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Damage Control? A Comment on Professor Neuman’s Reading of

*Reno v. AADC*

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DAMAGE CONTROL? A COMMENT ON PROFESSOR NEUMAN’S READING OF RENO V. AADC

DAVID COLE*

I. INTRODUCTION

Those who find themselves sympathetic to the losing side of a Supreme Court decision generally have two options. The first and more frequent response, at least among dissenting Justices and law professors, is to lay bare the decision’s flaws in the hopes that truth will someday prevail and the decision will be abandoned as an embarrassment. This approach tends to seek out and emphasize the worst implications of the Court’s reasoning, as a way of illustrating its defects. The second, more pragmatic response, favored by necessity by litigators who must live with the day-to-day consequences of Supreme Court decisions, is to minimize the damage done by reading the decision narrowly. From this perspective, one looks for limiting principles that might contain the Court’s reasoning in the hope that it will do less damage than a broad reading of the case might.

Professor Gerald Neuman’s article takes the latter approach to Reno v. American-Arab Anti-Discrimination Committee (“AADC”), although not because Professor Neuman is a litigator, but more likely because he is a careful scholar averse to hyperbole or overstatement. The decision rejects a challenge by eight aliens to being selectively deported because of their First Amendment protected political activities. Professor Neuman suggests that the case can be read not to implicate the First Amendment rights of aliens as such, because the conduct for which the aliens were targeted would not have been protected even if engaged in by United States citizens.

My view—by no means an objective one as I was and am counsel for the aliens in AADC—is that the decision is as a practical matter a devastating loss for aliens’ First Amendment rights, but as a purely legal matter a more limited loss. It is devastating as a practical matter because in effect the Court held that the Immigration and Naturalization Service (“INS”) may constitutionally single out aliens for investigation and deportation based on their membership in disfavored political groups, as long as it offers as a pretext

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some other technical basis for deportation. That holding sends a chilling message to all aliens, who must now fear that the INS will target them if they engage in unpopular political activity. And chilling effects are particularly severe in immigrant communities, partly because immigrants are less likely to have grown up with a strong First Amendment tradition, and partly because they have so much to lose from the INS.

As a doctrinal legal matter, however, the decision is much more limited because, as Professor Neuman correctly points out, the Court did not hold that aliens are not protected by the First Amendment, and indeed "said nothing whatever about the constraints the First Amendment places on statutory grounds of deportation." Rather, the Court held that aliens who are otherwise deportable on presumptively valid statutory grounds may not enjoin their deportation for the additional reason that they were singled out for deportation selectively. In other words, the decision is about selective enforcement claims in particular, and not about the First Amendment rights of aliens more generally. Up to this point, I agree entirely with Professor Neuman.

But Professor Neuman takes one further, albeit tentative step, and here I part company with him. He suggests that the decision might alternatively be squared with the First Amendment without undermining aliens' rights if the conduct for which the aliens were targeted would not have been protected by the First Amendment even if engaged in by U.S. citizens. He then argues that the First Amendment simply does not protect the provision of material support to "terrorist organizations" abroad, whether the donor is a citizen or an alien. If that view of the First Amendment were correct, and if the aliens in AADC were in fact targeted for such conduct, the case could be explained without positing any lesser status for aliens' First Amendment rights. The Court would merely be seen as refusing to recognize a claim for aliens that it would also refuse to recognize for citizens.

This move has a historic pedigree. In one of the Court's most important decisions addressing an alien's First Amendment challenge to deportation, Harisiades v. Shaughnessy, the Court upheld the deportation of several members of the Communist Party in the McCarthy era. In doing so, however, the Court declined the government's invitation to rule that aliens deserve reduced First Amendment protection. Instead it held that the government's showing in Harisiades was sufficient to avoid First Amendment infirmity under the then-prevailing standard for citizens set forth in Dennis v. United States, which upheld criminal convictions of U.S. citizen Communist Party leaders against a First Amendment challenge. Thus, although Harisiades

declined to find a First Amendment violation, it provides support for the proposition that aliens should be entitled to the same First Amendment protections as citizens. Professor Neuman apparently would like to do the same for AADC.

I am sympathetic to the project, for I believe there is no warrant for extending to aliens in this country any less robust First Amendment protection than we apply to citizens (or corporations for that matter). Indeed, that was the plaintiffs' central argument in AADC from the outset, a proposition which both the district court and the court of appeals accepted. And while I agree that the Supreme Court's AADC decision, properly read, does not address the First Amendment rights of aliens generally, I find unpersuasive Professor Neuman's suggestion for reconciling the case with the First Amendment.

