DEVOLUTION AND DISCRIMINATION

*VICTOR C. ROMERO**

I.
THE IMMIGRATION POWER: FEDERAL OR STATE?

One way to determine whether the national or the state governments should have the power over "immigration," that is, the ability to regulate the flow of noncitizens into a polity, is to look at the text of the U.S. Constitution, which purports to allocate powers between these entities. Unfortunately, the word "immigration" appears nowhere in the Constitution.[1] The terms "naturalization,"[2] "commerce with foreign nations,"[3] and the congressional power "to declare war"[4] have all been raised as textual foundations for the federal immigration authority,[5] although none specifically use the term "immigration." Steve Legomsky has raised the question whether, à la *McCulloch v. Maryland*,[6] immigration might be a "necessary and proper" derivative of the federal government's naturalization power.[7]

* Professor of Law, The Pennsylvania State University, Dickinson School of Law. E-mail: <VCR1@PSU.EDU>. I thank Matthew Garvey for inviting me to participate in this important symposium and the rest of the staff of the *NYU Annual Survey of American Law* for their hospitality. My thinking on these issues has been sharpened by fruitful conversations with Bob Ackerman and Nancy Morawetz. Most importantly, I am grateful to 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. The closest term to "immigration" is the word "migration," which appears in Article I, Section 9, Clause 1, but apparently refers to the slave trade. *See* U.S. CONST. art. I, § 9, cl. 1; IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK CH. 2, § I.A.3 (7th ed. 2000) ("The Clause refers to the importation of slaves and not immigrants, but its language does not limit it to slaves.").

2. U.S. CONST. art. I, § 8, cl. 4.

3. U.S. CONST. art. I, § 8, cl. 3.

4. U.S. CONST. art. I, § 8, cl. 11.

5. *See, e.g.*, Head Money Cases, 112 U.S. 580, 590–94 (1884) (upholding federal immigration statute under foreign commerce clause power); Passenger Cases, 48 U.S. (7 How.) 283, 509–10 (1849) (Daniel, J., dissenting) (conceding that the war clause authorizes Congress to regulate noncitizen enemies, but not friends); *see also* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 10-13 (3d ed. 2002) (discussing possible explicit constitutional texts in support of federal immigration power).

6. 17 U.S. (4 Wheat.) 316, 411–21 (1819).

7. LEGOMSKY, *supra* note 5, at 12-13. R

Despite this lack of specific text, the Supreme Court has consistently affirmed, explicitly and implicitly, the federal government's plenary power over immigration, often in cases where the noncitizens asserting their rights to enter or remain in the United States were societal outsiders, such as the Chinese in the *Chinese Exclusion Case*[8] and *Fong Yue Ting v. United States*,[9] communist sympathizers in the 1950s trilogy of *United States ex rel. Knauff v. Shaughnessy*,[10] *Harisiades v. Shaughnessy*,[11] and *Shaughnessy v. United States ex rel. Mezei*,[12] and homosexuals in *Rosenberg v. Fleuti*[13] and *Boutilier v. INS*.[14] Despite calls among many to dismantle it,[15] Congress's plenary power over immigration, and the Executive's concomitant authority to enforce it, are likely here to stay, as most recently evidenced by the flurry of immigration-related bills post-September 11, 2001.[16] And while one may quibble over whether Congress has too much power over immigration, there is appeal to the notion that the federal government, and not the states, should have primary control over immigration. After all, from the average American's perspective, foreigners immigrate to and citizens hold passports from the United States, and not Rhode Island.[17]

Yet, the first formal federal immigration law was not enacted until 1875[18] despite the fact that the Constitution had created the

8. 130 U.S. 581 (1889).

9. 149 U.S. 698 (1893).

10. 338 U.S. 537 (1950).

11. 342 U.S. 580 (1952).

12. 345 U.S. 206 (1953).

13. 374 U.S. 449 (1963).

14. 387 U.S. 118 (1967).

15. *See, e.g.*, Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987).

16. Indeed, the first of these was signed by President Bush barely a month after the mass hijackings, on the very day that this symposium was held. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

17. It is interesting to note that before the Constitution's enactment, some states, such as Vermont, allowed noncitizens to be full participants in their political affairs. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRATION, BORDERS, AND FUNDAMENTAL LAW 64 (1996) ("Vermont had included in its constitution of 1777 a provision admitting foreigners to the rights of natural-born subjects after one year's residence and an oath of allegiance.").

