller v. Albright*, 523 U.S. 420 (1998).

146. 517 U.S. 806 (1996).

147. See *id.* at 813. In *Whren*, the Court stated:

We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

Hurley specifically noted that GLIB did not raise an equal protection claim and that the case was to turn instead on the Boy Scouts' First Amendment expressive association argument.¹⁴⁸ While it might have had difficulty persuading the Court that sufficient state action was involved to keep the claim alive, one wonders whether GLIB might have been better off pursuing the equal protection argument, knowing now that 1996's *Evans*, another equal protection decision, followed on the heels of the 1995 *Hurley* decision.

Our hypothetical same-gender partner overstay might glean the following lesson from the preceding analysis of the Supreme Court's gay rights cases. It appears that she would be best off emphasizing discrimination claims outside the realm of First Amendment free expression (as in *Hurley* and *Dale*) or of special substantive due process rights (like in *Hardwick*).¹⁴⁹ Instead, an equal protection analysis that emphasizes extreme, animus-driven conduct by the government based solely on sexual orientation would be a better theme (as in *Evans*).¹⁵⁰ Put another way, the justices appear reluctant to either create new rights or violate third parties' constitutional rights. Nonetheless, a majority of the Court will uphold the cause of persons unduly discriminated against because of their status rather than conduct.

This pattern of minimal judicial intervention is also reflected in the Court's recent immigration and nationality cases: *Miller v. Albright*,¹⁵¹

Id.

148. See *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995).

Given the scope of the issues as originally joined in this case, it is worth noting some that have fallen aside in the course of the litigation, before reaching us. Although the Council presents us with a First Amendment claim, respondents do not. Neither do they press a claim that the Council's action has denied them equal protection of the laws in violation of the Fourteenth Amendment.

149. She could attempt to pursue a variant of the expressive association claim asserted in *Dale* — the "right of intimate association." See generally Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). This option will be briefly explored, and ultimately rejected because of *Hurley-Dale*. See *infra* note 228.

150. Because she would be asserting an equal protection-like claim against the federal government, the plaintiff's claim would be based in the Fifth Amendment's Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

151. 523 U.S. 420 (1997).

Nguyen v. INS,¹⁵² and a pair of consolidated cases – *Zadvydas v. Davis/Ashcroft v. Ma*¹⁵³ and *INS v. St. Cyr/INS v. Calcano-Martinez*.¹⁵⁴ When it believes that the government is unfairly discriminating against a group or individual based on noncitizen status, the Court steps in to protect them. If the government has a strong countervailing federal interest in maintaining the discriminatory practice, however, the Court will not interfere.

C. The Court's Recent Opinions on Immigrants' Rights

1. THE PARALLEL TO *HARDWICK-EVANS*: *MILLER-NGUYEN*

Just as the characterization of the claims in *Hardwick* (substantive due process) and *Evans* (equal protection) played such a crucial role in these cases' outcomes, so too did characterization matter in *Miller v. Albright*.¹⁵⁵ The analysis in *Miller* depended less on the constitutional claim that was asserted (equal protection), however, than who was asserting the right (citizen versus noncitizen). In the end, the Court's failure to reach consensus on the equal protection claim in *Miller* prompted it to grant certiorari this past term in *Nguyen v. INS*,¹⁵⁶ on the same issue.

In *Miller v. Albright*, the Supreme Court issued a six-to-three decision where no opinion mustered more than three votes (indeed, the two dissenting opinions were the threesomes). Lorelyn Penero Miller, the daughter of a Filipino mother and American father who had never married, challenged a provision in the Immigration and Nationality Act requiring United States citizen fathers, but not mothers, to assert their paternity within eighteen years of the child's birth. Miller's primary argument was that this was a form of unconstitutional gender discrimination built into the immigration code, especially given the enhanced scientific methods of proving paternity today that made the INA provision appear to endorse the outmoded stereotype of the uncaring father. The Court upheld the statute with three pairs of justices issuing different opinions to justify the holding.

Justice Stevens, writing for himself and Chief Justice Rehnquist, thought that a rational basis test (just as in *Evans*) applied to this equal protection challenge on the theory that immigration policy is subject to the plenary power of Congress. But even if a heightened form of scru-

152. 533 U.S. 53 (2000).

153. 533 U.S. 678 (2001).

154. 533 U.S. 289 (2001).

155. The portions of the text describing *Miller* were taken in large measure from my previous work, Romero, *On Elián*, *supra* note 39, at 357-59.

156. *Nguyen v. INS*, 208 F.3d 528 (5th Cir. 2000), *cert. granted*, 530 U.S. 1305 (2000).

tiny applied, Stevens believed that Congress's concern over fostering a good relationship between father and child while the child is a minor, among other reasons, satisfied this more stringent test.¹⁵⁷

Justice Scalia, joined by Justice Thomas, asserted that the Court had no power to provide the relief Miller requested. To the extent that Miller sought citizenship as her remedy, Scalia asserted that only Congress could confer this upon her, even if the Court was to agree with her equal protection claim.¹⁵⁸

Justice O'Connor, joined by Justice Kennedy, seemed to suggest that the viability of the gender-based equal protection claim was governed by who brought the suit. Because Miller was a noncitizen, the challenged statute, as applied to her, would be upheld under the most deferential "rational basis" standard of review. O'Connor therefore concluded that Stevens's analysis of the statute was correct.¹⁵⁹ However, in an interesting piece of dicta, O'Connor noted that had Miller's father, who had been erroneously dismissed from the case, remained in the suit, the heightened scrutiny befitting a gender-based claim would have applied, and O'Connor would have voted to strike down these provisions.¹⁶⁰

The O'Connor opinion is particularly intriguing because its gender discrimination analysis tracks that of the dissenters in *Miller*, all three of whom voted to strike down the legislation. Over the course of two opinions, Justices Ginsburg, Breyer, and Souter agreed with the heightened scrutiny standard mentioned in the O'Connor dicta. Unlike O'Connor, however, none of the three justices found standing to be a relevant issue, paving the way for Miller to assert her father's gender-based claim as a third party.¹⁶¹

The *Miller* decision is therefore as frustrating as it is encouraging for individual constitutional rights claims. On the positive side, a solid five-person majority on the Court asserted that gender-based stereotypes could not survive an equal protection challenge even within the realm of immigration and nationality law.¹⁶² On the other hand, the thrust of O'Connor's dicta spoke only to the rights of citizens in conferring citizenship upon their noncitizen children born out of wedlock, rather than

157. *Miller*, 523 U.S. at 440.

158. *Id.* at 452-59 (Scalia, J., dissenting).

159. *Id.* at 445-52.

160. *Id.* at 451-52.

161. *Id.* at 460-90.

162. For more on *Miller*, see generally Cornelia T. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1; *The Supreme Court 1997 Term: Gender Discrimination—Immigration and Nationality Act*, 112 HARV. L. REV. 202-12 (1998).

directly affirming the rights of the noncitizen herself. Indeed, even the Breyer dissent noted that a deferential standard of review applies “in [cases] involving aliens.”¹⁶³

Nguyen v. INS resolved the issue which *Miller* left open: Could the gender-based distinction governing the conferral of citizenship to an out-of-wedlock foreign child survive heightened scrutiny under the Court’s equal protection jurisprudence? In a sharply divided 5-4 vote, Justice Kennedy, joined by Scalia, Thomas, Rehnquist, and Stevens, held that it did. Justice O’Connor, joined by Souter, Ginsburg, and Breyer, filed a dissent.¹⁶⁴

Interestingly, both the majority and dissent agreed on the proper standard to be applied here, that of heightened or intermediate scrutiny as befits gender-discrimination claims. As such, the government was charged with asserting an important governmental objective that was substantially related to the challenged gender-based classification.¹⁶⁵ It was in the application of the test that the two sides differed. The majority found that the dual interests in assuring that: (1) “a biological parent-child relationship exists;”¹⁶⁶ and (2) “the child and the citizen parent have some demonstrated opportunity or potential to develop . . . a relationship that . . . consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States”¹⁶⁷ were substantially related to the gender-based classification. The dissent rejected these ideas as the province of speculation and stereotype.

Despite Kennedy’s authorship, Justice Stevens’s influence was evident throughout the majority opinion. Aside from anchoring his analysis on two governmental objectives first identified by Stevens in *Miller*,¹⁶⁸

163. *Miller*, 523 U.S. at 480 (Breyer, J., dissenting).

164. Justice Scalia, joined by Thomas, filed a concurring opinion tracking his earlier argument in *Miller* that only Congress was authorized to confer citizenship, but felt it appropriate to reach the equal protection issue since a majority of the Court was so inclined. *Nguyen v. INS*, 533 U.S. 53, 121 S.Ct. 2053, 2066 (2001) (Scalia, J., concurring).

165. *Id.* at 2059. “For a gender-based classification to withstand equal protection scrutiny, it must be established ‘‘at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” *Id.* at 2066. O’Connor stated:

Because the Immigration and Naturalization Service (INS) has not shown an exceedingly persuasive justification for the sex-based classification embodied in 8 U.S.C. § 1409(a)(4)—i.e., because it has failed to establish at least that the classification substantially relates to the achievement of important governmental objectives—I would reverse the judgment of the Court of Appeals.

Id. (O’Connor, J., dissenting).

166. *Id.* at 2060.

167. *Id.* at 2061.

168. See *Miller v. Allbright*, 523 U.S. 420, 435 (1997) (“The [challenged provision] serves, at least in part, to ensure that a person born out of wedlock who claims citizenship by birth actually shares a blood relationship with an American citizen.”). *Id.* at 438 (“Section 1409 also serves two

Justice Kennedy specifically mentioned Stevens as having argued that the gender neutrality advocated by the dissent masks the real biological difference between mother (who is always present at the child's birth) and father (who may not be).¹⁶⁹ Following Stevens's reasoning, Kennedy concluded that "the differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth."¹⁷⁰

It is curious that Kennedy, who had joined O'Connor in *Miller*, and not Stevens, adopted much of Stevens's reasoning in *Nguyen*. This is particularly noteworthy given O'Connor's (and thus implicitly, Kennedy's) specific disavowal of Stevens's assertion in *Miller* that the statute would survive heightened scrutiny.¹⁷¹ Having been described as one with a "streak of independence"¹⁷² — a phrase most closely associated

other important purposes that are unrelated to the determination of paternity: the interest in encouraging the development of a healthy relationship between the citizen parent and the child while the child is a minor; and the related interest in fostering ties between the foreign-born child and the United States.") (Stevens, J., concurring).