Professor Neuman's tactic is to dispute what he sees as a "key assumption" of the Ninth Circuit's AADC decision—namely "that fundraising by U.S. citizens for an overseas political organization that committed terrorist acts could not be the subject of criminal prosecution unless the citizens were shown to have a specific intent to further the terrorist activity of the organization." He argues at some length that the Constitution does not prohibit the federal government from criminalizing support of the lawful activities of foreign terrorist organizations, even by citizens. The implication of the argument is that if AADC is understood as simply denying a selective enforcement defense to deportation where the basis for selection was activity that could have been criminally prosecuted if engaged in by citizens, its decision does not deny equal First Amendment protection to aliens. It's a sort of leveling down strategy.

The argument fails, I believe, for two fundamental reasons. First, the Court in AADC did not treat the case as involving fundraising, but membership. This is presumably because the government conceded that it selectively sought to deport the plaintiffs for a range of core associational activities, including but not limited to fundraising. Thus, neither the Supreme Court decision on its face nor the underlying findings of fact support an argument that the case is about the peculiar constitutional status of fundraising. Surely Professor Neuman would not maintain that the government could criminalize membership in a foreign terrorist organization without the requisite element of specific intent to further the group's illegal ends. That argument would require rejection of a legion of cases invalidating criminal and civil disabilities imposed on Communist Party members for their associations.

7. Neuman, supra note 2, at 329.
Second, Professor Neuman’s conception of the First and Fifth Amendment rights of United States citizens is too parsimonious—fundraising is a core form of constitutionally protected association, and the prohibition on guilt by association cannot be evaded so formalistically. A law that forbade payment of dues to Amnesty International would be just as invalid as a law that forbade membership in Amnesty International, and for the same reasons. There is strong support in constitutional principle and precedent for the proposition that the government may not selectively criminalize material support to foreign terrorist organizations without proof that the individual supporter specifically intended to further some illegal activity of the group. In the end, Professor Neuman advocates abandoning the prohibition on guilt by association for “foreign terrorist organizations.” But that principle was itself developed in the context of association with a foreign organization that had been designated as “terrorist,” the Communist Party. We forget the lessons of that era at our peril.

In short, then, Professor Neuman misreads AADC as a case about fundraising rather than about association, and more fundamentally, misreads the First and Fifth Amendments by contending that selective punishment of fundraising for particular groups does not violate the right of association. I address these misreadings in turn, and then suggest an alternative reading of AADC as a decision about remedies rather than rights. In my view, the best reading of the Court’s decision is that selective enforcement of the immigration laws does not justify the remedy of an injunction against deportation where there are valid grounds for deportation. On this view, the case turns on an assessment not of the scope of aliens’ constitutional rights, but on the propriety of a particular remedy.

II. A THEORY IN SEARCH OF FACTS

Professor Neuman’s discussion of AADC is predicated on the assumption that the individuals were targeted for providing material support to a foreign terrorist organization. It is that assumption that leads Professor Neuman to posit that the Ninth Circuit may have been wrong to enjoin the deportations, because in his view it is unclear that the right of association bars the government from selectively penalizing fundraising for designated foreign terrorist organizations. He concedes that citizens could not constitutionally be penalized for mere membership in a foreign terrorist organization, but argues that they could be penalized for contributing funds or other support to such a group, even if their support is intended and used for wholly lawful and peaceful ends. The Supreme Court decision may then be explained, Professor Neuman implies, as a case about targeting for fundraising, rather than about targeting for association more generally. But Professor Neuman’s assumption about the facts in AADC is simply wrong, as a brief recitation of the undisputed facts reveals.
When the FBI in 1986 urged the INS to seek the deportation of Khader Hamide, a permanent resident alien who had publicly advocated Palestinian self-determination, it did so because, in the FBI’s words, he is “intelligent, aggressive, dedicated, and shows great leadership ability.”\(^8\) Shortly thereafter, FBI and INS agents arrested Mr. Hamide and seven other noncitizens in Los Angeles, and charged them as deportable for associating with the Popular Front for the Liberation of Palestine (“PFLP”), a group that according to the INS advocated the “doctrines of world communism.” Then-FBI Director William Webster explained in Congress that the FBI’s investigation of the eight had found no evidence of criminal or terrorist activity, that the individuals “were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation,” and that “if these individuals had been United States citizens, there would not have been a basis for their arrest.” The INS District Director who authorized the deportation proceedings admitted that the aliens “were singled out for deportation because of their alleged political affiliations with the [PFLP].” When the eight filed *American-Arab Anti-Discrimination Committee v. Meese*, a federal lawsuit challenging the constitutionality of the “world communism” charges, the INS on the eve of a preliminary injunction hearing dropped the associational charges against six of the eight, and substituted technical visa violation charges, explaining in a press conference that the change was merely tactical, and that the INS continued to seek deportation of all eight because “[i]t is our belief that they are members of [the PFLP].”

