ARTICLES

TRIBAL MARRIAGES, SAME-SEX UNIONS, AND AN INTERSTATE RECOGNITION CONUNDRUM

Mark P. Strasser

Abstract: This Article focuses on the reasons for state and federal recognition of Native American polygamous unions and the implications of states’ recognition of these unions for the validity of same-sex marriages across state lines. It discusses some historical Native American domestic relations practices and explains why states recognized certain Native American marital unions that would not have been recognized had they been celebrated locally. This Article also analyzes the significance of the recognition of these unions for the debate surrounding recognition of same-sex unions. The historical treatment of Native American polygamous unions suggests Congress has the power to assure that same-sex couples have the same rights and protections as do different-sex couples as long as their marriages were valid in the domicile at the time of celebration.

BRAVE NEW WORLD: THE USE AND POTENTIAL MISUSE OF DNA TECHNOLOGY IN IMMIGRATION LAW

Janice D. Villiers

Abstract: DNA technology revolutionized criminal law, family law and trust and estates practice. It is now revolutionizing immigration law. Currently the Department of Homeland Security does not require DNA tests, but it recommends these tests when primary documentation, such as marriage licenses, birth certificates and adoption papers are not available to prove the relationship between the U.S. citizen petitioner and the beneficiary who is seeking permanent resident status in the United States. DNA
tests are attractive to the government as a result of administrative convenience and as a means of countering fraud, but adoption of a wholesale policy of DNA testing poses a host of potential problems. In an area of law where family reunification is described as the primary goal, an increase in the use of DNA sometimes results in separating families and other unintended consequences. By promoting the use of DNA evidence, the social interests that are paramount in a family relationship could become subservient to genetic interests. The beneficiaries could become mere genetic entities, whose biological relationship through their genes is paramount. This promotes the view that shared genes are the principal means of identifying human relationships and that one should be entitled to legal benefits solely on this basis. Quality control in the collection, storage and testing of samples, access of individuals to testing facilities, especially in developing countries, privacy interests and the potential for misuse of the results of these tests, particularly in preventing the admission of aliens on health grounds are among the potential problems identified in this article. Using examples from disciplines where DNA evidence has been adopted—criminal, family and estates and trusts law—this article will present a workable policy for the use of this technology in immigration law.

**Farmers, Middlemen, and the New Rule of Law Movement**

*Brian JM Quinn & Anh T.T. Vu*

Abstract: This paper investigates the economic relationships between farmers and middlemen in Vietnam’s Mekong Delta and places it in the context of the new rule of law movement. The new rule of law movement, which has grown in the wake of the collapse of formerly centrally planned economies, argues that the rule of law is a prerequisite for economic growth and that transition economies can only succeed by adopting strong formal legal rights and institutions. Notwithstanding more than two decades of an aggressive rule of law reform program, Vietnam’s formal legal system remains weak. Using survey data from a sample of fruit farmers and middlemen we find that participants in the farm-gate market for pomelos carry out relatively complex transactions by granting buyers credit with little explicit reliance on formal legal structures. The development of complex markets for fruit in the Mekong Delta in the absence of strong legal rights provides lessons for proponents of the new rule of law movement. First, in the absence of formal structures, private parties find ways of structuring transactions in order to assure contract performance. Second, development of formal legal structures is a very long term proposition with uncertain results. And finally, the experience of farmers and middlemen
suggests that formal law and the development of formal legal institutions appear to trail economic development and should not therefore be considered an essential component of short-term economic reform efforts.

NOTES

Presidential Promises and the Uniting American Families Act: Bringing Same-Sex Immigration Rights to the United States

Sara E. Farber

Abstract: Binational same-sex couples in the United States all too often face a difficult reality. Due to discriminatory immigration laws, which prevent United States citizens from sponsoring their same-sex partners for permanent residence, same-sex couples must choose between deportation and separating their families. The Uniting American Families Act, however, offers a remedy to this unacceptable inequality. Yet the Act currently does not have the congressional support it needs to pass. This Note argues that President Obama, as the country’s Executive, should use his “bully pulpit” to inspire the Act’s passage. Specifically, this Note examines the manifestation and extent of Executive power in relation to immigration, the timeliness of the issue, and the recent broadening of Executive power to support a conclusion that Mr. Obama should take such action.