169. See *Nguyen*, 533 U.S. 53, 121 S.Ct. at 2061.

Finally, to require Congress to speak without reference to the gender of the parent with regard to its objective of ensuring a blood tie between parent and child would be to insist on a hollow neutrality. As Justice STEVENS pointed out in *Miller*, Congress could have required both mothers and fathers to prove parenthood within 30 days or, for that matter, 18 years, of the child's birth. 523 U.S., at 436, 118 S.Ct. 1428. Given that the mother is always present at birth, but that the father need not be, the facially neutral rule would sometimes require fathers to take additional affirmative steps which would not be required of mothers, whose names will appear on the birth certificate as a result of their presence at the birth, and who will have the benefit of witnesses to the birth to call upon. The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. The equal protection question is whether the distinction is lawful. Here, the use of gender specific terms takes into account a biological difference between the parents.

170. *Id.*

171. See *Miller*, 523 U.S. at 451-52.

Although I do not share Justice STEVENS' assessment that the provision withstands heightened scrutiny, *ante*, at 1436-1442, I believe it passes rational scrutiny for the reasons he gives for sustaining it under the higher standard. It is unlikely, in my opinion, that any gender classifications based on stereotypes can survive heightened scrutiny, but under rational scrutiny, a statute may be defended based on generalized classifications unsupported by empirical evidence.

Id. (O'Connor, J., dissenting) (internal citations omitted).

172. John Paul Jones, & Anthony McLeod Kennedy, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 277 (Melvin I. Urofsky ed., 1994). Another commentator described the first five terms of Justice Kennedy's tenure thusly:

On balance, he has been a consistent member of the Court's conservative majority on practically every issue. His cautious approach applies both to judicial technique and to substantive results. The most obvious feature to his judicial technique is a strong respect for precedent. On occasion, however, Justice Kennedy is not a technical conservative. At times, his analytical path to a restrictive result tramples precedent and operates on the basis of questionable empirical assumptions.

with Stevens's jurisprudence¹⁷³ — Kennedy's decision to break ranks from his usual conservative allies was noted earlier in *Evans*.

This time, however, he abandoned the liberal wing perhaps because of his concern about granting automatic citizenship to a large number of children born of United States servicemen and their foreign partners. Although never explicitly stated, Kennedy's caution surfaced during his discussion about the biological differences between verifying maternity versus paternity. After stating that, unlike biological mothers, fathers may not be physically present at a child's birth, Kennedy invoked the image of the millions of American soldiers stationed abroad, noting that the vast majority are male.¹⁷⁴ The implication is that Congress did not want to grant automatic citizenship to binational "G.I. babies"; therefore, the Court should be reluctant to thwart legislative intent by opening the floodgates to a stream of new citizens. While "invasion" arguments are as old as the *Chinese Exclusion Case*,¹⁷⁵ they are seldom tested empirically. Even assuming that automatic citizenship was conferred upon the hypothetical millions of children sired by United States servicemen and

Theodore Eisenberg, *Anthony M. Kennedy*, in LEON FRIEDMAN & FRED L. ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1733* (1997).

One partial to the *Nguyen* dissent might argue, as Justice O'Connor does, that Kennedy's majority opinion is at least inconsistent with the Court's most recent gender-based equal protection cases (see, e.g., *VMI* and *Hogan*), if not the "trampling" of precedent that Professor Eisenberg describes.

173. See, e.g., Sue Davis, *John Paul Stevens*, in *SUPREME COURT JUSTICES*, *supra* note 172, at 409 (noting that the distinguishing characteristic of Stevens's Supreme Court career has been his independence).

174. "Given the nine month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity. This fact takes on particular significance in the case of a child born overseas and out of wedlock. One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries. See Department of Defense, *Selected Manpower Statistics* 48, 74 (1999) (reporting that in 1969, the year in which Nguyen was born, there were 3,458,072 active duty military personnel, 39,506 of whom were female); Department of Defense, *Selected Manpower Statistics* 29 (1970) (noting that 1,041,094 military personnel were stationed in foreign countries in 1969); Department of Defense, *Selected Manpower Statistics* 49, 76 (1999) (reporting that in 1999 there were 1,385,703 active duty military personnel, 200,287 of whom were female); *id.* at 33 (noting that 252,763 military personnel were stationed in foreign countries in 1999)." *Nguyen v. INS*, 533 U.S. 53, 121 S.Ct. 2053, 2061-62 (2001). See also David A. Martin, *Behind the Scenes On A Different Set: What Congress Needs To Do In The Aftermath of St. Cyr and Nguyen*, 16 *GEO. IMMIGR. L.J.* 313, 335 (2002) ("If Nguyen had gone the other way, tens or hundreds of thousands of individuals of all ages, with absolutely no social or experiential connection with life in the United States, would suddenly have had all the rights associated with U.S. citizenship, including most importantly the right to settle here. The Court, citing statistics about the wide travel of Americans and the posting of U.S. soldiers overseas (presumably fathering non-marital offspring), abundantly signaled its concern about such consequences.").

175. See *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889) (noting California's observation describing the influx of Chinese workers constituted "immigration in numbers approaching the character of an Oriental invasion, and was a menace to our civilization").

birthed by noncitizen women, it is likely that only a fraction of these children raised in a foreign country would opt for American citizenship, given class, cultural, and distance barriers.

Further, Kennedy might have believed that the hardship imposed upon fathers is reasonable, unlike what he viewed as the virulent campaign waged against homosexuals in *Evans*.¹⁷⁶ Kennedy noted that the challenged INA code section provides three ways by which a parent may confer citizenship upon a child: by legitimation; court paternity order; or written acknowledgment of paternity. In addition, a child may seek citizenship separate and apart from his relationship to his biological father based on the child's own ties to the United States.¹⁷⁷ In contrast, Colorado's Amendment 2 would have rendered homosexuals powerless to effect any anti-gay change in that state's law.

In her dissent, Justice O'Connor took the opposite view from Kennedy. She focused on the Court's departure from their recent gender-based equal protection jurisprudence, giving only lip service to the idea of heightened scrutiny.¹⁷⁸ First, O'Connor questioned whether the majority's proffered interest in providing fathers the potential to have a relationship with their out-of-wedlock offspring was based on nothing more than pure post-litigation argument rather than on congressional intent.¹⁷⁹ But even assuming the validity of determining congressional intent as the purported goal, O'Connor argued that a gender-neutral statute requiring the physical presence at or awareness of the child's birth would have satisfied this interest.¹⁸⁰ Second, because of the ease of determining paternity through modern methods such as DNA testing, O'Connor contended that protecting the statute's gender-based classification perpetuated an impermissible stereotype of the differences between mothers and fathers.¹⁸¹ Thus, O'Connor concluded that the majority's application of heightened scrutiny was incorrect, but hoped that time will reveal *Nguyen* to be an aberration in the Court's equal protection jurisprudence.¹⁸²

Even though he penned no opinion in *Nguyen*, Justice Stevens's vote was not a surprise, given his endorsement of the challenged provision in *Miller*. Like Kennedy, Stevens probably viewed this statute as simply equalizing the parenting responsibilities placed upon mothers

176. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (describing Amendment 2 as seeming "inexplicable by anything but animus toward the class it affects. . .").

177. See *Nguyen*, 533 U.S. 53, 121 S.Ct. at 2064.

178. *Id.* at 2078 (O'Connor, J., dissenting).

179. *Id.* at 2068-69.

180. *Id.* at 2072-73.

181. *Id.* at 2069.

182. *Id.* at 2078-79.

and fathers with respect to their illegitimate offspring. Moreover, given Stevens's prior rejection of the Court's tripartite equal protection analysis,¹⁸³ perhaps Stevens felt no qualms about upholding the challenged provision under either the "intermediate scrutiny" or "rational basis" tests.¹⁸⁴ Indeed, if Stevens's ultimate concern was protecting the rights of the disadvantaged, then one can reconcile his votes in *Evans* and *Nguyen* by distinguishing the great burden barriers to voting rights based on sexual orientation might have when compared with the less onerous burden on a father to actually take responsibility for his offspring by declaring his paternity for citizenship purposes before the child's eighteenth birthday.

Yet, this analysis is not completely satisfying. Behind the citizen fathers in *Miller* and *Nguyen* were noncitizen children who were denied citizenship by virtue of the Court's rulings. Indeed, in earlier cases involving both documented and undocumented immigrants, Stevens has shown compassion for a class he has described as "already subject to disadvantages not shared by the remainder of the community."¹⁸⁵ Reminiscent of *Carolene Products*,¹⁸⁶ Stevens invoked that opinion's lan-

183. The Court has followed a three-tiered system of equal protection analysis, subjecting racial classifications to strict scrutiny, gender classifications to intermediate review, and general economic legislation to a "rational basis" test. See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 638-44 (6th ed. 2000). Justice Stevens, however, explicitly rejected this approach in *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring):

There is only one Equal Protection Clause. It requires every state to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in others. . . . I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method that the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.

See also SUPREME COURT JUSTICES, *supra* note 172, at 411 ("Stevens has rejected [the Court's equal protection analysis] arguing that the three standards of analysis cannot adequately explain the Court's decisions.").

184. Interestingly, despite his prior rejection of the tripartite equal protection regime, Stevens asserted in *Miller* that immigration and nationality law were areas over which Congress enjoyed plenary power, thus entitling it to considerable deference. *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1997) ("Deference to the political branches dictates 'a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.'") (Stevens, J., concurring) (internal citation omitted). Although Kennedy appropriated much of Stevens's *Miller* analysis, he specifically refused to address the issue of Congressional plenary power in *Nguyen*. *Nguyen*, 533 U.S. 53, 121 S.Ct. 2053, 2065 ("In light of our holding that there is no equal protection violation . . . we need not assess the implications of statements in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power.").

185. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976).

186. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938) ("prejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect those minorities . . . [thus calling] . . . for a correspondingly more searching judicial inquiry.").

guage by describing immigrants as a “discrete and insular” minority.¹⁸⁷ But perhaps the question of hardship is one of degree for Stevens (and likely for Kennedy as well): Notwithstanding the arguably blameless status of the noncitizen children in *Nguyen* and *Miller*, Stevens would likely distinguish the complete inability of homosexuals to thwart Colorado Amendment 2 because of its breadth with the relatively less burdensome task of seeking a declaration of paternity from one’s father within an eighteen-year period.

Of course, even this characterization fails to capture the reality that for many noncitizen children, the labyrinthine Immigration and Nationality Act enforced by an overburdened federal agency¹⁸⁸ may make even this apparently wide-open window of opportunity seem particularly narrow. As Stevens acknowledged previously, noncitizens “are not entitled to vote and . . . are often handicapped by a lack of familiarity with our language and customs.”¹⁸⁹ Add to this the difficulty Ms. Penero Miller faced in trying to have her United States based father acknowledge her existence while she resided in the Philippines,¹⁹⁰ and the burdens faced by the *Evans* and *Miller/Nguyen* plaintiffs appear not so different.

We are thus left to speculate as to how *Nguyen* might influence our analysis of a same-gender partner’s selective deportation claim, in light of the *Hardwick* and *Evans* line of gay rights cases.¹⁹¹ One thing is

187. *Hampton*, 426 U.S. at 102 (striking down federal regulations denying civil service employment to legal permanent residents). Aside from penning the majority opinion benefitting legal permanent residents in *Hampton*, Stevens also voted in favor of undocumented immigrants in *Plyer v. Doe*, 457 U.S. 202 (1982) (holding unconstitutional Texas law depriving undocumented immigrant children of public school education).

188. The travails of the INS are well-documented. In a recent study by Syracuse University’s Government Performance Project, the INS was judged the least reliable among the twenty agencies surveyed, with a rating of “C-.” *All Things Considered: Immigration and Naturalization Service Is Under Fierce Criticism for Poor Leadership, Accountability and Management* (NPR radio broadcast, Apr. 6, 2000), available at 2000 WL 21470322.

189. *Hampton*, 426 U.S. at 102.

190. See Nancie L. Katz, *High Court Hears Citizenship Case of Girl Abandoned by U.S. Soldier*, HOUSTON CHRONICLE, Nov. 5, 1997, at A9 (“After a seven-month affair in the Philippines, [Charlie Miller] says, he deserted Luz Penero. He had fought in Vietnam and wanted to forget his six years in combat. He spent two decades ignoring his child’s letters, but after 22 years, he wrote back.”).

191. Aside from *Nguyen*, the Court recently decided one other case *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164 (2001), which relates to administrative law and therefore might greatly influence future immigration decisions. It modifies the long-standing *Chevron* doctrine, as discussed earlier, which, requires the Court to generally defer to administrative agency interpretations of ambiguous Congressional statutes. Specifically, the Court ruled that Congress did not intend for the United States Customs Service’s tariff classifications to have the force of law, and thus, such classifications were not entitled to *Chevron* deference. *Id.* at 2177. Rather than simply deferring to authoritative agency interpretations, the Court will examine first whether Congress interpreted such agency action to have the force of law. *Id.* Thus, the Court noted that “[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure [such as notice-

clear: even though *Evans* permitted an avenue of equal protection argument that barred a state's action against homosexuals, the landscape changes when the federal government's interests over immigration are at stake. Justices whose views are as diverse as Rehnquist and Stevens agree that, when it comes to immigration decisions, Congress has virtually unlimited power to regulate admissions and exclusions. Moreover, the entire Court agreed to apply a heightened scrutiny test to the federal statute in *Nguyen* that appeared to be a shadow of the robust rational basis review applied to the state anti-homosexual law struck down in *Evans*.

Examining his record in the four gay rights cases discussed here, Justice Stevens voted in favor of homosexual rights in three of the four lawsuits, including the equal protection suit in *Evans*. Yet, the selective deportation suit might be more like *Hurley* than *Evans* for Stevens. Just as *Hurley* involved the First Amendment's grant of rights to trump a state's anti-discrimination law, so might Congress's plenary power to authorize the deportation of overstays (and the INS's concomitant *Chevron* power to enforce it)¹⁹² trump Vermont's desire to confer its same-gender partner benefits to those who decide to civilly unite. Then again, Stevens's strong pro-gay rights rhetoric in *Hardwick*¹⁹³ suggests that his understanding of the federal government's exercise of its deportation power may not be selectively enforced, much in the way the Court described the neutral Georgia sodomy law as targeting same-gender acts only. Assuming he considers deportation a punishment of sufficient consequence, Stevens might very well consider "outrageous" the selec-

and-comment provisions] tending to foster fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 2172. Because immigration law is administrative in nature, *Mead* will likely have a significant impact upon INS actions in the future. However, it probably will not have a particularly strong bearing on the issues discussed here.

For instance, in *Mead*, the Court cited with approval its recent decision in *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), in which it noted that agency interpretations contained in policy statements, agency manuals, and enforcement guidelines, lack the force of law and are therefore not entitled to *Chevron* deference. *Mead*, 533 U.S. 218, 121 S.Ct. at 2176 n.17 (citing *Christensen*). Thus, *Mead* might support the idea that no deference should be given to INS's selective enforcement because such deportation pursuant to an INS directive would not have the force of law. However, this is a tenuous link, at best. More likely, *Mead* is arguably irrelevant here because INS in this instance is not interpreting any Congressional statute. It is simply enforcing a Congressional directive, the merits of which the deportee does not dispute. Indeed, unlike the parties in *Mead*, Ms. Camacho, the foreign same-gender partner in the opening narrative does not dispute her deportability under the statute; rather, she questions the INS's decision to selectively deport her based on her sexual orientation.

192. See generally *Chevron U.S.A. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984) (holding that reviewing courts must give greater deference to agency's interpretation of its own statutes).

193. See *supra* notes 120-21 and accompanying text.

tive deportation of same-gender partner overstays as invidiously unconstitutional.

Justices O'Connor and Kennedy also remain mysteries in this game of prediction. On the one hand, they both voted for the class of homosexuals in *Evans*, yet they refused to side with the three dissenters in *Miller*, based on their standing analysis, and then finally parted ways on the constitutionality of the gender-based classification in *Nguyen*. Indeed, save for the *Evans* and *Nguyen* decisions, O'Connor has voted against gays or noncitizens in five of the seven cases surveyed thus far; Kennedy has voted negatively on these issues in five of the six cases. Yet, both O'Connor and Kennedy appear to loathe broad, stereotyped depictions of groups based on sexual orientation (for both justices in *Evans*) and, sometimes, gender (for only O'Connor in *Nguyen*). Aside from Kennedy's strong stance against animus-based legislation in *Evans*,¹⁹⁴ O'Connor's closing remarks in *Nguyen* are equally powerful:

No one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications. Today's decision instead represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to such classifications to determine whether a constitutional violation has occurred. I trust that the depth and vitality of these precedents will ensure that today's error remains an aberration.¹⁹⁵

Kennedy and O'Connor display the same distaste as Souter for the negative stereotypes that appeared in *Dale*.¹⁹⁶ In adjudicating the selective deportation claim then, the key issue for O'Connor and Kennedy will likely be whether the government's exclusive decision to remove same-gender partners solely on the basis of their homosexuality is sufficiently analogous to *Evans*, a case striking anti-gay legislation on mere rationality review, or, for O'Connor but not Kennedy, *Nguyen*, a case in which O'Connor believed an invidious gender-based stereotype was used to determine citizenship conferral. Whether the selective deportation of same-gender partner overstays is "outrageous" may be a difficult issue for this pair of justices.

How Justices Breyer, Souter, and Ginsburg rule seems more predictable. Despite Breyer's insistence that rational basis review governs noncitizen suits, he was willing to find standing for the absent citizen father in *Miller* and he joined O'Connor's dissent in *Nguyen*. Thus, he might find the United States citizen partner of a deportable homosexual

194. See GERSTMAN, *supra* note 101, at 99-102; see also *Romer v. Evans*, 517 U.S. 620, 632-33 (1996).

195. *Nguyen v. INS*, 533 U.S. 53, 121 S.Ct. 2053, 2078 (2001) (O'Connor, J., concurring).

196. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 696, 700-02 (2000).

overstay similarly situated. If so, his voting record on gay and immigrants' rights issues suggests much sympathy for our hypothetical overstay. Breyer voted in favor of gay or immigrants' rights in four of the six cases reviewed here — *Hurley* and *AADC* being the exceptions. Ginsburg's record is identical to Breyer's, while Souter sided with the individual rights claimant in *AADC*, making his record five out of six.

Our analysis of Justices Rehnquist's, Thomas's, and Scalia's likely votes on the issue do not appear to change much after *Miller* and *Nguyen*. Rehnquist has ruled solidly against providing much protection for gays or noncitizens in all of the cases examined, while Thomas and Scalia have ruled the same way in the cases in which they have participated, if for different reasons.

Thus, after reviewing the first two immigration cases — *Miller* and *Nguyen* — and the four gay rights opinions — *Hardwick*, *Evans*, *Hurley*, and *Dale* — in light of the *AADC* "outrageous" exception test, it appears that six justices are where they were before: Breyer, Souter, Ginsburg on the pro-gay/immigrants' rights side, and Rehnquist, Scalia, and Thomas, on the other. With his deference to the federal government's power in *AADC*, *Miller*, and *Nguyen*, Stevens's vote becomes harder to call. And as always, O'Connor and Kennedy remain right in the middle, especially after their appearance on either side of the *Nguyen* debate.

The constitutional immigration law cases examined thus far — *Miller*, *Nguyen*, and *AADC* — appear to grant much power to the government in the areas of immigration and nationality law, leaving only an undefined egregious selective enforcement claim as possible constitutional armor for deportable noncitizens. When viewed in light of the gay rights cases explored earlier — *Hardwick*, *Evans*, *Hurley*, and *Dale* — the case of our foreign same-gender partner overstay might appear to be a loser: Of the seven cases examined so far, the individual rights claimant — either the homosexual or the noncitizen — has lost six of the seven times, prevailing only in *Evans*.