As these facts illustrate, the government targeted the eight for their political associations generally, and not for fundraising in particular. Indeed, the district court in *AADC* found, based largely on government concessions, that the government targeted plaintiffs for being members of the PFLP, distributing PFLP literature, recruiting new members, communicating with PFLP leaders in the United States, and attending PFLP meetings, in addition to humanitarian fundraising.\(^9\) The government never challenged any of those findings on appeal. While fundraising was *one* of the associational activities the government identified as a basis for its actions, it was only one among many.

The Supreme Court treated the case accordingly as a case about association generally, rather than about fundraising in particular. It did not rule that aliens have no selective enforcement defense when singled out for *fundraising*, but rather that aliens have no such defense when singled out for *membership*. The Court stated its holding as follows: “When an alien’s continuing presence in the country is in violation of the immigration laws, the

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8. The facts recited in this paragraph are taken from Brief for Respondents at 3-5, Reno v. AADC, 119 S. Ct. 936 (1999) (No. 97-1252), and are supported by citations to the undisputed facts in the record in the Supreme Court.
9. *Id.* (citing district court opinions).
government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity.”

Thus, neither the record in the case nor the Supreme Court’s own opinion supports Professor Neuman’s attempt to read the case as if it were about fundraising per se. Accordingly, even if Professor Neuman were right that fundraising is not constitutionally protected against selective prosecution, that theory would not fit the facts of AADC.

III. FUNDRAISING AND THE RIGHT OF ASSOCIATION

The second and more fundamental flaw in Professor Neuman’s analysis, however, is his contention that citizens may be selectively prosecuted based on fundraising for particular terrorist organizations without any evidence of intent to further the group’s unlawful ends. If the prohibition on guilt by association means anything, it must mean that the government could not constitutionally penalize someone for sending a box of crayons to a daycare center merely because the daycare center was run by a group that also engaged in terrorism. Yet Professor Neuman’s argument would permit just such a penalty.

This issue has tremendous real world significance because, as Professor Neuman notes, a statute enacted in 1996, the Antiterrorism and Effective Death Penalty Act (“AEDPA”), now makes it a crime for anyone—citizen or alien—to provide material support to designated “foreign terrorist organizations.” Under the law, the Secretary of State has virtually a blank check to designate any foreign organization that has engaged in an unlawful act of violence as a “foreign terrorist organization,” and it then becomes a crime, punishable by up to ten years in prison, to provide any material support to that organization other than medicine and religious supplies. Professor

10. 119 S. Ct. at 947. Similarly, the Court described the case as a suit against the INS “for allegedly targeting [the plaintiffs] for deportation because of their affiliation with a politically unpopular group.” Id. at 938. And the Court noted that INS regional commissioner William Odencrantz said, even after the association charges had been dropped, that the INS was seeking to deport the plaintiffs “because of their affiliation with the PFLP.” Id. at 948. Indeed, the Court never even mentions fundraising in its decision.

11. At most, a conclusion that fundraising is a legitimate basis for selective deportation would have triggered a mixed-motive analysis. Where the government takes action for constitutionally legitimate and illegitimate reasons, the action remains invalid unless the government meets the heavy burden of proving that it would have taken the same action without any consideration of the illegitimate factors. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).