18. *See* Act of Mar. 3, 1875, 18 Stat. 477 (repealed 1974).

national government close to a century earlier.[19] Moreover, Roger Daniels tells us that many early immigrants from Europe focused less on coming to America than on moving, for example, from one German village in the Old to the New World, which led, in one instance, to the founding of Germantown, Pennsylvania.[20]

As the national government grew in prominence, federal immigration regulation evolved, shifting power away from the states. Today, the Immigration and Nationality Act[21] is a labyrinth, rivaling the tax code in breadth and complexity. Accompanying this evolution has been a corresponding shift in attitude among more recent migrants. No longer will a Mexican agricultural worker limit himself to tilling the lands of bordering states like California, Texas, and Arizona; Ohio[22] and Oregon[23] also have substantial numbers of seasonal and long-term Mexican laborers.

Notwithstanding the federalization of immigration law since the nation's founding, the states have continued to play a prominent role, with high-immigration states often seeking to exert the most influence.[24] While the Constitution's Equal Protection Clause strictly scrutinizes state laws that discriminate on the basis of alien-

19. The United States Constitution was ratified in 1788. Michael Allen Gillespie & Michael Lienesch, *Introduction* to RATIFYING THE CONSTITUTION 9 (Michael Allen Gillespie & Michael Lienesch eds., 1989).

20. Whereas one generalizes about migration from Europe, from England, and from Italy going to the New World, to the American colonies, and to the cities of the northeastern United States, the fact of the matter is that migration often follows more precise patterns, often from a particular region, city, or village in the sending country to specific regions, cities, or even specific city blocks in the receiving nation.

ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 19 (1990). The first major German migration in 1683, for instance, resulted because villagers from Krefeld decided to move en masse to establish what is now Germantown, Pennsylvania. *Id.*

21. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

22. The Farm Labor Organizing Committee (FLOC) of the AFL-CIO, based in Toledo, Ohio, is a union of migrant and seasonal farmworkers based in the Midwest. Its foreign roots are belied by its flag, which is emblazoned with a Mexican eagle and the words "*Hasta La Victoria*" ("Onwards to Victory"). *See* FLOC Homepage, *at* http://www.iupui.edu/~floc (last visited Sept. 18, 2002).

23. The Latino farmworker population is so large in the northwest that a cooperative was formed called the Pineros y Campesinos Unidos del Noroeste (Northwest Treeplanters and Farmworkers United), which represents over 4,500 farmworkers in Oregon and is the state's largest Latino organization. *See* PCUN Homepage, *at* http://www.pcun.org (last visited on February 1, 2002).

24. When Governor Tom Vilsack of Iowa, a low-immigration state, proposed to remedy the state's labor shortage by encouraging immigration to three "model cities," he was greeted by a backlash in largely white areas, which has been sup-

age, thereby limiting state power,[25] Congress has found ways to allow the individual states to indirectly control the influx of noncitizens into the United States, which, in turn, indirectly affects their numbers in these states. If, for example, California was able to influence immigration from the Philippines, it would likely be able to affect Filipino populations in Los Angeles and Honolulu, the two largest Filipino communities in the United States as of 1990.[26]

The earlier panels today focused on two ways in which Congress has, wittingly or unwittingly, contributed to the devolution of immigration law. First, the 1996 Welfare Reform Act has made it difficult for many poorer immigrants to remain in the country by allowing states to preclude them from receiving state benefits.[27] Second, states have de facto control over immigration through federal laws that have tied deportation consequences to state criminal laws involving moral turpitude crimes, aggravated felonies, and controlled substances offenses.[28] Thus, states today have effectively been given the license to experiment with their laws, systematically disadvantaging certain groups.

---

ported by several national anti-immigration organizations. *See* William Claiborne, *Immigration Foes Find Platform in Iowa*, WASH. POST, Aug. 19, 2001, at A3.

25. *See generally* Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425 (1997).

26. *See* Bert Eljera, *Filipinos Find Home in Daly City*, ASIAN WEEK, May 3–9, 1996, *available at* http://www.asianweek.com/050396/dalycity.html (citing 1990 U.S. Census Bureau statistics listing Los Angeles-Long Beach and Honolulu as the top two metropolitan areas for Filipino residents in the U.S.).