Toward an Unconditional Right to Vote for Persons with Mental Disabilities: Reconciling State Law with Constitutional Guarantees

Ryan Kelley

Abstract: Casting a ballot is a primary form of community participation in the United States. This exercise provides citizens with a means to safeguard their legal rights and effectuate change. Nevertheless, some citizens, such as people with mental disabilities, are often denied this fundamental right solely based upon their status. These citizens have faced a long history of pernicious discrimination at the hands of their communities, legislators, and even the courts. Yet, social policy has begun to evolve in light of more nuanced understandings of mental disabilities. This
knowledge has also spurred the reform of state and federal law. While the prospect of change looms high, in the context of voting, some states lag behind and recent jurisprudence demands that they reform voter eligibility requirements. This Note calls for all states to ensure that the right to vote is a presumptive right of the mentally disabled, to facilitate its exercise, and to deny it by a clear and fair standard that only excludes the mentally incapacitated when there is a clear lack of understanding of the nature and effect of voting.

**COLLECTIVE RIGHTS TO INDIGENOUS LAND IN CARCIERI V. SALAZAR**

**Melanie Riccobene Jarboe**

[pages 395–416]

**Abstract:** Since settlers set foot in the Americas, tension has existed between American Indian tribes and European settlers over tribal rights to land. When the Narragansett Tribe of Rhode Island proposed to build low-income housing on a thirty-one acre parcel of land, it became involved in years of litigation with the State of Rhode Island, its governor, and the town of Charlestown, RI. Throughout the litigation, the debate over collective ownership of land, cultural differences in property rights and the intentions behind the United States government’s policy positions regarding American Indians simmered below the surface. This comment focuses on those issues and argues that the Supreme Court’s decision in *Carcieri v. Salazar*, by refusing to grant collective rights to the Narragansett Tribe, violates the Indian Reorganization Act and constitutes an unjust imposition of the western view of individual rights to tribal land ownership.

**COMPREHENSIVE ECONOMIC SANCTIONS, THE RIGHT TO DEVELOPMENT, AND CONSTITUTIONALLY IMPERMISSIBLE VIOLATIONS OF INTERNATIONAL LAW**

**Benjamin Manchak**

[pages 417–452]

**Abstract:** This Comment examines the legality of the comprehensive unilateral embargo imposed by the United States on Cuba within the framework of international law. It argues that, independent of its humanitarian impact or the dubious legality of its extra-jurisdictional components, the comprehensive embargo violates international law because it undermines
Cuba’s right to development. International law is, and has always been, a component part of U.S. law—it is enforceable in U.S. courts, it informs judicial interpretation of U.S. statutes, and it guides legislative and executive action in matters of both foreign and domestic policy. In addition to its supplementary interpretive function in our legal system, international law is, through the Supremacy Clause, binding on the United States as a constitutional matter. Because of the role international law plays in the United States, a direct conflict between federal and international law is constitutional anathema. This Comment argues that the tension must be resolved by reference to the substance and timing of the federal enactments that violate international law. Thus, of the coordinate branches, the legislative branch is in the best position to correct the constitutional imbalance. The Comment concludes that Congress must either pass new legislation explicitly renouncing the right to development as an international legal norm, or, in light of the role of international law in our constitutional system, execute faithfully its duty to interpret and uphold the Constitution by repealing the legislation that has created the decades-old embargo.

E-Verify: An Exceptionalist System Embedded in the Immigration Reform Battle Between Federal and State Governments

Shelly Chandra Patel

[pages453–474]

Abstract: The immigration debate has proven to be fertile ground for promoting exceptionalist practices, where certain groups of people are isolated from the rest of the population and regarded as a subclass. The federal electronic employment verification system, E-Verify, is a prime example of such a practice. Passed under the Procurement Act, the goal of E-Verify was to promote efficiency and economy in government procurement. Unfortunately, the system falls far short of these goals because of problems inherent in the electronic database and increased state involvement over immigration reform. E-Verify is often criticized as unreliable because it relies on inaccurate databases, imposes an undue financial burden on employers, and leaves immigrant workers vulnerable to subjective determinations about their legal status. While Congress works on resolving these issues, the legal landscape is nevertheless changing as states enact and enforce their own immigration laws, including those that mandate the use of E-Verify. State entry into the immigration arena not only expands the reach of the system’s problems, but it also threatens to legitimize the exclusion of immigrants, documented or undocumented.
This Comment describes how the implementation of E-Verify has frustrated the goals of efficiency and economy, and argues that Congress should establish definitive boundaries between state and federal immigration reform to restore the political imbalance.