13. Under 8 U.S.C. § 1189(a)(1), “[t]he Secretary is authorized to designate an organization as a foreign terrorist organization . . . if the Secretary finds that—(A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined at 8 U.S.C. § 1182(a)(3)(B)); and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.” The term “terrorist activity” is broadly defined in 8 U.S.C. § 1182(a)(3)(B) (Supp. III 1998) to include, inter alia, the unlawful use of, or threat to use, an explosive or firearm against person or property, unless for mere personal monetary gain. “National security” is broadly defined in 8 U.S.C. § 1189(c)(2) (Supp. III 1998) to mean “national defense, foreign relations, or economic interests of
Neuman maintains that this law is arguably constitutional, and that therefore a deportation proceeding motivated by similar conduct on the part of aliens would also arguably be constitutional. He contends that such government action "should be viewed as an incidental burden on First Amendment activity, rather than as a targeted regulation of First Amendment activity." In so doing, he relies on *United States v. O'Brien*, which holds that where the government regulates conduct generally, without regard to its communicative character, the fact that the conduct might be engaged in for expressive purposes does not trigger stringent First Amendment scrutiny, but only a more deferential standard of review. The Court in *O'Brien* upheld a regulation banning the destruction of draft cards, finding that the military had a legitimate administrative interest in the preservation of draft cards (because they facilitated efficient administration of the draft), and that this interest was "unrelated to the suppression of free expression," because the interest would be undermined whether a draft card was destroyed for expressive or wholly nonexpressive purposes. By contrast, the Court subsequently held, laws banning flag-burning must be subjected to strict scrutiny, because the government's interest in banning flag-burning derives from the communicative impact of the conduct prohibited. Professor Neuman reasons that the government's interest in penalizing fundraising for terrorist groups is to stem those groups' terrorist activity, and therefore is unrelated to the suppression of expression or association. He likens a ban on support of terrorist groups to an embargo on trade with a foreign country, which the courts have generally upheld using deferential *O'Brien* review.

This argument fails for two reasons. First, the right of association would be rendered meaningless if it did not include the right to provide material support to the group with which one is associated. Organizations cannot survive without the material support of their members. All political organizations collect dues, seek donations, rely on volunteer services, and/or engage in other activity to raise money. Without material support, there is no association. The effort to disassociate money (or material support) from

the United States." Thus, the Secretary has broad discretion to designate any foreign group that has used or has threatened to use force, and whose activities the Secretary deems to be contrary to our national defense, foreign relations, or economic interests.

Once the Secretary designates an organization and publishes the designation in the Federal Register, it becomes a crime, punishable by up to 10 years of imprisonment and a fine, to "knowingly provide[] material support or resources to a foreign terrorist organization, or [to] attempt[] or conspire[] to do so." 18 U.S.C. § 2339B(a) (Supp. III 1998).

"Material support or resources" is broadly defined as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2339A(b) (Supp. III 1998).

15. *Id.* at 376.
18. *Id.* at 330 & n.78.
association is accordingly as doomed as the effort to disassociate money from speech. 19

As the Supreme Court has said, "[t]he right to join together 'for the advancement of beliefs and ideas' . . . is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.' " 20 The Court has repeatedly made clear that monetary contributions to political organizations are a protected form of association and expression. In Buckley v. Valeo, the Supreme Court held that the First Amendment protects monetary contributions to political campaigns. 21 And in Village of Schaumburg v. Citizens for a Better Environment, 22 the Court similarly held that the First Amendment protects a nonprofit group's right to solicit funds. 23

But Professor Neuman's argument also fails for a second reason. Even assuming that a distinction could be drawn in some situations between laws regulating material support of organizations and laws regulating association itself, the government's selective punishment of material support for particular groups can only be viewed as a restraint on association. Professor Neuman's argument might hold, for example, for a tax law regulating fundraising generally, without regard to the identity of the groups for which the fundraising is done. Such a law would be subject to only deferential scrutiny, for it would be targeted at financial transactions regardless of their associational or communicative content.

A penalty imposed on persons for financially supporting particular groups, however, cannot properly be treated as a general regulation of financial support without regard to the support's associational character. Had the draft card destruction law in O'Brien criminalized only those who destroyed draft cards in association with the Weather Underground or Students for a Democratic Society, it would plainly have been seen not as a general regulation of conduct, but as a regulation targeted at particular associations. Similarly, a campaign finance law that imposed contribution caps only on those who supported Communist Party candidates would clearly be analyzed