Yet, the "outrageous" language from *AADC* coupled with the holding in *Evans* might provide sufficient ammunition for our hypothetical deportee when viewed in the light of four subconstitutional law cases — in reality, two pairs of related cases — recently decided by the Supreme Court. Each of the previous seven cases reviewed emphasizes two important factors that the Court weighs in deciding whether to uphold the individual rights claim: whether the plaintiff asks for equal, not special treatment, in response to the government's discriminatory conduct; and whether there is a legitimate countervailing federal or constitutional interest to justify the prejudice. The remaining four opinions will

demonstrate how egregious, unjustifiable governmental conduct raises serious constitutional questions, even within the political, often non-judicial realm of immigration law.

2. THE COURT'S JUNE 2001 SUBCONSTITUTIONAL DECISIONS ON
INDEFINITE DETENTION AND HABEAS CORPUS RELIEF -
ZADVYDAS/MA AND *ST. CYR/CALCANO-MARTINEZ*

Thus far, we have examined the direct application of constitutional norms to immigration and nationality cases by reviewing the Court's decisions in *Miller*, *Nguyen*, and *AADC*. In each of these three cases, we have noted how the Court has deferred to Congressional and INS power over immigration matters, even when it has claimed to be exercising a heightened review of their actions. Given the ineffectiveness of directly applying constitutional norms in immigration cases, Professor Hiroshi Motomura identified a second way by which the Court has historically protected noncitizens' rights through phantom subconstitutional norms to circumvent the question of the political branches' plenary power over immigration.¹⁹⁷

Relatedly, the Court's June 2001 subconstitutional decisions on two immigration issues — indefinite detention and retroactive denial of habeas corpus relief — might shed some light on the availability of five votes in favor of our hypothetical same-gender partner overstay. Neither of these two issues were constitutional in nature — indeed, the Court took great pains to describe its holdings as statutory — yet, the Constitution informed how the five-person majorities found in favor of the immigrants. Specifically, the Court held that the statutory provision in each case had to be read to avoid a serious constitutional question, which is a well-known canon of statutory construction.¹⁹⁸ Despite the absence of direct constitutional rulings, these 5-to-4 late-term decisions were favorable to immigrants' rights advocates, and therefore, are worth reviewing to try to discern why, whether constitutionally or subconstitutionally, five persons on the Court decided that the government had acted in derogation of noncitizens' interests.

197. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560-61 (1990); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

198. See Motomura, *Phantom*, *supra* note 197, at 560-61 ("A time-honored canon of statutory interpretation, often invoked by citing Justice Brandeis' 1936 concurrence in *Ashwander v. Tennessee Valley Authority*, says that judges should interpret statutes to avoid constitutional doubt.").

a. *Zadvydas v. Davis* and *Ashcroft v. Ma*: Indefinite Detention

The first issue involved whether the federal government had the power to indefinitely detain a noncitizen who could not be deported because no country was willing to receive her.¹⁹⁹ In the consolidated cases *Zadvydas v. Davis* and *Ashcroft v. Ma*, the Court held that the statutory provision governing the INS's power to detain pending deportation must be construed to avoid a Fifth Amendment due process violation, thereby requiring that a reasonable limitation be placed on the government's power even though no such language appears in the statute's text.²⁰⁰ The petitioners in both cases had been adjudged deportable after having committed certain criminal offenses; however, after they had been detained pursuant to statute, they could not effectively be deported because their respective receiving countries would not grant them entry.²⁰¹ Indeed, for Kim Ho Ma, the prospect of ever returning to Cambodia has been made even less likely because Cambodia has no repatriation agreement with the United States.²⁰²

Justice Breyer, joined by O'Connor, Stevens, Souter, and Ginsburg, noted that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."²⁰³ In the past, indefinite civil detention has been reserved for particularly dangerous individuals whose mental incapacity, for example, rendered them a continuing threat to society. In contrast, Breyer noted that deportees do not generally impose such a threat, nor is their detention to be construed a punishment, unlike in the criminal law context.

Next, Breyer distinguished the deportees' condition from that of a person first entering the United States. In response to the government's assertion that its plenary power over immigration supported its action here, the Court held that, unlike the indefinite detention on Ellis Island of a former United States resident in *Shaughnessy v. United States ex rel Mezei*,²⁰⁴ the indefinite detention of one who has already entered the

199. *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 2496 (2001).

200. *Id.* at 2497-98.

201. *Id.* at 2496.

202. *Id.* at 2496-97 (noting district court's evidentiary finding that there was no "realistic chance" that Ma would be returned to Cambodia in the absence of a repatriation treaty with the United States).

203. *Id.* at 2500.

204. 345 U.S. 206 (1953). *Mezei*, a United States resident for twenty-five years, was denied readmission into the country after leaving temporarily to visit his ailing mother in Romania. Upon his return, he was detained on Ellis Island as excludable, ostensibly for national security reasons, and therefore sought admission elsewhere. After he was denied entry in over a dozen countries, *Mezei* advised the INS that he would no longer seek to depart. He then challenged his confinement on Ellis Island without a hearing as a denial of due process. The district court and

United States was subject to closer constitutional examination than the detention and exclusion of a returning noncitizen who has technically not entered the country.

Both Justices Scalia and Kennedy filed dissenting opinions, in *Zadvydas* with Thomas joining Scalia, and Rehnquist joining Kennedy.²⁰⁵ Scalia asserted that a deportee had no constitutional right to be paroled into the United States when she enjoyed no right to be here in the first place:

“A criminal alien under final order of removal” who allegedly will not be accepted by any other country in the reasonably foreseeable future claims a constitutional right of supervised release into the United States. This claim can be repackaged as freedom from “physical restraint” or freedom from “indefinite detention,” but it is at bottom a claimed right of release into this country by an individual who *concededly* has no legal right to be here. There is no such constitutional right.²⁰⁶

Scalia then distinguished precedent situations involving the torture or commitment to hard labor of a deportee, arguing that such cases have nothing to do with the claimed right to supervised parole, which was the issue here.²⁰⁷ Under no circumstances, Scalia concluded, could the fed-

court of appeals granted Mezei's request for a hearing, perhaps signaling limits on Congress's heretofore plenary power over immigration or, alternatively, as the decline of the “red scare.”

In addition, these decisions renewed the hope that some constitutional individual rights claims could survive *Knauff* and *Harisiades*. However, upon appeal to the Supreme Court, *Mezei* followed precedent, and the Court overturned the lower courts' decisions. After the Court recited the facts, its first statement was a reaffirmation of the plenary power of Congress followed by a citation to four cases that outline Congress's traditional plenary power over immigration — *Chae Chan Ping*, *Fong Yue Ting*, *Knauff*, and *Harisiades*: “Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.” While acknowledging that departing noncitizens may avail themselves of procedural due process protections, the Court appeared to characterize Mezei not as a returning twenty-five year resident, but as “an alien on the threshold of initial entry. As such, *Knauff's* deferential standard of judicial review applied to the Attorney General's actions here: “‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’” Despite the attempts by Justices Jackson and Black in dissents to distinguish *Knauff* by emphasizing that, unlike *Knauff*, Mezei was actually detained at Ellis Island and therefore deserved at least a hearing on the merits. The Court would not be dissuaded. See Romero, *On Elián*, *supra* note 39, at 353-54.

205. Scalia and Thomas also joined part of Kennedy's opinion in which he explained how the clear intent of Congress was that the INS could indefinitely detain a deportee. The two justices did not, however, agree that there might be circumstances in which a court could provide for relief of a person detained for an unreasonable period of time. See *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 2505 (2001) (“I join Part I of JUSTICE KENNEDY's dissent, which establishes the Attorney General's clear statutory authority to detain criminal aliens with no specified time limit. I write separately because I do not believe that, as JUSTICE KENNEDY suggests in Part II of his opinion, there may be some situations in which the courts can order release.”).

206. *Id.* (Scalia, J., dissenting) (emphasis in original).

207. *Id.* at 2506.

eral courts require the INS to release an individual who had been fairly adjudged deportable according to established administrative processes.²⁰⁸ *Mezei*, the case involving the possible indefinite detention on Ellis Island, controlled Scalia's analysis here and marked his departure from the majority's view.²⁰⁹

Kennedy's opinion took less strict a stance than Scalia's by not ruling out the possibility of judicial intervention in some instances.²¹⁰ Kennedy disagreed with the majority's construction of the statute at issue, especially its creation of a specific time period after which supervised release must be provided should deportation be no longer forthcoming.²¹¹ Describing this new rule as having been "invented by the Court,"²¹² Kennedy then moved on to uphold the statute's constitutionality, stating that a person who has substantive objections to a detention order may challenge them in a habeas proceeding where the facts can be fully litigated:

The Government has conceded that habeas jurisdiction is available under 28 U.S.C. § 2241 to review an alien's challenge to detention following entry of a final order of deportation, . . . although it does not detail what the nature of the habeas review would be. As a result, we need not decide today whether, and to what extent, a habeas court could review the Attorney General's determination that a detained alien continues to be dangerous or a flight risk. Given the undeniable deprivation of liberty caused by the detention, there might be substantial questions concerning the severity necessary for there to be a community risk; the adequacy of judicial review in specific cases where it is alleged there is no justification for concluding an alien is dangerous or a flight risk; and other issues. These matters are not presented to us here.²¹³

Unlike the majority, Kennedy preferred a lower court's case-by-case analysis of a specific detention rather than a blanket subconstitutional rule outlawing indefinite detention which Congress did not intend. Put differently, Kennedy saw the possible constitutional issue as one involving procedural due process, which he believed was satisfied by the current safeguards even if they led to possible indefinite detention, rather than the broader substantive due process violation that the majority

208. *Id.*

209. *Id.* at 2507 ("Because I believe *Mezei* controls these cases, and, like the Court, I also see no reason to reconsider *Mezei*, I find no constitutional impediment to the discretion Congress gave to the Attorney General.").

210. *Id.* at 2508.

211. *Id.*

212. *Id.*

213. *Id.* at 2517.

hoped to avoid through a narrower reading of the INS's power under the statute.

Like the deportees in *Zadvydas* and *Ma*, our hypothetical foreign same-gender partner overstay would be in a similar situation of seeking parole or deferment or supervised release. While she would concededly have no right to be in the United States, she would claim under *AADC* that she should not be subject to targeted deportation based on her sexual orientation.