**First, Do No Harm: Tort Liability, Regulation and the Forced Repatriation of Undocumented Immigrants**

*Daniel J. Procaccini*

[pages 475–495]

**Abstract:** In *Montejo v. Martin Memorial Medical Center*, a jury found that it was not unreasonable for a hospital to return a traumatically injured, undocumented immigrant to his native country against the will of his guardian. Also known as forced repatriation, the practice of international patient dumping results from the disjointed federal regulations governing the intersection of immigration and health care law. This Comment examines the underlying causes of forced repatriation and whether tort liability is a suitable means for preventing this practice. It concludes that direct regulation, rather than tort law, is a preferable method of preventing this harm and calls upon Congress to adopt uniform regulations regarding the medical transfer of all patients to foreign hospitals, regardless of their immigration status.
TRIBAL MARRIAGES, SAME-SEX UNIONS, AND AN INTERSTATE RECOGNITION CONUNDRUM

MARK P. STRASSER*

Abstract: This Article focuses on the reasons for state and federal recognition of Native American polygamous unions and the implications of states’ recognition of these unions for the validity of same-sex marriages across state lines. It discusses some historical Native American domestic relations practices and explains why states recognized certain Native American marital unions that would not have been recognized had they been celebrated locally. This Article also analyzes the significance of the recognition of these unions for the debate surrounding recognition of same-sex unions. The historical treatment of Native American polygamous unions suggests Congress has the power to assure that same-sex couples have the same rights and protections as do different-sex couples as long as their marriages were valid in the domicile at the time of celebration.

Introduction

Opponents of same-sex marriage suggest that the recognition of such marriages will lead to the recognition of polygamous marriages.¹ This argument implies both that there are no important differences between same-sex and polygamous unions and that the recognition of polygamous unions in this country is simply unfathomable. Neither of these implicit contentions is correct. Same-sex and polygamous unions differ in important ways.² Moreover, the United States has recog-

¹ See Kevin G. Clarkson et al., The Alaska Marriage Amendment: The People’s Choice on the Last Frontier, 16 ALASKA L. REV. 213, 230 n.105 (1999) (“[T]he recognition of same-sex marriage might have a slippery-slope effect leading to recognition of relationships such as polygamy.”); George W. Dent, Jr., “How Does Same-Sex Marriage Threaten You?,” 59 RUTGERS L. REV. 233, 257 (2007) (“Recognition of SSM [same-sex marriage] would also generate unbearable pressure to expand further the legal definition of marriage to include, at least, polygamy and endogamy.”).

² See generally Maura I. Strassberg, Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage, 75 N.C. L. REV. 1501, 1505 (1997) (discussing some of the differences between same-sex marriage and Mormon polygamy).
nized Native American polygamous unions as a matter of course. Tribes recognized marriages that states customarily considered void for violating an important public policy of the state. Nonetheless, most states recognized those unions as valid, even though these unions would have been void had they been celebrated on non-tribal land.

This Article focuses on why Native American polygamous unions were recognized by federal and state governments. It explores what states’ recognition of these unions means for the validity of same-sex marriages across state lines. Part I describes some historical Native American domestic relations practices and explains why states recognized certain Native American marital unions that would not have been recognized had they been celebrated elsewhere. Part II analyzes what recognition of these unions means for the debate surrounding recognition of same-sex unions. This Article concludes by arguing that the historical treatment of Native American polygamous marriages suggests Congress has the power to assure same-sex couples the same rights and protections that almost all other families enjoy when traveling through or moving to other states.

I. TRIBAL DOMESTIC RELATIONS PRACTICES

Historically, Native American marriage practices were given deference by both the federal government and the states. Congress did not limit the types of tribal unions that the federal government would recognize. Similarly, states recognized Native American unions as long as they were valid under tribal customs and laws. In doing so, the states did not discuss whether these unions would have been recognized had they involved no Native Americans. Unfortunately, courts did not offer detailed explanations as to why such unions would be recognized. They did, however, imply an unspoken rule

4 See Scott v. Epperson, 284 P. 19, 19 (Okla. 1930); Blake v. Sessions, 220 P. 876, 878 (Okla. 1923).
5 See, e.g., James v. Adams, 155 P. 1121, 1122 (Okla. 1915); Cyr v. Walker, 116 P. 931, 934 (Okla. 1911).
6 See, e.g., Kobogum, 43 N.W. at 605; Earl v. Godley, 44 N.W. 254, 255 (Minn. 1890); Ortley v. Ross, 110 N.W. 982, 983 (Neb. 1907).
7 See, e.g., James, 155 P. at 1122; Cyr, 116 P. at 934.
8 See Hallowell v. Commons, 210 F. 793, 800 (8th Cir. 1914).
9 See, e.g., James, 155 P. at 1122; Cyr, 116 P. at 934.
10 See Kobogum, 43 N.W. at 605; Earl, 44 N.W. at 255; Ortley, 110 N.W. at 983.
making recognition of tribal unions mandatory but allowing local public policy to determine the validity of non-tribal marriages.\textsuperscript{11}