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19. See Buckley v. Valeo, 424 U.S. 1, 16-17 (1976) (rejecting contention that money can be separate from speech for regulatory purposes).
20. Id. at 65-66 (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)).
21. Id. at 16-17, 24-25.
23. See also Meyer v. Grant, 486 U.S. 414 (1988) (holding that statutory prohibition against paid solicitors violates First Amendment); Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295-96 (1981) (monetary contributions to a group are a form of "collective expression" protected by the right of association); Staub v. City of Baxley, 355 U.S. 313, 321-25 (1958) (striking down on First Amendment grounds law requiring permit to solicit citizens for membership in any organization that requires fees or dues); Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312, 1316 (9th Cir.) ("contributing money is an act of political association that is protected by the First Amendment"); cert. denied, 505 U.S. 1230 (1992); Brock v. Local 375, Plumbers Int'l Union, 860 F.2d 346, 349 (9th Cir. 1988) (spending money for scholarships, charitable contributions, and political purposes are "precisely the types of activities that benefit from first amendment protection"); In re Asbestos Litig., 46 F.3d 1284, 1290 (3d Cir. 1994) (contributions to political organization are constitutionally protected absent specific intent to further the group's illegal ends).
as a targeted regulation of association rather than as a general regulation of contributions. The point is that where the government selectively regulates conduct only when it is done in association with particular groups, it cannot be said that the government's interest is unrelated to that association. On the contrary, in the setting Professor Neuman discusses, the government's interest arises *only* when fundraising is done for particular political groups. It has no interest in regulating material support generally, or even overseas material support. Its interest is only in regulating material support to particular disfavored groups.

Professor Neuman argues that the law should be reviewed deferentially because the reason for singling out the disfavored groups turns not on the groups' political ideology or views, but on the groups' terrorist activity.\(^{24}\) There is good reason to doubt that characterization, but even if it were true, it would not save the prohibition from strict scrutiny. Professor Neuman himself illustrates the reason to doubt the characterization: the immigration law's definition of "terrorist activity" is so broad that virtually any group that has ever engaged in any unlawful use of firearm against person or property would be covered. Yet the INS has clearly not targeted all aliens associated with all such groups for deportation. Nor does AEDPA prohibit material support to all such groups. It prohibits support only to those few select groups, among the thousands who have engaged in terrorist activity, that the Secretary of State designates as "foreign terrorist organizations," based ultimately on her unreviewable decision that the groups' activities undermine our "national security, foreign relations or economic interests."\(^{25}\) Thus, neither the *AADC* case nor the AEDPA prohibition Professor Neuman discusses involve penalties imposed on all terrorist groups.

But more significantly, even if one could defend the targeting of the groups as predicated on their terrorist (and therefore constitutionally unprotected) acts, the constitutionally salient question is why the individual is being targeted, not why the group is being targeted. It is the individual who faces deportation in the *AADC* case, or ten years in prison under AEDPA. And the whole dispute in both the *AADC* case and under the AEDPA provision is whether individuals can be penalized for their association with or support of certain groups *without any evidence that they specifically intended to further the group's illegal activities*. Under AEDPA a citizen can be convicted even if he can prove that his provision of support was intended and in fact used solely for peaceful ends. In that event, the individual is not being targeted for terrorist activity, but for his association with a group that engaged in terrorist activity without any help from the individual.

The point is illustrated by the cases that established the "specific intent" standard. The Supreme Court has long held that the government may not

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penalize an individual for his association with a group that engages in both lawful and unlawful activities unless it proves that the individual specifically intended to further the group's unlawful activities. The principle was established in connection with efforts to punish people for association with the Communist Party, which Congress had found to be a foreign-dominated organization that used terrorism and other illegal means toward an illegal end—the overthrow of the United States by force or violence. The Supreme Court did not question Congress' motive in singling out the Communist Party for such illegal activities, but nonetheless held that the First Amendment barred the government from imposing even civil disabilities for association with the Communist Party absent a "specific intent" showing. As the Court warned, "if there were a . . . blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired." If Professor Neuman's view were correct, all of these statutes would have been treated as content-neutral and subjected only to intermediate scrutiny, because Congress targeted the Communist Party for its illegal conduct, not for its political ideas.

The Communist Party cases also refute Professor Neuman's other justification for finding criminalization of material support to terrorist organizations constitutional—what he calls the "cross-border nature of the regulation." Professor Neuman argues that because the recipient organizations are located abroad, their activities are less susceptible to federal regulation, leaving the government with fewer options. But the Communist Party was, by Congress' own finding, a "foreign-dominated organization," and there, too, the government's options for regulation were limited. Yet notwithstanding the fact that the Communist Party was not only a foreign-dominated organization, but one with the purpose of overthrowing the United States (unlike other countries' terrorist organizations now designated, which are for the most part involved in domestic civil wars and insurgencies), the Court repeatedly insisted that