On the other hand, *Zadvydas/Ma* is different from our scenario because the consequence of the government's action here is deportation, something that the INS could not accomplish in *Zadvydas/Ma*. There is no potential procedural due process violation for removing a deportable individual because, as Justice Scalia noted, the deportee has no underlying constitutional interest in being in the United States and has received sufficient due process through deportation proceedings.

Still, that five justices — including Justices Stevens and O'Connor — were willing to take seriously procedural due process limitations on governmental actions vis-à-vis immigrants and nonimmigrants who have entered the United States, and a sixth, Justice Kennedy, recognized that judicial oversight of INS activity is alive and well, gives our hypothetical same-gender partner some hope. The question over time will be whether *Zadvydas/Ma* will garner support beyond indefinite detentions to arguably less egregious deprivations of liberty, such as the selective deportation of same-gender partner overstays, which after all, appears to be less of a procedural due process concern and more of an equal protection issue, along the lines discussed in *Evans*.

b. *INS v. St. Cyr* and *Calcano-Martinez v. INS*: Habeas and Direct Review

The second issue asked whether Congress had the power to retroactively deny habeas corpus (*St. Cyr*) and direct judicial review (*Calcano-Martinez*) to noncitizens whose deportation cases were pending prior to the adoption of the 1996 immigration amendments²¹⁴ that purportedly curtailed such review, and who were eligible for discretionary waivers of their deportation under old law. In the first case, Enrico St. Cyr, a Haitian citizen, pleaded guilty to the sale of about \$100 worth of cocaine, for which he was sentenced to three years in state prison²¹⁵ and

214. See Antiterrorism and Effective Death Penalty Act of 1996 Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter ADEPA]; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Pub. L. No. 104-132, 110 Stat. 3009-546 (1996) [hereinafter IIRAIRA].

215. See David M. Herszenhorn, *A Month After Court Victory, Immigrant is Let Out of Prison*, N.Y. TIMES, July 14, 2001, at B7.

was adjudged deportable. Under pre-1996 rules, St. Cyr was also eligible for a statutory waiver of deportation routinely given to minor offenders and upon which many relied in exchange for pleading guilty at their criminal trial. Because deportation proceedings against him were not commenced until after 1996, St. Cyr could not avail himself of the waiver under the new law, the Attorney General asserted. St. Cyr filed for habeas relief, arguing that the new law did not retroactively apply to bar the Attorney General from granting discretionary relief. In response, the INS contended that district courts could no longer exercise habeas jurisdiction over deportation cases post-1996. The Court, therefore, had to adjudicate not only whether it had jurisdiction — either directly or via the writ of habeas corpus — to hear St. Cyr's claim, but it also needed to decide whether discretionary relief was still available to pre-1996 deportees. Similar issues were raised in *Calcano-Martinez*, except that instead of habeas review, the INS argued that the 1996 amendments barred direct judicial review of deportation proceedings.

Although it held in *Calcano-Martinez* that Congress had the power to retroactively revoke a noncitizen's ability to seek direct judicial review of a deportation order, the Court simultaneously held in *St. Cyr* that Congress did not unambiguously intend to bar habeas corpus suits on the same grounds.²¹⁶

While constitutional challenges to Congressional power were raised by the parties, the Court decided both cases on statutory construction grounds alone.²¹⁷ Yet, just as in *Zadvydas/Ma*, the Court undergirded its statutory analysis with a dose of constitutionalism. Citing the language of the Suspension Clause — to wit, “The Privilege of the Writ of Habeas Corpus shall not be suspended . . .” — Justice Stevens, joined by Kennedy, Souter, Ginsburg, and Breyer, stated that to construe the 1996 code amendments to retroactively deprive noncitizens of the right to file for habeas corpus review of their deportation proceedings would raise serious constitutional questions.²¹⁸ Reviewing the statutory language, Stevens would therefore not construe the statute to retroactively bar habeas relief unless there was “specific and unambiguous”²¹⁹ congressional intent to do so. Although it found in *Calcano-Martinez* that Congress intended curtailment of direct judicial review, the Court in *St. Cyr* ruled that the legislature did not intend the abolition of the writ of

216. See *Calcano-Martinez v. INS*, 533 U.S. ___, 121 S.Ct. 2268, 2269 (2001); *St. Cyr v. INS*, 533 U.S. ___, 121 S.Ct. 2271, 2293 (2001).

217. See *St. Cyr*, 121 S.Ct. at 2276-87; *Calcano-Martinez*, 121 S.Ct. at 2270 (relying primarily on the arguments set forth in *St. Cyr*).

218. *St. Cyr*, 121 S.Ct. at 2278-79.

219. *Id.* at 2287.

habeas corpus for deportees.²²⁰ Finding that habeas courts remained open, the Court also ruled that the Attorney General still retained discretion whether to grant suspension of deportation, rejecting the government's assertion that such a remedy was barred by the retroactive application of the 1996 amendments.²²¹

Justice Scalia, writing in dissent for Rehnquist, Thomas, and in part O'Connor, stated that the statute's "utterly clear"²²² language deprived federal courts of jurisdiction via either habeas or direct review. Moreover, he questioned the majority's interpretation of the Suspension Clause, arguing that both the plain meaning of the statute and controlling precedent authorize Congress's actions in this context without offending the Constitution. The Clause forbids the "suspension" of the writ except in cases of public emergency, while Congress here is permanently altering the writ's content in a context the Clause does not address: whether the judiciary has the right to compel the executive to exercise its discretion in favor of a deportable noncitizen.²²³ Finally, Scalia rejected both the petitioner's due process and Article III arguments, characterizing the deportee as one whose continued stay in the United States is subject only to the exercise of executive grace through the Attorney General's decision to suspend deportation. Such an act is borne of legislative fiat, Scalia argued, and is not a constitutional mandate.²²⁴

Justice O'Connor joined most of Scalia's opinion, parting ways over Scalia's discussion of the Suspension Clause. Justice O'Connor believed that, assuming its relevance to the issues here, the Clause did not provide the substantive relief the petitioners sought — that is, a judicial mandamus requiring the Attorney General to exercise its suspension discretion over this matter.²²⁵ Just as Justice Kennedy was reluctant to issue a blanket ruling in *Zadvydas/Ma*, O'Connor did not want to tread upon the legitimate power of the executive over immigration matters without due cause.

The relevance of the *St. Cyr/Calcano-Martinez* to our selective deportation hypothetical is unclear. On the one hand, the pair of cases appear to be of even less relevance than *Zadvydas/Ma* because of the lack of guidance on issues of substantive due process or equal protection-like concepts that have been examined elsewhere in this article.

220. See *id.* at 2276-87; *Calcano-Martinez*, 121 S.Ct. at 2270 (relying primarily on the arguments set forth in *St. Cyr*).

221. *St. Cyr*, 121 S. Ct. at 2287.

222. *Id.* at 2293 (Scalia, J., dissenting).

223. *Id.* at 2298-2302.

224. *Id.*

225. *Id.* at 2303.

Indeed, *St. Cyr/Calcano-Martinez* is more procedural than *Zadvydas/Ma* — the former pair relies on a constitutional norm that provides procedural due process protection — habeas relief — rather than discussing the underlying liberty interest which partly informed the indefinite detention holding in *Zadvydas/Ma*.²²⁶ Viewed another way, however, *St. Cyr/Calcano-Martinez* speaks to the underlying substantive interest in a discretionary remedy upon which the petitioners relied under prior law. But this may not be the best reading of *St. Cyr/Calcano-Martinez* because it would implicitly equate the hardships borne of indefinite detention in *Zadvydas/Ma* with the theoretically less determinate evils visited upon one denied suspension of deportation. Put differently, a person who is indefinitely detained suffers a greater deprivation of liberty than one denied suspension of deportation, since the latter is not incarcerated or detained, but only sent to another country.

Perhaps most confusing are the differences in votes by Justices Kennedy and O'Connor. In *Zadvydas/Ma*, O'Connor voted with the pro-noncitizen majority, but voted against them in *St. Cyr/Calcano-Martinez*. Kennedy's votes were the inverse of O'Connor's: he sided with the dissent in *Zadvydas/Ma*, but with the majority in *St. Cyr/Calcano-Martinez*. Evident from their opinions in these cases is Kennedy's and O'Connor's concern that the Court not overstep its bounds in the area of immigration policy. In *Zadvydas/Ma*, Kennedy questioned the Court's decision to effectively rewrite Congress's detention statute by creating a "reasonableness" requirement that does not appear anywhere in the text. Similarly, in *St. Cyr/Calcano-Martinez*, O'Connor refused to force the Attorney General to exercise his discretion in ruling upon whether to suspend deportable noncitizens.

In both cases, these two justices agreed with the canon that requires that statutes be construed so as to avoid constitutional doubt, yet they

226. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. INS*, 533 U.S. 678, 121 S.Ct. 2491, 2498 (2001). Justice Breyer goes on to add that this substantive freedom is protected by proper procedural safeguards: "And this Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections." *See id.* While Justice Kennedy's dissent did not disagree that the due process clause contains both a substantive and procedural element to it, he opined that in this case, only the question of procedure was at issue. *See id.* at 2515 (Kennedy, J., dissenting).

Whether a due process right is denied when removable aliens who are flight risks or dangers to the community are detained turns, then, not on the substantive right to be free, but on whether there are adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large. The procedures to determine and to review the status-required detention go far toward this objective.

Id.

could not agree as to how this rule was to be applied. They also agreed that the Court should cautiously guard against invading upon the province of the political branches' authority over immigration matters. A similar "agreement over the law but disagreement over its application" explains Kennedy's and O'Connor's split in *Nguyen* after they had filed a joint opinion in *Miller*.²²⁷ In predicting what these recent subconstitutional cases might mean for their votes on our same-gender partner overstay hypothetical is unclear, although it would be safe to say that these two justices have no particularly strong leanings either pro- or anti-immigrant with respect to the close cases in *Zadvydas/Ma* and *St. Cyr/Calcano-Martinez*.

Thus, both Kennedy and O'Connor will likely pay close attention to the particular facts and law brought before the Court on our hypothetical same-gender partner's selective deportation claim. Should both Kennedy and O'Connor believe that the INS is engaging in outrageous conduct by specifically targeting homosexuals in the same way that Colorado's Amendment 2 did in *Evans*, our fictional same-gender partner overstay will likely get these two justices' approval to the extent that their votes in *Nguyen* and *Zadvydas/Ma* affirm that the immigration code, and thus enforcement pursuant to it, are not immune from equal protection or due process review, respectively.