A. Tribes as Separate Sovereign Nations

Before delving into historical aspects of tribal marriage and states’ reasons for their recognition, it is important to understand the extent to which tribes can legally regulate their own affairs. A Native American tribe is an unusual legal entity.\textsuperscript{12} It is not the legal equivalent of a state within the United States.\textsuperscript{13} It is also not, however, considered a foreign nation existing separately from the United States.\textsuperscript{14} This special legal status derives from the Constitution, wherein tribes are explicitly mentioned and are differentiated both from states and from foreign nations.\textsuperscript{15}

Indeed, the Supreme Court has described Native American tribes as “domestic dependent nations,” which are “completely under the sovereignty and dominion of the United States.”\textsuperscript{16} Yet, in the eyes of the Court, tribes are also separate sovereignties capable of regulating their internal affairs.\textsuperscript{17} In \textit{United States v. Wheeler}, the Court explained that “until Congress acts, the tribes retain their existing sovereign powers.”\textsuperscript{18} The Court further clarified that Native American tribes “possess those aspects of sovereignty not withdrawn by treaty or statute, or [withdrawn] by implication as a necessary result of their dependent status.”\textsuperscript{19} Absent congressional action to the contrary, tribes

\textsuperscript{11} See Kobogum, 43 N.W. at 605; Earl, 44 N.W. at 255; Ortley, 110 N.W. at 983.
\textsuperscript{13} See \textit{Kiowa Tribe}, 523 U.S. at 755–56 (“We have often noted, however, that the immunity possessed by Indian tribes is not coextensive with that of the States.” (citing Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991))).
\textsuperscript{14} See \textit{Jones}, 175 U.S. at 10 (“The Indian tribes within the limits of the United States are not foreign nations . . . .”).
\textsuperscript{15} See U.S. Const. art. I, § 8, cl. 3 (“Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).
\textsuperscript{16} Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).
\textsuperscript{17} See Worcester v. Georgia, 31 U.S. 515, 581 (1852) (M’Lean, J., concurring) (“In the management of their internal concerns, they are dependent on no power.”). This article will not spell out the implications of domestic dependent nation status or discuss whether some other formulation would more accurately capture the legal status of the tribes. Cf. Matthew L.M. Fletcher, \textit{Same-Sex Marriage, Indian Tribes, and the Constitution}, 61 U. MIAMI L. REV. 53, 62 (2006) (“Indian tribes, Indian Country, and federal Indian law were and are sui generis—‘extraconstitutional.’”).
\textsuperscript{18} 435 U.S. 313, 323 (1978).
\textsuperscript{19} \textit{Id.} (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191(1978)).
can regulate their own internal affairs, including the conditions under which tribal members on Native lands can marry and divorce.\(^\text{20}\)

**B. Deference to Tribal Domestic Relations Law**

It has long been recognized that tribal marital practices may not mirror those of the states.\(^\text{21}\) Because tribes have the authority to govern their members, tribal unions do not have to conform to the laws of the states in which they are located.\(^\text{22}\) The Supreme Court confronted the question of whether tribal inheritance laws must conform to state inheritance laws in *Jones v. Meehan*.\(^\text{23}\) There, the Court addressed whether the eldest son of a polygamous chief would inherit his father’s land.\(^\text{24}\) The son’s inheritance hinged on whether the Court followed state or tribal inheritance law.\(^\text{25}\) Ultimately, the Court looked to “the laws, usages, and customs of the Chippewa Indians,” and decided in favor of the eldest son.\(^\text{26}\) The Court reasoned that Chippewa law controlled because only Congress—and not the state—had the power to substitute state or federal law for tribal law.\(^\text{27}\) Indeed, “the government has never recognized any distinction as to the right of inheritance among the Indians between the children of the


\(^{21}\) See, e.g., *In re Kansas Indians*, 72 U.S. 737, 745–46 (1866) (“The Shawnees have a custom of their own with regard to marriage. Some marry according to the old custom, and some marry by the minister.”).

\(^{22}\) See *Worcester*, 31 U.S. at 581 (M’Lean, J., concurring).

\(^{23}\) See *Worcester*, 31 U.S. at 2, 29.

\(^{24}\) Id. at 26 (noting that the chief had “two wives, both living at the same time”).

\(^{25}\) See *Worcester*, 31 U.S. at 2, 29.

\(^{26}\) See *Jones*, 175 U.S. at 28 (citing United States v. Shanks, 15 Minn. 369 (1870)); *In re Kansas Indians*, 72 U.S. at 737.
first wife and the children of a polygamous consort, where the Indians by their customs, while in a tribal state, permitted polygamy."