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26. See NAACP v. Claiborne Hardware, 458 U.S. 886, 925 (1982) (NAACP leaders and members could not be held liable for injuries sustained in an NAACP-led boycott, absent proof that they specifically intended to further the unlawful activities); Healy v. James, 408 U.S. 169, 186 (1972) (student group could not be denied campus benefits based on association with a national organization with illegal ends, absent specific intent to further the national group's unlawful ends); United States v. Robel, 389 U.S. 258, 262 (1967) (holding that government could not ban Communist Party members from working in defense facilities absent proof that they had specific intent to further the Party's unlawful ends); Keyishian v. Board of Regents, 385 U.S. 589, 606 (1967) ("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); Elfbrandt v. Russell, 384 U.S. 11, 19 (1966) (invalidating oath requiring state employees not to join Communist Party because "a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); Noto v. United States, 367 U.S. 290, 299-300 (1961) (First Amendment bars punishment of "one in sympathy with the legitimate aims of [the Communist Party], but not specifically intending to accomplish them by resort to violence").


29. Neuman, supra note 2, at 330.
association with the Communist Party could not be penalized absent a showing that the individual specifically intended to further the Party's illegal ends.

Finally, Professor Neuman's analogy to embargoes on trade with foreign nations also misses the mark. These cases are different for a simple reason: the First Amendment protects the right to political association, but does not protect the right to trade with or travel to a foreign nation. Thus, a restriction on travel to Cuba is not targeted at First Amendment activity. It may have an incidental effect on First Amendment activity, if, for example, someone seeks to travel to Cuba for newsgathering or other First Amendment purposes. But as the discussion of O'Brien above illustrates, all sorts of laws not directed at First Amendment activity have such incidental effects, and incidental effects do not trigger heightened review.

The Supreme Court has consistently recognized the distinction between laws targeted at foreign nations and laws targeted at political association. The Court has upheld laws barring trade with or travel to a foreign nation, even where persons seek to engage in those activities for First Amendment purposes. But the Court has also consistently struck down laws that restrict travel based on association with foreign political organizations. Thus, in Regan v. Wald, upholding the Cuba travel ban, the Court expressly distinguished two prior decisions, Aptheker v. Secretary of State, and Kent v. Dulles, in which it had invalidated decisions to deny passports to members of the Communist Party.

As the Regan Court explained, the "Secretary of State in Zemel, as here, made no effort selectively to deny passports on the basis of political . . . affiliation, but simply imposed a general ban on travel to Cuba." In Regan and Zemel and the appellate court decisions that have followed them, the challenged laws were held not to implicate the "First Amendment rights of the sort that controlled in Kent and Aptheker" precisely because they were "across-the-board restriction[s]" not targeted at association with a political group. By contrast, AEDPA does not impose any across-the-board restriction, but selectively criminalizes "material support" only when done in association with particular political groups.

Cases upholding embargoes on trade with or travel to foreign nations do so because the embargoes were not targeted at political association as such. Foreign nations have a status quite distinct from political associations. As a nation, our government routinely engages in nation-to-nation diplomacy, and

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30. See Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1441 (9th Cir. 1996) ("no First Amendment rights are implicated" by travel, even to gather information).
31. See, e.g., Regan v. Wald, 468 U.S. 222 (1984); Zemel v. Rusk, 381 U.S. 1 (1965); Freedom to Travel Campaign, 82 F.3d at 1441.
34. Regan, 468 U.S. at 241.
35. Id.
must often take action specific to certain nations that in turn limits what U.S. citizens may do. Targeting a nation does not target political association as such. But the same is not true of targeting political organizations. Because our Constitution protects the right of political association, the government is limited in what it can do to individuals based on their associational acts.\textsuperscript{36}

In sum, even if Professor Neuman were correct to read \textit{AADC} as being about fundraising or material support rather than association more generally, the First Amendment analysis would not change. Whether the government targets association with the PFLP as such or targets certain conduct only when done in association with the PFLP, the trigger for government action is PFLP association, and accordingly the law must satisfy strict scrutiny. And when the government seeks to punish an individual for his connection to a group that engages in illegal activities, the only narrowly tailored way to do that is to target only those who specifically intend to further the group's illegal ends.

IV. An Alternative Reading

Finding a narrow reading of \textit{AADC} is of course in the interest of all who care about the political rights of the millions of noncitizens who live among us. But in the end, it is unclear whether Professor Neuman's reading in fact narrows the Court's opinion. In my view, a better reading of the decision, one that is more consistent both with what the Court said and with the underlying record, is that the decision limits the remedies available for unconstitutional government action.