27. Two earlier panelists have written thoughtful pieces on opposite sides of the devolution debate in the context of welfare reform. *Compare* Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997), *with* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001). With state budgets facing severe shortfalls in the near future, especially after September 11's terrorist attacks, one possible scenario is that states might look to curtail benefits to noncitizens. *See* Kevin Sack, *State Budgets Facing a Fall in Revenues*, N.Y. TIMES, Nov. 2, 2001, at A12.

28. Thus, linking removability to state criminal law has led to deportations for some but not others, despite the commission of the same offense. *See, e.g.*, Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1724–29 (1999) (illustrating the potential for disparity in immigration consequences for noncitizens convicted of state assault or battery crimes due to differences in state sentencing laws).

II.
WELFARE REFORM, CRIME, AND THE NONCITIZEN UNDERCLASS

Federal welfare reform and crime laws that have a devolutionary effect on immigration law harm not only noncitizens generally, but vulnerable noncitizens particularly. Worse off than the U.S. citizen have-nots who occupy the next-to-the-last rung of the societal ladder are those similarly-situated foreigners whose additional burdens of non-citizenship relegate them to the very bottom step.

I want to pick up where the other two panels left off. Instead of analyzing the socioeconomic obstacles created by state laws affecting welfare or criminal law enforcement, I will address the more status-based disabilities that are often the unintended consequences of policies that heighten societal inequities.

III.
IMMIGRATION DEVOLUTION AND RACE

Although distinct, race and immigration have been inextricably intertwined since the nation's founding. As Ian Haney López[29] and Michael Olivas[30] have demonstrated, immigration policy has long reflected prevailing racial tastes with newer immigrants subjected to de jure or de facto burdens placed on them by prior arrivals. Hence, the English picked on the Irish, the Irish on the Chinese, the Chinese on the Mexicans.[31] In addition, Neil Gotanda[32] and Natsu Taylor Saito[33] remind us that, in America, one's

29. IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

30. *See* Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990) (comparing the immigration histories of the Native Americans, Chinese, and Mexicans in America).

31. *See* Victor C. Romero, *Expanding the Circle of Membership by Reconstructing the "Alien": Lessons from Social Psychology and the "Promise Enforcement" Cases*, 32 U. MICH. J.L. REFORM 1, 8–15 (1998).

32. *See* Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome," in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1098 (Hyung-Chan Kim ed., 1992) ("The evacuated Japanese Americans, including U.S. citizens, were presumed to be sufficiently foreign for an inference by the military that such racial-foreigners might be disloyal. Japanese Americans were therefore characterized as different from the African American racial minority. With the presence of racial foreignness, a presumption of disloyalty was reasonable and natural."); *see also* Neil Gotanda, *"Other Non-Whites" in American Legal History*, 85 COLUM. L. REV. 1186, 1190–92 (1985) (reviewing PETER IRONS, JUSTICE AT WAR (1983)) (discussing *Korematsu v. United States*, 323 U.S. 214 (1944), and other wartime "camp cases").

citizenship is often presumed based on one's color. Whites and blacks are presumptively American; browns (Latinos) and yellows (Asians) are presumptively foreign.[34]

Indeed, given the racially-tinged origins of congressional plenary power in the Chinese exclusion/deportation cases and their progeny,[35] one might suppose that devolution to the states of some immigration authority might be desirable. By ridding ourselves of the racist vestiges of the plenary power doctrine, so the argument goes, we might be able to start afresh, creating new immigration policy free and clear of racism.

However, inside and outside of immigration law, critical race theorists assert that racism persisted in the past and persists today in both the state and federal governments despite efforts by one to check the other.[36] As a sterling example of the federal judiciary curbing racist state legislatures, one need only recall the 1954 Supreme Court' s bold statement in *Brown v. Board of Education*[37] outlawing segregated schools despite the southern states' fervent opposition. Without *Brown*, the southern states likely would have continued their racist ways, and although de jure segregation might have eventually been eradicated, it is unlikely that the end would have come as quickly absent the Court's intervention. Inside immigration law, Congress may have not been as effective a check. Because deportations will often be triggered by criminal activity,[38] and

33. *See* Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997) (arguing that the concept of Asian Americans as foreigners reinforces American racial hierarchy); *see also* Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347 (1997) (discussing Saito's article).

34. Gotanda, *supra* note 32, at 1096; *see also* Romero, *supra* note 25, at 446 ("Racist remarks directed against persons of Asian and Latino descent more likely command the victims to return to their homeland than slurs aimed at blacks. Indeed, immigrant blacks from the West Indies often find a cultural disconnect with native African-Americans and yet are often perceived as part of the indigenous black community.").