Later, in United States v. Quiver, the Supreme Court noted a well-established Congressional policy to “permit the personal and domestic relations of the Indians with each other to be regulated . . . according to their tribal customs and laws.” The Court further noted that this deference to tribal custom and law was accorded even to polygamy and revoked only “when Congress expressly or clearly directs otherwise.” Considering in that case whether a federal criminal statute making adultery a crime could be enforced against two adulterous Native Americans, the Court held that the adultery law did not apply to the Native Americans because “bigamy, polygamy, incest, adultery [and] fornication . . . always hav[ed] been left to the tribal customs and laws.

II. SHOULD THE TRIBAL MARRIAGE BE RECOGNIZED?

Although the states and the federal government usually do not interfere with tribal domestic relations, several issues should be addressed clearly and separately when analyzing cases addressing the validity of Native American marriages. The first of these issues is whether the marriage was valid where celebrated. Even if valid where celebrated, a different issue is whether that marriage would also be recognized in a different jurisdiction where such marriages were prohibited. Finally, the reasons behind the marriage’s recognition should be delineated.

A. WAS THE MARRIAGE VALID WHERE CELEBRATED?

As a general matter, courts have held that Native American marriages established in accord with tribal customs and usages were valid,

28 Hallowell, 210 F. at 799.
30 Id. at 605–06; see also Hallowell, 210 F. at 800 (“[T]he laws only of Congress, and in the absence of such laws were left to be governed by their own laws and customs as to domestic and social practices including marriage, and whether they should practice monogamy or polygamy was left wholly to them.”). To date, Congress has not expressly directed polygamous tribal unions be declared void, although the federal government has attempted to influence tribal marriage practices in other ways. See Hallowell, 210 F. at 800. (“Congress could have passed a law prohibiting plural marriages among tribal Indians if it saw fit, but it did not do so.”); Jill Elaine Hasday, Federalism and the Family Reconstructed, 45 UCLA L. Rev. 1297, 1358 n.233 (1998) (discussing an attempt by the Commissioner of Indian Affairs to discourage plural marriages among the tribes).
31 Quiver, 241 U.S. at 605.
as long as the marriage involved at least one tribal member and were on Native American lands.\textsuperscript{32} The latter qualifications were important because tribal and state marriage practices often had different rules regarding: (1) who could marry whom; (2) the formal requirements of marriage; and (3) the number of spouses in a marriage. As such, determining the validity of a tribal marriage under tribal law was a fact-intensive inquiry.

For example, some tribes did not require any formal ceremony in order for a couple to be considered married.\textsuperscript{33} Instead, these tribes merely required the parties to cohabitate as husband and wife.\textsuperscript{34} This practice mirrored common law marriage, in that such marriages also do not require any formal ceremony.\textsuperscript{35} Other tribes, however, would not accept mere cohabitation and instead required evidence of an

\textsuperscript{32} Many of the cases involved marriages between a member and a non-member of the tribe. See, e.g., Scott v. Epperson, 284 P. 19, 19 (Okla. 1930); Blake v. Sessions, 220 P. 876, 876 (Okla. 1923); Cyr v. Walker, 116 P. 931, 934 (Okla. 1911). In Cyr v. Walker, the court explained:

\begin{quote}
So long as Indians live together under the tribal relation and tribal government, they are subject only to the jurisdiction of Congress. . . . They have been uniformly recognized as capable of regulating and managing their own tribal affairs, including their domestic relations; and domestic relations formed under their customs and laws have been treated by the courts as valid.
\end{quote}

116 P. at 934 (citing Kobogum v. Jackson Iron Co., 43 N.W. 602, 602 (Mich. 1889); Boyer v. Dively, 58 Mo. 510, 510 (1875)).

\textsuperscript{33} Cyr, 116 P. at 934.

\textsuperscript{34} Id. (“Mere meeting and co-habitation as husband and wife constituted a marriage . . . .”).