As an initial matter, it is worth underscoring what Professor Neuman accurately points out—namely, that the Court did not decide anything about the applicability of the First Amendment to statutory grounds for deportation. If any of the aliens in \textit{AADC} are ultimately deported for their associations with the PFLP, that question will be presented: can Congress deport aliens for activity that would be constitutionally protected if engaged in by their U.S. citizen neighbors? All the Court in \textit{AADC} held was that if an alien is otherwise deportable (presumably on legitimate statutory deportation grounds), she cannot defeat the deportation by complaining that she was selected for deportation based on her associations.

It is also worth noting that nothing in the Court's decision turns on an analysis of the First Amendment. Indeed, the decision appears to go to great lengths to avoid relying on any notion of diminished First Amendment rights

\textsuperscript{36} It may well be, as Professor Neuman suggests, that some foreign organizations pose as great or greater a threat to our national interests than some foreign nations do. Neuman, supra note 2, at 330-31 n.79. But surely that is not determinative. There can be no doubt that at its height, the Communist Party posed a far greater threat to our national interests (at least as defined by those charged with defining and defending those interests) than, say, Cuba does today. The distinction between nations and political associations has nothing to do with relative threats to our national interests, and everything to do with the constitutional protection accorded the right of association.
for noncitizens. Instead, the Court’s analysis focuses on the problems it perceives with immigration selective enforcement claims generally, whatever the basis for the alleged unconstitutional targeting. Thus, it first states its holding as follows: “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.”37

No step in the Court’s reasoning is specific to the First Amendment. The Court notes its general disinclination to recognize selective enforcement claims, “[e]ven in the criminal-law field,” because they “invade a special province of the Executive.”38 It cites “the potential for delay” presented by the litigation of selective enforcement claims in the deportation setting, the danger of subjecting immigration prosecution policies to discovery, and the fact that deportation is, at least in the Court’s view, not as severe a consequence as criminal punishment, where selective prosecution is, at least in theory, an available defense.39 Finally, and perhaps most importantly, it concludes that the injunctive remedy sought is problematic because it would tolerate a continuing violation of immigration law: “The contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing.”40

Thus, the Court’s reasoning turns on nothing specific to the First Amendment, but rather on the peculiarities of selective enforcement claims, peculiarities that arise whether the targeting is based on race, sex, religion, or political views or associations. Accordingly, limiting the Court’s holding by making arguments about the particular First Amendment claims in the AADC case—even if the arguments could be squared with the facts or with First Amendment theory—is difficult to square with the Court’s language and reasoning.

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.

On this view, the Court’s holding should not be understood to establish that the Constitution is not violated by discriminatory enforcement. Rather, it

37. AADC, 119 S. Ct. at 945.
38. Id. at 946.
39. Id. at 946-47.
40. Id. at 947.
should be understood to establish only that for equitable and prudential reasons the constitutional violation, if any, does not justify this particular injunctive remedy. The Court's first statement of its holding is consistent with this interpretation: "As a general matter ... an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." The Court's second iteration of its holding is stated more broadly, maintaining that when an alien is unlawfully here, "the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity." But that statement is broader than the Court's reasoning and analysis require, and to that extent is dicta.

The remedial reading of Reno v. AADC is supported by the Court's qualification that in some situations, impermissibly motivated selective deportations would justify an injunctive remedy. The Court stated that "[t]o 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. Whether or not there be such exceptions, the general rule certainly applies here." This sentence suggests that the Court was seeking to forestall a parade of horribles: an INS plan to selectively deport all black aliens, or all immigrants who have supported the Democratic Party. The constitutional principle that would permit a distinction to be drawn between a discriminatory action based on political association and one based on race, or between discrimination against the Democratic Party and discrimination against the PFLP, is not obvious, and the Court does not elaborate. But the Court's suggestion sounds as if it was reasoning from equity. If the Court's holding is based on an equitable balancing, a more "outrageous" constitutional violation might be found to justify equitable relief that a less outrageous constitutional violation might not.