35. *See, e.g.*, Chin, *supra* note 15, at 12. R

36. Race critics posit that "racism is normal, not aberrant, in American society." Richard Delgado, *Introduction* to CRITICAL RACE THEORY: THE CUTTING EDGE, at xiv (Richard Delgado ed., 1995).

37. 347 U.S. 483 (1954).

38. Indeed, former Immigration and Naturalization Service (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, promoting the integrity of the legal immigration system, and deterring violations of the immigration law." Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, to Immi-

because criminal law is traditionally left to the states, many states might enforce race-neutral laws in a racially discriminatory manner, sweeping up scores of noncitizens of color along the way.[39]

Kevin Johnson has written much about the intersection between race and immigration,[40] arguing for vigilance on the part of both federal and state government actors not to conflate the two, in what has in recent years been labeled "racial profiling."[41] Just as African-American citizens worry about being charged with "driving while Black," Latinos guard against claims of "driving while Mexican," while Middle Easterners eschew the label "flying while Arab." Thus, the bottom line appears to be this sad fact: if racism within immigration law and policy is systemic, then devolution will not cure the problem. Put differently, both federal and state governments are just as likely to employ racist policies.[42]

---

gration and Naturalization Service Regional Directors et al. 4 (Nov. 17, 2000), http://www.ins.usdoj.gov/graphics/lawsregs/handbook/discretion.pdf. Typically, dangerous criminal noncitizens are at the top of the Service's priority list. *See* INS, OPERATIONS INSTRUCTION 242.1A(22) (1993) (characterizing as "high enforcement priority" deportable noncitizens who are "dangerous criminals, large-scale [noncitizen] smugglers, narcotic drug traffickers, terrorists, war criminals, [and] habitual immigration violators").

39. On the problem of racial profiling in criminal law, see, for example, DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999); Jennifer A. Larrabee, Note, "*DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice,* 6 J.L. & POL'Y 291 (1997); Tracey Maclin, *Race and the Fourth Amendment,* 51 VAND. L. REV. 333 (1998); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

40. *See, e.g.*, Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42 (1995); 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); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995) [hereinafter Johnson, *An Essay on Immigration Politics*]; Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class,* 42 UCLA L. REV. 1509, 1544–46 (1995).

41. *See* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000).

42. After listening to the earlier panelists on this issue, I am persuaded that there might be practical reasons why, despite the systemic racism at all levels of government, concentrating immigration power in the federal system might be preferable. Ellen Yacknin argued forcefully that having a single immigration policy would be easier to challenge in court than fifty individual state policies. Charles Kamasaki highlighted the likelihood of increased racial profiling should criminal immigration enforcement power devolve, in part because it would be unrealistic to expect that the INS would be able to sufficiently train state law enforce-

One response to this gloomy prediction might be that devolution could lead to pro-immigrant policies in some progressive, high-immigration states. Because such states value the cultural and ethnic diversity immigration brings, their governments might be more willing to pass pro-immigrant legislation than their federal counterparts. However, recent reality belies this hypothesis. California, long a bastion of immigration, reached its tipping point in the early 1990s when its voters approved Proposition 187, the state initiative curtailing public services to certain undocumented residents.[43] Indeed, a substantial number of citizens of color voted to approve the measure to the detriment of their noncitizen brethren.[44] Although Proposition 187 was eventually struck down in federal court as unconstitutional,[45] its passage serves as a cautionary tale to those who argue that state control over immigration might lead to more protection for noncitizens of color.

IV.
IMMIGRATION DEVOLUTION AND HOMOSEXUAL UNIONS

But there are situations today where some minority groups might benefit from immigration devolution. For example, take the case of same-gender partners.[46] Under the Immigration and Nationality Act as interpreted by the Ninth Circuit in *Adams v. Howerton,*[47] same-gender binational couples married under a valid state law may not avail themselves of immigration benefits even though

ment officers when its own federal personnel are often inadequately prepared and, indeed, engage in racial profiling themselves.

43. *See, e.g.*, Lolita K. Buckner Inniss, *California's Proposition 187—Does It Mean What It Says? Does It Say What It Means? A Textual and Constitutional Analysis,* 10 GEO. IMMIGR. L.J. 577 (1996); Johnson, *An Essay on Immigration Politics*, *supra* note 40; Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1451 (1995).