\textsuperscript{35} See In re Golding’s Estate, 89 P.2d 1049, 1053 (Nev. 1939) (discussing the similarities between the tribal marriage custom and common law marriage). The requirements of common law marriage themselves differed across jurisdictions. See In re McLaughlin’s Estate, 30 P. 651, 655 (Wash. 1892). In In re McLaughlin, the court noted:

\begin{quote}
There is considerable conflict in the authorities as to the acts which are necessary to establish a common-law marriage, some courts even going to the extent of holding that continued cohabitation alone is sufficient, while others hold that there must have been a contract between the parties, and others to the still further extent that this must have been evidenced by some kind of a ceremony, or, at least, a declaration to that effect in the presence of other parties.
\end{quote}

Id. Montana’s common law marriage requirement states that the party must prove that “(1) the parties were competent to enter into a marriage; (2) the parties assumed a marital relationship by mutual consent and agreement; and (3) the parties confirmed their marriage by cohabitation and public repute.” State v. Bullman, 203 P.3d 768, 771–72 (Mont. 2009) (citing In re Estate of Ober, 62 P.3d 1114 (Mont. 2003)).
agreement by the parties to be married. This approach is similar to the approach used by some states. Other tribes had several criteria by which to determine whether an individual was married, while others only required that one of several criteria be met for the relationship to be recognized. For example, in the Choctaw tribe, individuals could enter into a valid marriage by participating in a Native ceremony, being married by a minister, or simply living together as husband and wife.

While there were similarities between state and tribal marriage practices, there were important differences as well. For example, when a common law marriage has been contracted, states would require that the union be dissolved formally. In contrast, some tribes

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36 See Henry v. Taylor, 93 N.W. 641, 643 (S.D. 1903) (“Granting that an agreement to live together, followed by cohabitation, constitutes the Indian custom of marriage, it was necessary to prove that Sam and Alice made an express agreement of that character, and actually lived together pursuant thereto, and not otherwise.”). But see Compo v. Jackson Iron Co., 16 N.W. 295, 296 (Mich. 1883). In Compo v. Jackson, the court commented:

And it would be a singular state of things, under a custom for parties to take each other for husband and wife at pleasure, and dissolve the relation at pleasure, without any ceremony whatever, if the legality in law were to be made to depend on somebody having been present to hear their conversation, and know whether they used the word marriage or not. If we recognize at all these polygamous and temporary marriages, we must, of necessity, assume that the marriage is constituted by the mere living together of the man and woman in the relation which the tribes recognize as that of matrimony.

Id.

37 See In re Marriage of Martin, 681 N.W.2d 612, 617 (Iowa 2004) (discussing the common law requirement of “a present intent and agreement to be married”).

38 See Wall v. Williams, 11 Ala. 826, 829 (1847). In Wall v. Williams, the court said:

[A]nother witness . . . stated that he was acquainted with the law of marriage among the Choctaws up to 1833; that they were sometimes married by a minister, sometimes by a Choctaw ceremony, and sometimes a man and woman took each other (without ceremony), lived together and were considered man and wife. Marriages were also solemnized by a justice of the peace from an adjoining county.

Id.

did not require any formal ceremony to dissolve a marriage.\footnote[40]{See La Framboise v. Day, 161 N.W. 529, 530–31 (Minn. 1917); Earl v. Godley, 44 N.W. 254, 254; Cyr, 116 P. at 934.} Instead, the tribe required only separation of the parties.\footnote[41]{See La Framboise, 161 N.W. at 530–31 (“According to the custom of the Sioux Indians an Indian marriage might be terminated, and either party be at liberty to marry again, by mere abandonment, without further ceremony.”); Cyr, 116 P. at 934 (“[T]he dissolution of such marriage was effected by separation of the parties, . . . which separation, by mutual consent or by abandonment by one or the other, was equivalent to an absolute divorce, and the parties thereafter were free to form other marital alliances.”). In \textit{Earl v. Godley}, the court elaborated: 

\begin{quote}
[\text{A}mong the Indian tribe there was a custom or law that any member of the tribe who desired to obtain a wife might purchase one, and the man and woman would thereupon, in accordance with such custom, live and cohabit together as husband and wife without other or further marriage ceremony; and that, in accordance with the usage and established custom prevailing among them, the parties might either of them also divorce themselves by dismissing or abandoning the other, without further ceremony, and thereupon either were at liberty to take another husband or wife . . . .
\end{quote}

44 N.W. at 254.\footnote[42]{See, e.g., State v. Pass, 121 P.2d 882, 882 (Ariz. 1942); Palmer v. Cully, 153 P. 154, 155 (Okla. 1915); Cyr, 116 P. at 931. The court in \textit{Palmer v. Cully} found that the issues for review included “that plaintiff is a full-blood Seminole Indian, illiterate, and ignorant of the law; that she is the widow of one Kintah Palmer, a Seminole Indian, who died intestate and without issue, in March, 1912, seised and possessed of certain lands.” \textit{Palmer}, 153 P. at 155. Often, courts were asked to determine whether or when parties had been married upon death of one of the parties so as to distribute the assets of an estate. \textit{Cyr}, 116 P. at 931. In \textit{Cyr}, the court held:

\begin{quote}
Whether plaintiff in error is entitled to share with Joel Delonias, the son of her deceased husband, in said allotment depends upon whether she was Xavier Delonias’ wife at the time of his decease, or had been, prior to said time, divorced according to the laws and customs of the Pottawatomie Tribe of Indians.
\end{quote}