But whether something is "outrageous" is a question of degree. Should either Kennedy or O'Connor believe, like Scalia consistently asserts, that deportees do not have a constitutional right to be in the United States, that the Court should generally refrain from second-guessing the political branches, and that the hardship visited upon the same-gender overstay — unlike indefinite detention or retroactive denial of habeas — is not particularly serious,²²⁸ then one or both of these justices might rule against our same-gender partner overstay.

227. See *supra* notes 170-81, 193, and accompanying text.

228. Outside of the cases mentioned here, other sources suggest that Kennedy and O'Connor might not consider the deportation of an overstay a particularly vexatious consequence. In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984), Justice O'Connor took care to describe a deportation hearing as a "purely civil action" and not a criminal one, thereby following longstanding precedent describing deportation as not punitive in nature. In *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985), in upholding the Board of Immigration Appeals' (BIA) decision that a same-gender partner's deportation would not constitute "extreme hardship" to his United States citizen partner, then-Circuit Judge Kennedy noted that:

Deportation rarely occurs without personal distress and emotional hurt. Various courts have previously upheld orders of the BIA that resulted in the separation of aliens from members of their families, or placed aliens in war-torn countries in which life can be deemed harsh, if not brutal. Against this background, the individual application before us does not demonstrate that the BIA abused its discretion.

Id. (internal citations omitted).

Then there is Justice Stevens. Despite his apparent deference to Congress and the INS in *Miller/Nguyen* and *AADC*, Stevens votes solidly in favor of the noncitizen in both *Zadvydas/Ma* and *St. Cyr/Calcano-Martinez*, penning the majority opinions in the latter set of cases. While these subconstitutional decisions appear to more strongly protect the rights of noncitizens than the constitutional immigration decisions discussed earlier, Stevens's voting record belies an overall concern for the underdog. Combining these immigration decisions with his even stronger positions and rhetoric in the gay rights cases — specifically *Hardwick* and *Dale* — suggests that he would vote in favor of the same-gender partner overstay, especially if he considers *Miller* and *Nguyen* as being cases about burdening males rather than females.

The rest of the justices will probably line up along the lines already discussed: Scalia, Rehnquist, and Thomas against the same-gender partner overstay; Breyer, Ginsburg, and Souter for the individual.

These particular justices' opinions aside, the next section explores what a Court's opinion might look like should it choose to favor our hypothetical plaintiff, on the one hand, or rule in favor of the government, on the other. It concludes that, on balance, the selective deportation of same-gender partner overstays should constitute an "outrageous" case under the *AADC* test.

D. *Why the Selective Deportation of Same-Gender Partner Overstays Should Constitute the "Rara Avis"*

The "outrageous" test articulated by Scalia in *AADC* appears to be another version of the "minimal protection" test that has led to the protection of individual rights in both the gay rights and immigrants' rights cases. In *Evans*, the Court applied what appeared to be a heightened scrutiny test masquerading as rational basis to prevent particularly invidious sexual orientation discrimination under the Equal Protection Clause.²²⁹ In *Zadvydas/Ma* and *St. Cyr/Calcano-Martinez*, the specters of due process and the Suspension Clause were invoked as limits on the statutory interpretation of immigration laws that could otherwise excessively curtail noncitizens' rights.

However, the cases in which the Court chose to protect the homosexual or the noncitizen stand in contrast to the majority of the cases reviewed in which the Court deferred to majoritarian sentiment against gays and noncitizens because it believed these groups sought special rights rather than minimum equal treatment. In *Hardwick*, the Court narrowly characterized the case as a claim for a special right to engage

229. *Romers v. Evans*, 517 U.S. 620, 635-36 (1996).

in homosexual sodomy rather than as a broader right of privacy to deny protection under the disfavored substantive due process doctrine. Similarly, the *Miller/Nguyen* and *AADC* Courts chose not to interfere in the executive and legislative branches' decisions over immigration matters, even though in *Nguyen* the Court purported to apply heightened scrutiny to the challenged legislation. Finally, in *Hurley* and *Dale*, the Court refused to give credence to the dictates of a single state's law over the national constitutional rights owing to private groups who choose to discriminate against homosexuals.

Thus, the Court will strike down legislative or executive action only if a majority believes two elements are fulfilled: (1) the plaintiff has been unfairly deprived of a right open to all and asks only for "equal," as opposed to "special," treatment; and (2) there is no legitimate governmental interest in protecting the will of the majority of the people opposed to providing equal treatment, either through legislative policy, executive action, or the expression of a core constitutional value.

1. EQUAL, BUT NOT SPECIAL, RIGHTS

To make her case, the same-gender partner overstay will, like the plaintiffs in *Evans*, need to convince the Court that her selective deportation is particularly egregious — indeed, "outrageous" — and not the product of some rational distinction between homosexuals and other deportees. Though not constitutional decisions, *Zadvydas/Ma* and *St. Cyr/Calcano-Martinez* might provide her with analogous facts, urging the Court to broaden its protection of nonimmigrants currently in the United States so that they are treated like all other deportees whose sexual orientation conforms to societal norms.²³⁰

The decision to deport same-gender partner overstays simply because they are homosexual has the same sweeping, irrational quality to it that Amendment 2 had in *Evans*. While concededly more narrow in its scope because a deportation order affects the noncitizen homosexuals' immigration status only, for the noncitizen, the barrier erected by that decision is arguably as insurmountable as the virtual dilution of voting power created by the Coloradans. Indeed, because the INS's policy would be of national scope, it would have a far more widespread impact on gays and lesbians than a single state's discriminatory act. Thus, a

230. *Hurley* and *Dale* might provide a substantive basis for asserting a First Amendment right to "expressively associate" by entering a civil union that would be substantially interfered with by the deportation of one of the foreign partners. Of course, the response would be that first, the Vermont civil union is not sufficiently analogous to the parade in *Hurley* or the Boy Scouts organization to constitute an "expressive association." And further, even if it were, the INS's decision to deport would have a minimal effect on the association because the couple could choose to live outside of the United States.

class action claim would be the best vehicle for a frontal assault on such a policy.

To prove that theirs is an "equal rights" (and not "special rights") claim, our hypothetical class action plaintiffs should: (1) present specific evidence of homophobic conduct by the INS; (2) show that they are productive members of society; (3) emphasize that they seek no change in existing law, but only that their deportability be considered separate and apart from their sexual orientation; and (4) draw analogies to the Court's most recent decisions in *Zadvydas/Ma* and *St. Cyr/Calcano-Martinez*, arguing that extreme unfairness may not be visited upon even non-United States citizens.

To bolster the analogy, persuasive evidence will first need to be gathered to demonstrate the animus required by *Evans*. A written formal or informal policy of deporting same-gender partners supported by documentary evidence of invidious discrimination would provide the best case. A good example would be the INS letter *Adams v. Howerton*²³¹ plaintiffs Richard Adams and Tony Sullivan received regarding their request that Mr. Sullivan, an Australian, be classified as Mr. Adams's spouse:

Upon consideration, it is ordered that your visa petition filed on April 28, 1975 for classification of Anthony Corbett Sullivan as the spouse of a United States citizen be denied for the following reasons:

You have failed to establish that a bona fide marital relationship can exist between two faggots.²³²

Second, evidence that the INS generally does not deport productive, out-of-status, noncitizens would likewise suggest animus. Last year, the *New York Times* reported that the INS does not even bother deporting undocumented immigrants anymore, only those who it later discover have criminal records.²³³ Because of the then-booming United States economy and these undocumented immigrants' willingness to do work no United States workers would perform, the INS concentrated its deportation efforts elsewhere, targeting mostly those with criminal records.²³⁴ If our hypothetical overstays demonstrated their contributions to the general welfare through employment, the payment of taxes, caring for adopted children, volunteer work, or other productive activities, then the INS's policy of selectively choosing them for deportation becomes even more suspect, especially in light of current INS

231. See *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982); see also *supra* notes 1-6 and accompanying text.

232. STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 157 (3d ed. 2002).

233. Louis Uchitelle, *I.N.S. Is Looking The Other Way As Illegal Immigrants Fill Jobs: Enforcement Changes in Face of Labor Shortage*, N.Y. TIMES, Mar. 9, 2000, at A1.

234. *Id.*

prosecutorial discretion guidelines.²³⁵

A third point, crucial to the deportees' claim, would be to assert that they are not looking to have the law changed to promote homosexuality. As discussed above, their argument asks only that they be treated as any heterosexual overstays, without consideration of their homosexual relationships. They should avoid the *Hardwick* trap by not claiming a special right to which gays should be entitled. Relying instead on the *Evans* analysis, strong evidence of animus, and a vow not to change existing law, our fictional deportees could provide the Court with a firm doctrinal basis for finding the selective deportation constitutionally "outrageous" under *AADC*.

Fourth and finally, analogies should be made to the deprivations of rights discussed in *Zadvydas/Ma* and *St. Cyr/Calcano-Martinez*. Read broadly, these two pairs of cases stand for the proposition that a minimum level of protection afforded noncitizens exists regardless of Congress's plenary power over immigration and the INS's *Chevron* power to enforce the law. Just as the government may not indefinitely detain or retroactively deny habeas relief to noncitizens, neither may it rely on sexual orientation as a basis for prioritizing deportability.

In response, the government might characterize the selective deportation argument as a claim for special treatment by a non-suspect class, relying on *Nguyen* and *Hardwick* by drawing distinctions between homosexuals and heterosexuals. It might also argue that *Evans*, *Zadvydas/Ma*, and *St. Cyr/Calcano-Martinez* should be read narrowly to apply only to extreme deprivations of liberty and due process. As will be shown below, such arguments fail to persuade because they offend our common sense of justice and fair play.