44. *See Times Poll: A Look at the Electorate*, L.A. TIMES, Nov. 10, 1994, at B2, *cited in* Johnson, *An Essay on Immigration Politics*, *supra* note 40, at 659 (containing the following exit poll results by race of votes cast for/against Proposition 187: white (63-37%), black (47-53%), Latino (23-77%), Asian (47-53%)).

45. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995); s*ee also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 303 (2001); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 748 (2d ed. 2002) (describing *League of United Latin American Citizens* court's decision as declaring "most provisions of the law unconstitutional on federal preemption grounds. . .").

46. For a more comprehensive analysis of the constitutional immigration law ramifications of this issue, see Victor C. Romero, *The Selective Deportation of Same-Gender Partners: In Search of the "Rara Avis"*, 56 U. MIAMI L. REV. 537 (2002).

47. 673 F.2d 1036 (9th Cir. 1982).

the code typically allows a U.S. citizen to petition for her other-gender foreign "spouse" so that he may eventually apply for U.S. citizenship based on their marriage. In addition, Congress, in 1996, passed the Defense of Marriage Act,[48] which not only prevented same-gender couples from receiving federal benefits afforded heterosexual married couples, but also permitted states not to recognize same-gender unions performed in other states.

It seems to me that immigration devolution would work wonders for U.S.-based same-gender binational couples, who, as of today, may be civilly united under the laws of Vermont only.[49] Among the over 3000 individuals who have availed themselves of Vermont's "civil union" statute since its inception, seventy-eight percent are from other states, Washington, D.C., or other countries.[50] If, as has happened in welfare reform and in criminal law enforcement, federal law permitted the states' marriage laws to influence immigration law, then we would probably see many more same-gender binational marriages in Vermont followed by applications to the Immigration and Naturalization Service for adjustment of status of the foreign partner.[51] Like welfare and criminal laws, marriage laws vary from state to state, and yet, as we have learned from today's discussion, the federal authorities have not viewed that lack of uniformity problematic in either the welfare or criminal law context. Allowing the state of Vermont to influence immigration law by conferring the functional equivalent of marital status upon same-gender couples would go far towards uniting families, a goal long valued by our federal immigration policy.[52]

48. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000)). *See generally* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997).

49. *See generally* Robert E. Rains, *The Evolving Status of Same-Sex Unions in Hawaii, Alaska, Vermont and Throughout the United States*, 4 CONTEMP. ISSUES IN L. 71 (1999).

50. Vt. Civil Union Review Comm'n Report 7 (2001), http://www.leg.state.vt.us/baker/cureport.doc. The foreign countries represented were Canada, England, Venezuela, Mexico, Philippines, Australia, the Netherlands, Germany, India, and Guatemala. *Id.*

51. The United States would then join a growing number of countries that allow for immigration benefits arising out of same-gender partnerships. The eleven countries that currently provide immigration benefits to same-gender partners are Australia, Belgium, Canada, Denmark, France, Iceland, the 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).

52. *See, e.g.*, Victor C. Romero, *The Child Citizenship Act and the Family Reunification Act: Valuing the Citizen Child as Well as the Citizen Parent*, 55 FLA. L. REV. (forth-

V.
CONCLUSION: A MIXED BAG

And so, while the lack of uniformity that accompanies immigration law devolution might lead to undesirable results in welfare reform and criminal law enforcement, and would likely not stem the tide of racism, it might lead to the opening of opportunities for gay Americans to petition their binational partners for immigration benefits.[53] Such a development would turn the state of Vermont into a solitary haven for binational same-gender unions, thereby improving upon the federal immigration code's desire to keep families together by extending the breadth of its reach to include others usually excluded. Devolution in that case would lead to more protection for immigrants than what is currently available under the status quo.

coming January 2003) ("[F]amily immigration is a cornerstone of modern immigration law for which Congress has allotted at least 226,000 visas per year. As Professors Alex Aleinikoff, David Martin, and Hiroshi Motomura have noted, 'The dominant feature of current arrangements for permanent immigration to the United States is family reunification.' Indeed, this emphasis on family unity has been a staple of immigration law since the first comprehensive family-based set of preferences was established in 1952.") (quoting T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 319 (4th ed. 1998)) (footnotes omitted).

53. In 2001, a federal bill was introduced to provide immigration benefits to foreign same-gender partners of U.S. citizens. *See* Permanent Partners Immigration Act of 2001, 107 H.R. 690, 107th Cong. (2001), *available at* http://thomas.loc.gov. However, no further action has been taken on this proposed legislation.