\textit{Id}. Courts were also asked to determine the validity of marriages for other reasons such as when the marital testimonial privilege was asserted. \textit{See} State v. Pass, 121 P.2d 882, 882 (Ariz. 1942). In \textit{State v. Pass} the court stated:

\begin{quote}
The principal witness against [Frank Pass] was Ruby Contreras Pass. Without her testimony it is clear there could have been no conviction. When she was offered by the state as a witness, defendant promptly objected on the ground that she was his wife and disqualified by statute to testify against him except with his consent.
\end{quote}

\textit{Id}.\footnote[43]{\textit{See, e.g., Henry}, 93 N.W. at 643.}

The differences between state and tribal marriages forced courts charged with determining a marriage’s validity to consider a number of factors.\footnote[42]{See, e.g., State v. Pass, 121 P.2d 882, 882 (Ariz. 1942); Palmer v. Cully, 153 P. 154, 155 (Okla. 1915); Cyr, 116 P. at 931. The court in \textit{Palmer v. Cully} found that the issues for review included “that plaintiff is a full-blood Seminole Indian, illiterate, and ignorant of the law; that she is the widow of one Kintah Palmer, a Seminole Indian, who died intestate and without issue, in March, 1912, seised and possessed of certain lands.” \textit{Palmer}, 153 P. at 155. Often, courts were asked to determine whether or when parties had been married upon death of one of the parties so as to distribute the assets of an estate. \textit{Cyr}, 116 P. at 931. In \textit{Cyr}, the court held:

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\textit{Id}.\footnote[43]{\textit{See, e.g., Henry}, 93 N.W. at 643.}
the marriage conformed to those practices and usages.\textsuperscript{44} Third, the court would determine where the couple had lived.\textsuperscript{45}

The court in \textit{In re Paquet’s Estate} used these factors to determine whether a couple, Ophelia and Fred Paquet, had been legally married and thus whether Ophelia was entitled to her husband’s estate.\textsuperscript{46} Although there was evidence that the two had married according to Clatsop Indian custom, the Oregon Supreme Court noted that Ophelia and Fred had not been living on Native lands but, instead, in a place where state law governed.\textsuperscript{47} Oregon law precluded intermarriage between Native-Americans and whites.\textsuperscript{48} As a result, the court held that the marriage was void and of no legal effect.\textsuperscript{49} The court explained that “[s]uch a marriage would only be valid where Indians lived together under the tribal relation and a tribal form of government . . . [because] they would then be subject only to the jurisdiction of Congress.”\textsuperscript{50} As a result, the court held that Ophelia had no legal claim to Fred’s estate.\textsuperscript{51}

Determining whether or when individuals were married also required careful examination of differing tribal marriage dissolution practices. For example, the Choctaw recognized different ways by which individuals could validly end their marriage.\textsuperscript{52} Specifically, those who had married ceremonially were not required to end the marriage ceremonially.\textsuperscript{53} Similarly, a couple married by a justice of the peace might end their union by the tribal custom of simply ceasing to live together.\textsuperscript{54}

\textsuperscript{44} See id.

\textsuperscript{45} See, e.g., \textit{Wall}, 8 Ala. at 53 (“[T]he marriage, if contracted according to Choctaw usage, between members of the tribe, in their own territory, before their laws were abrogated, was valid . . . .”).

\textsuperscript{46} See 200 P. 911, 913 (Or. 1921).

\textsuperscript{47} \textit{Id.} at 913–14 (noting that the two had married “within Tillamook county and at a place where the state would have original and exclusive jurisdiction over any marriage contract between them”).

\textsuperscript{48} \textit{Id.} at 913 (explaining that the law prohibited any white person from marrying “any person having more than one-half Indian blood” (quoting 1921 Or. Laws. 2163, \textit{repealed by} 1951 OR. Laws. ch. 455 § 2)).

\textsuperscript{49} See id. at 914.

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{In re Paquet’s Estate}, 200 P. at 914. The court noted in dicta, however, that “in the interests of justice, a fair and reasonable settlement should be made” because Ophelia had “lived with [Fred] as a good and faithful wife for more than 30 years.” \textit{Id.}

\textsuperscript{52} See Rogers v. Cordingley, 4 N.W.2d 627, 629 (Minn. 1942).