First, the government might look to *Nguyen* and *Hardwick* for guidance, not so much doctrinally as thematically. In *Nguyen*, the Court applied an intermediate scrutiny test in a most deferential way, finding that the actual differences between men and women supported Congress's gender-based citizenship statute. Thus, the Court concluded that the statute's distinctions were not rooted in invidious stereotyping. Similarly, the INS may argue that its decision to deport same-gender partner overstays may be based on rational bases and not homophobic animus or stereotypes. To the extent Congress's decision to pass the Defense of Marriage Act stemmed from a desire to preserve the traditional institution of heterosexual marriage and not to condemn homosexuality, the INS would contend that its decision to deport same-gender partner overstays simply enforces that national policy. Like the father in *Nguyen*,

235. See *supra* notes 29-30 and accompanying text.

the hypothetical overstay is not entitled to special treatment but, rather is subject to differential treatment based on her different sexual orientation, which provides her no unique protection under the law, as even the *Evans* majority acknowledged.²³⁶

In *Hardwick*, the Court upheld selective enforcement of anti-sodomy laws against homosexuals because it found no substantive due process right to engage in same-gender sodomy. Here, the government may assert that same-gender partner overstays probably engage in homosexual conduct and are not to be provided special constitutional protection for their acts. Thus, the INS's policy to selectively deport same-gender partner overstays may be justified on *Hardwick* grounds: Because some states still prohibit homosexual sodomy, the INS is within its rights to deport someone who could have been prosecuted for a crime of moral turpitude.²³⁷ To the extent that the INS has consistently prioritized the deportation of criminals, it might argue that the decision to deport same-gender partner overstays is a permissible proxy for criminal conduct. After all, the Court in *AADC* presumed that the INS would act constitutionally and would only invalidate its action if it acted "outrageously." If, under *Hardwick*, homosexual sodomy may be criminalized and, indeed, it remains a crime in some jurisdictions, and if criminal sexual conduct can constitute a deportable offense, then surely the selective deportation of a same-gender partner overstay is not unreasonable, even if it is based on one's status.

While the above arguments from *Nguyen* and *Hardwick* appear doctrinally sound, they fail the "common sense" test. *Nguyen* did not involve the specific targeting of a disadvantaged group because of their status; rather, it acknowledged the reality that males in the armed services should be held responsible for their foreign-born, out-of-wedlock offspring, a responsibility that is borne solely by the noncitizen mother. Homosexuals deported en masse because of their same-gender relationships suffer a much greater disability than United States citizen fathers, both within immigration law and in society generally. Put another way, homosexuals of both genders fit the description of a "discrete and insular minority" more closely than heterosexual males in the armed services and therefore deserve more protection.

Moreover, in *Hardwick*, the Court's real concern was actual homosexual conduct, not status. While engaging in a civil union may techni-

236. See also *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001) (noting that even though federal law forbids it, the Fourteenth Amendment's Equal Protection Clause does not prohibit discrimination against disabled persons); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000) (noting that the Equal Protection Clause does not forbid age discrimination).

237. See INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2001) (stating that a moral turpitude crime is a deportable offense).

cally be an "act," to deport homosexuals en masse because they seek state recognition of their relationships appears as draconian as removing all black, male, noncitizens because they dared to marry white, female, citizens. As a practical matter, it would be difficult to imagine the INS drawing the "act/status" distinction given that it believes that foreign homosexuals persecuted based solely on their sexual orientation are eligible for asylum in the United States.²³⁸

Even if the Court found the themes in *Nguyen* and *Hardwick* inapposite and *Evans* more appropriate, the INS might contend that the deprivation of immigration benefits does not confer upon the same-gender partner overstay as broad-based a disability as Amendment 2 envisioned. Just as the noncitizen in *Nguyen* had available several different ways of establishing citizenship despite having a United States citizen father,²³⁹ the same-gender partner overstay need not rely on her United States citizen partner to remain in the United States. Indeed, both employment and diversity visas are avenues open to all prospective immigrants,²⁴⁰ same-gender partners included.²⁴¹

As argued earlier, however, mass selective deportation based on sexual orientation has the potential to affect a greater number of homosexuals than Colorado's Amendment 2, which would have applied only

238. See LEGOMSKY, *supra* note 232 at 926 n.5. See also *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (upholding withholding of deportation to homosexual persecuted in Cuba based on sexual orientation).

239. See *Nguyen v. INS*, 533 U.S. 53, 121 S.Ct. 2053, 2064-65 (2001).

In analyzing § 1409(a)(4), we are mindful that the obligation it imposes with respect to the acquisition of citizenship by the child of a citizen father is minimal. This circumstance shows that Congress has not erected inordinate and unnecessary hurdles to the conferral of citizenship on the children of citizen fathers in furthering its important objectives. Only the least onerous of the three options provided for in § 1409(a)(4) must be satisfied. If the child has been legitimated under the law of the relevant jurisdiction, that will be the end of the matter. See § 1409(a)(4)(A). In the alternative, a father who has not legitimated his child by formal means need only make a written acknowledgement of paternity under oath in order to transmit citizenship to his child, hardly a substantial burden. See § 1409(a)(4)(B). Or, the father could choose to obtain a court order of paternity. See § 1409(a)(4)(C). . . . Section 1409(a), moreover, is not the sole means by which the child of a citizen father can attain citizenship. An individual who fails to comply with § 1409(a), but who has substantial ties to the United States, can seek citizenship in his or her own right, rather than via reliance on ties to a citizen parent. See, e.g., 8 U.S.C. §§ 1423, 1427.

Id.

240. See INA § 201(a)(2), 8 U.S.C. § 1151(a)(2) (2001) (provision allowing for employment-based immigration); INA § 201(a)(3), 8 U.S.C. § 1151(a)(3) (2001) (provision allowing for diversity-based immigration).

241. Indeed, Pradeep Singla, Program Associate at the Lesbian and Gay Immigration Rights Task Force, shared with me that he was aware "of one binational couple in Vermont where the foreign partner was about to fall out of status after his student visa expired. He, however, was able to obtain an H-1B [temporary work] visa." E-mail from Pradeep Singla, *supra* note 18.

to state residents. In addition, the availability of other avenues for remaining in the United States does not legitimize a homophobic deportation policy. An analogy to interracial marriages might clarify this point. Because a black noncitizen can immigrate to the United States by obtaining either an employment or diversity visa does not justify denying him the opportunity to obtain a family-based visa because he chooses to marry a white United States citizen. In our hypothetical, the same-gender deportee does not even go that far. She does not ask that the immigration code be changed to allow for same-gender immigration benefits; she wants only to be treated as any heterosexual overstay.

Finally, the INS might argue that any analogies to the *Zadvydas/Ma* and *St. Cyr/Calcano-Martinez* cases are unconvincing. It could describe the indefinite detention and retroactive application of the law as more extreme abuses of governmental power than the decision to deport an admittedly removable noncitizen, albeit one who was selectively chosen.

While these two sets of cases do focus on arguably more extreme deprivations of due process, there is no principled reason to limit *Zadvydas/Ma* and *St. Cyr/Calcano-Martinez* to their specific facts. That *Zadvydas* and *St. Cyr* suffered significant hardship does not mean that same-gender partner overstays selectively chosen for mass deportation would not. Selectively choosing someone to be deported because that person is gay offends our sensibilities much in the same way that indefinite detention and the retroactive denial of habeas relief do. All three governmental acts are abuses of power that the Court should not tolerate.

On balance, despite the government's best efforts to ground its defense of a sexual orientation-based selective deportation policy in doctrine and traditional values,²⁴² our hypothetical same-gender partner overstay's claim sounds more in equal rights than special rights when basic fairness is considered. Selective targeting of homosexuals for deportation based solely on their status alone imposes upon an already vilified class a sweeping disability, not unlike discrimination based on race or gender.

242. "The endowment effect suggests that, *ceteris paribus*, people feel more invested in rules that have long been in place, and so a long history of a particular policy will help protect it against constitutional challenge. This helps explain the robustness of marriage's discrimination against same-gender couples and the military's exclusion of [Gay, Lesbian, Bisexual, Transgendered] people, both longstanding policies." Eskridge, *supra* note 29, at 1388. The debate within religious communities has, not surprisingly, spawned much literature. See, e.g., DAVID L. BALICH, *HOMOSEXUALITY, SCIENCE, AND THE "PLAIN SENSE" OF SCRIPTURE* (2000); CHOON-LEONG SEOW, *HOMOSEXUALITY AND CHRISTIAN COMMUNITY* (1996); JEFFREY S. SIKER, *HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE* (1994).

2. NO COUNTERVAILING FEDERAL OR CONSTITUTIONAL INTEREST IN
SELECTIVE DEPORTATION OF SAME-GENDER
PARTNER OVERSTAYS

Even if it accepts the view that our same-gender partner overstay seeks only equal and not special treatment, the Court will still inquire whether there is a legitimate countervailing governmental interest to preserve majoritarian anti-gay and anti-immigrant outcomes through legislative fiat, executive action, or constitutional imperative. Despite that the majority of the cases reviewed here suggest that the Court usually defers to anti-gay and anti-immigrant legislative or executive action, the following discussion demonstrates that there is no legitimate reason for the Court to support the selective deportation of foreign same-gender partner overstays.

Evans, *Zadvydas/Ma*, and *St. Cyr/Calcano-Martinez* all suggest that, while it is often reluctant to do so, the Court will intervene to elevate the rights of gays and noncitizens if there is no good countervailing reason to do otherwise. In *Evans*, the Court concluded that the very essence of equal protection was the requirement that all have access to the political process, something denied homosexuals for no other reason than their sexual orientation. In *Zadvydas/Ma*, indefinite detention was adjudged too punitive a consequence that would deprive due process rights even to those individuals adjudged deportable. In *St. Cyr/Calcano-Martinez*, the Court found that retroactive denial of the writ of habeas corpus crossed the citizen-noncitizen divide in a way that failed to provide even minimal protection for this already disadvantaged group. Analogously, the Court might find that the government has no rational reason for deporting same-gender overstays based solely on their sexual orientation and that they should be considered for deportation or deferral like any other group.