The Younger v. Harris line of cases provides an analogy. There, the Court has held, as a matter of equitable discretion guided by federalism concerns, that federal courts should not enjoin ongoing state criminal proceedings. But the Younger rule admits of exceptions for particularly outrageous prosecutions. Thus, if a criminal proceeding is brought in bad faith or is based on a patently unconstitutional statute, the federal courts may enjoin it. AADC is best understood as a similar application of equitable discretion, rather than as a holding that the Constitution allows the government to engage in selective

41. I am indebted to my colleague Carlos Vázquez for this suggestion, one with which both Professors Neuman and David Martin apparently largely agree.
42. Id. at 945 (emphasis added).
43. Id. at 947 (emphasis added).
44. Id.
46. See id. at 53-54; see, e.g., Lewellen v. Raff, 843 F.2d 1103 (8th Cir. 1987) (enjoining bad faith prosecution); Fitzgerald v. Peek, 636 F.2d 943 (5th Cir), cert. denied, 452 U.S. 916 (1981); Tolbert v. City of Memphis, 568 F. Supp. 1285 (W.D. Tenn. 1983) (patently unconstitutional ordinance declared unconstitutional).
immigration prosecution on the very same bases that it forbids the government from engaging in selective criminal prosecution.

As Professor Neuman points out, the Court’s principal concern with remedy is in fact not justified. It is not true that recognizing selective enforcement as a defense will always require the toleration of an “ongoing violation.” Consider, for example, the permanent resident aliens among the AADC plaintiffs, under deportation for having provided material support to a terrorist organization. Like most criminal violations, that conduct, if it existed, had a beginning, middle, and end. If the permanent residents are no longer supporting the PFLP, no “ongoing violation” would be countenanced by enjoining their deportation based on selective enforcement.

More generally, I would add, the concern about tolerating “ongoing violations” of immigration law is surely overstated, for every year we tolerate the continuing presence of millions of aliens unlawfully here. The stringent legal requirements for making out a selective prosecution claim already ensure that the remedy would be available only when the “ongoing violation” alleged in the deportation proceeding is one that we do in fact tolerate. In order to establish selective prosecution, it is not sufficient to show that one’s own proceeding was improperly motivated; one must also show that the government has not sought to deport similarly situated others. Accordingly, if the immigration violation charged is one for which we do not tolerate unlawful presence, then a selective prosecution defense would fail at the threshold. One can only make out a successful selective prosecution claim by showing that the government has not sought to deport others with the same immigration violations, i.e., that the government is already tolerating ongoing violations of this immigration law. If it is already tolerating ongoing violations, requiring it to tolerate another where it has acted on the basis of an unconstitutional motive hardly seems improper.

Finally, a selective enforcement defense would not immunize an alien from all future deportation proceedings. It would simply bar the INS from seeking his or her deportation on the basis of impermissible motives. If the alien had overstayed a visitor’s visa, for example, but had succeeded in establishing selective enforcement, the deportation proceeding would be enjoined, but the INS would not be barred from seeking his deportation in the future, as long as it could show that the deportation was not connected to the initial, impermissibly motivated proceeding.

Thus, I agree with Professor Neuman that the concern that animated the Court’s analysis in AADC is largely unwarranted. The more important point, however, is that the Court’s decision is best understood as a decision about remedial limits, rather than about the substance of constitutional rights.

V. CONCLUSION

The fact that AADC can be read narrowly as a legal matter does not mitigate the widespread damage it has already done throughout the immi-
grant community. Even if read only as a limitation on remedy, it effectively silences the immigrant community by telling them that the INS is free to exercise its discretion selectively against them if they engage in political activity that a government official disfavors. Even if that power is rarely used, its very existence will ensure that many aliens will remain silent out of fear that they might become the next target. The remedial reading I have proposed leaves open the ultimate question of aliens’ First Amendment rights, as I believe the Supreme Court intended to do, but does not erase the substantial damage that has already been done.

It is a remarkable fact that in 1999, it remains unclear whether immigrants have the same First Amendment rights as citizens. In the lower courts, that was the core issue in *AADC v. Reno*, one on which the government and plaintiffs filed hundreds of pages of briefs. The district court and the Ninth Circuit unanimously concluded that aliens and citizens do have the same First Amendment rights. The Supreme Court’s resolution of *AADC* studiously avoided deciding that issue, but at the same time what it did decide—without even hearing from the aliens on the issue—will only exacerbate the chilling effect in immigrant communities of cases like the deportation proceedings at issue in *AADC*. Aliens must now fear that they can be singled out by the INS for engaging in activity that is fully protected for U.S. citizens.

Professor Neuman seeks to avoid this unfortunate result, but would do so not by reassuring aliens, but by spreading the chill to the citizen community as well. In his view, there is no constitutional impediment to incarcerating a person for supporting wholly lawful activities of a foreign organization, so long as that foreign organization also has engaged in illegal activities. That view, if accepted, would resurrect guilt by association, and far from limiting the damage done by *AADC*, would exacerbate it.