But despite this line of precedent, the Court may submit to the expertise of federal executive and legislature decisionmakers or may seek to preserve a constitutional core value. Regardless of the motive behind the Court's action, the result would nonetheless sustain discrimination against gays and lesbians. Thus, the *Miller/Nguyen* and *AADC* courts chose not to interfere in the executive and legislative branches' decisions over immigration matters, even though in *Nguyen* the Court purported to apply heightened scrutiny to the challenged legislation. The Court appears to trust the relative expertise of the political branches on immigration and nationality issues, giving credence to the proffered reasons for the government's action. In *AADC*, for instance, the Court was unwilling to intervene despite the assertion of a First Amendment right on the part of the deportable noncitizens for fear of diminishing the

political branches' power to combat international terrorism. And in *Nguyen*, the Court was reluctant to strike down a gender distinction that could effectively lead to the conferral of automatic citizenship to numbers greater than those contemplated by Congress. Finally, in *Hurley and Dale*, the Court refused to give credence to the dictates of a single state's law over the federal constitutional rights owing to private groups who choose to discriminate against homosexuals.

Yet, unlike in *Nguyen*, *AADC*, or *Hurley/Dale*, there is no valid reason to defer to Congress should it decide to single out same-gender partner overstays for deportation. Unlike in *Nguyen* or *AADC*, there is no threat of unduly interfering with the legislature's or executive's power over immigration since the remedy sought by the deportee is that the decision to deport her first be examined without regard to her sexual orientation. Should the INS still decide she should be deported, it may do so.²⁴³ Furthermore, unlike fears of the automatic conferral of citizenship in *Nguyen* or the promotion of terrorism in *AADC*, asking the INS to reconsider its deportation decision free of sexual orientation bias carries no similar negative consequence for immigration policy. Lastly, unlike in *Hurley* or *Dale*, no private party has a vested interest in preventing the same-gender partner overstay from asserting a right to equal treatment. While Congress has passed the Defense of Marriage Act to limit the federal rights of same-gender couples, our protagonist does not seek to be accorded marriage benefits in a way analogous to Dale wanting to be part of the Boy Scouts. The same-gender partner overstay seeks only to be treated like any other overstay, and the government has no apparently good reason to do otherwise.

III. CONCLUSION

United States citizen Richard Adams and Australian national Tony Sullivan were married by a Boulder city clerk in Colorado in 1975, hoping to be able to reside permanently in the United States just as any heterosexual binational couple.²⁴⁴ Because the Ninth Circuit construed

243. Of course, the next issue becomes the fabrication of reasons to avoid the charge of sexual orientation discrimination, which is analogous to the difficulty in *Batson* proceedings, for instance. See *Batson v. Kentucky*, 476 U.S. 79 (1986); *Purkett v. Elm*, 514 U.S. 765 (1995). On the difficulties posed by a *Batson* analysis, see Eric Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93 (1996). Thus, a smart INS lawyer may be able to come up with a sexual orientation-neutral reason for deporting a homosexual. However, the INS lawyer will be hard pressed to come up with a valid reason given the agency's policy that it has decided not to be specifically concerned about undocumented persons, which presumably extends to overstays as well. See *supra* text accompanying notes 228-29.

244. See Lesbian and Gay Immigration Rights Task Force, *Anthony Sullivan & Richard Adams, Plaintiffs in 1982 Case Against INS, Celebrate 25th Anniversary*, TASK FORCE UPDATE

the INA term "spouse" to refer to those involved in heterosexual marriages only²⁴⁵ and denied Sullivan's claims of hardship should he be deported,²⁴⁶ however, Sullivan has been forced to live in the United States as a fugitive from the INS so that he can be with Adam.²⁴⁷

The deported foreigner is not the only person affected; the United States citizen partner is likewise harmed. For instance, one United States citizen in another binational relationship expressed sadness about being effectively "forced to leave his own country because of his own government's discriminatory laws."²⁴⁸ This couple has moved to Canada where gays and lesbians are more protected under the law.²⁴⁹

Aside from Canada, eleven other nations also provide immigration benefits to same-gender partners.²⁵⁰ Indeed, one of the eleven recently took the next step in moving towards parity for homosexual relationships. As of April 1, 2001, all same-gender marriages performed in the Netherlands would have the same force and effect as traditional heterosexual marriages.²⁵¹

(Fall 1996), available at <http://www.lgirtf.org/newsletters/Fall96/FA96-12.html> (last visited on June 22, 2001).

245. *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982). See *supra* notes 1-6 and accompanying text.

246. *Sullivan v. INS*, 772 F.2d 609 (9th Cir. 1985). Interestingly, then-Circuit Judge Kennedy wrote the opinion for the Ninth Circuit upholding the Board of Immigration Appeals' finding that Sullivan would suffer no undue hardship:

Deportation rarely occurs without personal distress and emotional hurt. Various courts have previously upheld orders of the BIA that resulted in the separation of aliens from members of their families, or placed aliens in war-torn countries in which life can be deemed harsh, if not brutal. Against this background, the individual application before us does not demonstrate that the BIA abused its discretion. The Board considered the petitioner's individual claims on their merits and acted within its authority in denying the application.

Id. at 611 (citations omitted).

247. See JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 4 (2001) ("Australian Tony Sullivan lives illegally in the United States because the [Supreme Court] refused to help him remain with the American man he has loved for over a quarter century."). Returning to Australia was not an option for the couple because Adam had only been granted a temporary visa. *Id.* at 224.

248. See Lesbian and Gay Immigration Rights Task Force, "Oh Canada, Glorious and Free": *French/American Binational Couple Immigrates to Begin New Life Together*, TASK FORCE UPDATE (Winter 1997), available at <http://www.lgirtf.org/newsletters/Winter97/W6.html> (last visited June 24, 2001).

249. *Id.*

250. The eleven countries that currently provide immigration benefits to same-gender partners are: Australia; Belgium; Canada; Denmark; France; Iceland; Netherlands; Norway; South Africa; Sweden; New Zealand; and the United Kingdom. See Christopher A. Duenas, Note, *Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811, 813 n.8 (2000).

251. See David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 632-33 (2001) (describing new Dutch same-gender marriage law).

Two commentators predict that at some point, an American citizen will marry a Dutch citizen in a same-gender ceremony in the Netherlands and then seek recognition of that union in the United States.²⁵² While this scenario implicates more than the conferral of immigration benefits, it presents a problem that will likely require governmental attention at some point in the not-too-distant future. In an effort to resolve this complex issue, many others have argued for the extension of immigration benefits to same-gender couples²⁵³ or the legalization of gay marriages.²⁵⁴

This Article has a much less ambitious agenda: it seeks only to explore the possibility that the selective deportation of a same-gender partner who has overstayed her visa constitutes an outrageous case under the AADC test. Its modest goal is to discourage the INS from ever pursuing such a strategy, knowing that there are probably many who believe that same-gender partner overstays, even if civilly united in Vermont, are not the ideal candidates for "suspect class" status under our constitutional law.²⁵⁵ That notwithstanding, common sense and sound doctrine

252. *Id.* at 633.

253. See, e.g., Duenas, *supra* note 250; Brian McGloin, Comment, *Diverse Families with Parallel Needs: A Proposal for Same-Sex Immigration Benefits*, 30 CAL. W. INT'L L.J. 159 (1999); Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUMAN RIGHTS L. REV. 97 (1996); Amy R. Brownstein, Note, *Why Same-Sex Spouses Should Be Granted Preferential Immigration Status: Reevaluating Adams v. Howerton*, 16 LOY. L.A. INT'L & COMP. L.J. 763 (1994).

254. See, e.g., Koppelman, *supra* note 11; Jill R. Green, Comment, *Will the Marriage of Dick and Jane Evolve into the Marriage of Jane and Jane? Same-Sex Marriage: A Viable Union in the 21st Century*, 45 LOY. L. REV. 313 (1999); Jennifer Gerarda Brown, *Competitive Federalism and Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995); Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033 (1994); John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 18 CARDOZO L. REV. 1119 (1999); Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1 (1996).

255. Of course, the real way to test whether the INS would implement a policy of selective same-gender deportation would be to encourage several noncitizen partners in a same-gender union to deliberately overstay, thus forcing the INS's hand by setting up a possible class action test case – admittedly, a tricky proposition given the lack of case law post-AADC. At that point, the INS would have to decide whether to begin deporting such individuals, as it did in AADC, or to grant deferrals. Although e-mails I have received from several gay/lesbian advocacy groups suggest that same-gender immigration benefits are a major concern, no one has reported to me any case in which the INS has decided to selectively target an overstaying noncitizen partner for deportation. See E-mail from Pradeep Singla, *supra* note 18 ("Regarding your question about a foreign partner facing removal, I am not aware of any couple whose relationship has been certified in Vermont where the foreign partner is in removal proceedings."); E-mail from Carol Wolchok, American Bar Association, to Victor Romero, Penn State-Dickinson School of Law (May 17, 2001) (on file with author) ("Interesting question. I am not aware of recent cases. . ."). That said, I could well imagine some renegade INS branch doing this as an informal policy, as Adams and Sullivan's "two faggots" letter from the agency makes plain. See *supra* note 227 and

suggest that, despite the many anti-gay and anti-immigrant decisions handed down over the last twenty years, the Court will not hesitate to halt egregious government conduct when the plaintiff is being deprived of equal rights and there is no legitimate countervailing reason to justify the discrimination. In the hypothetical mass deportation of same-gender partner overstays, this Article applies such an approach while breathing life into the as-yet-undefined “outrageous” exception test created by the *AADC* Court.²⁵⁶

accompanying text. But aside from whether there evolves an anti-gay deportation policy, as a theoretical matter, the selective sexual orientation deportation hypothetical raises awareness of an issue of much concern to the gay/lesbian community (and, I believe, should be of equal concern to the general public) and tests the limits of the *AADC* test. Based on an analysis of the cases, it is unclear whether at this point in time such selective deportation would be considered “outrageous.” My hope, however, is that by mining the arguments pro and con, I have provided enough of a disincentive to the INS to ever consider the adoption of such a policy.

256. Despite its vagueness, the *AADC* “outrageous” test may develop into a useful tool for lower courts to ferret out extreme cases of selective deportation, such as the one described here. In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984), for example, the Court stated that the exclusionary rule could apply to “egregious” constitutional violations, without further explanation. Since then, the Ninth Circuit has issued two decisions, outlawing the INS’s sole reliance on racial appearance (*Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994)) or a foreign-sounding name (*Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994)) as proxies for alienage. See also Jonathan L. Hafetz, Note and Comment, *The Rule of Egregiousness: INS v. Lopez-Mendoza Reconsidered*, 19 WHITTIER L. REV. 843 (1998).