\textsuperscript{53} See id. at 628–29.

\textsuperscript{54} See id.
Needless to say, a system in which individuals might end their marriages by simply separating can leave the status of some marriages unclear. It might not be clear, for example, whether an individual who was no longer living with his wife had left permanently or, instead, planned on returning. To make matters more complicated, it was sometimes not clear when and to what marriages tribal law applied. For example, in Palmer v. Cully the Oklahoma Supreme Court examined tribal law, federal treaties and state laws to determine whether two Seminoles had legally married. Pheney Bowlegs had married Kintah Palmer in accord with Seminole custom in 1905. Kintah Palmer, however, had previously married and lived with another woman, Lowina Palmer, until about a year before he married Pheney Bowlegs. Lowina did not formally divorce Kintah in accordance with local law until 1911.

The court found that prior to April 28, 1904, parties married under Seminole custom could be divorced according to Seminole custom by simply separating physically. After that date, however, a marriage could only be dissolved under state law though court proceedings. The court found that because Kintah and his first wife, Lowina, had only physically separated and not obtained a divorce through court proceedings, Kintah and his second wife, Pheney, could not have legally married because bigamy was not legal under state law. Had the court applied tribal law,
the marriage might have been found valid if Seminole custom recognized plural marriage.\textsuperscript{63}

Determining whether a marriage was valid was also complicated by the fact that some tribes—but not all—recognized plural marriages.\textsuperscript{64} In \textit{Pompey}, the Oklahoma Supreme Court addressed the validity of the marriage between John Pompey and Rose Lottie.\textsuperscript{65} At the time that John and Rose allegedly married, John was already married to someone else.\textsuperscript{66} Both marriages had, however, occurred before April 28, 1904. Therefore, unlike the first marriage in \textit{Palmer}, it was clear that tribal law—and not state law—governed the marriage. The sole issue before the court was whether the Seminoles recognized plural marriages.\textsuperscript{67}

The court acknowledged the marriage’s validity should be determined by the “tribal laws, customs, and usages of the Seminole tribe.”\textsuperscript{68} The defendants asserted that the Seminole laws quoted in \textit{Palmer} demonstrated that the Seminoles did not recognize plural

\begin{quote}
with the law in this respect. They were recognized as husband and wife by their kinsmen, friends, and acquaintances, all of whom knew of their past domestic relations. They lived together in this manner for eight years, and for nearly a year after Kintah had been divorced from his former wife, and until his death, mutually agreeing, understanding, and believing that they were in law husband and wife.
\end{quote}

\textit{Id.}

\begin{quote}
\textsuperscript{63} See \textit{id.} at 157–58.
\textsuperscript{64} Okla. Land Co. v. Thomas, 127 P. 8, 9 (Okla. 1912) (“[P]rior to the passage of said act . . . it was customary for a man to cohabit with two or more women, all of whom were considered as his wives . . . .”). In \textit{Pompey v. King} the court held:

In the instant case there was testimony tending to prove a Seminole custom permitting plural marriages. No law of the Seminole Nation prohibiting plural marriages has been called to our attention; hence we are of the opinion that the learned trial judge committed error in preventing the jury from determining whether, under the facts proved, the custom existed among the Seminole Indians permitting plural marriages.

\textit{Id.}\textsuperscript{65}

\begin{quote}
\textsuperscript{65} See \textit{225 P.} at 175.
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} See \textit{id.}
\end{quote}
The Pompey court, however, noted that the laws quoted in Palmer did not “directly or indirectly” prohibit plural marriages. The court further noted that defendants had presented no other examples of Seminole laws suggesting that Seminole custom permitted such unions. Consequently, the Pompey court remanded the case so that a jury could determine whether Seminole custom permitted plural marriage.

B. State Recognition of Tribal Marriages

Once a marriage is determined to be valid under tribal law, the next question is whether that marriage would be recognized by the state. In Cyr, the Oklahoma Supreme Court explained that the tribes “have been uniformly recognized as capable of regulating and managing their own tribal affairs, including their domestic relations,” and noted that “domestic relations formed under [tribal] customs and laws have been treated by the courts as valid.” Indeed, as a general matter, courts finding a marriage valid under tribal laws would also find it valid under state laws as long as the marriage did not involve the imposition of fraud on any other jurisdiction.

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69 Id.
70 Pompey, 225 P. at 175.
71 Id.
72 Id. at 176.
73 See Kobogum, 43 N.W. at 605.
74 116 P. at 934. In another case, approximately four years later, the Oklahoma Supreme Court noted:

It has been very generally, if not universally, held by the American courts, that marriages contracted between tribal Indians, according to the laws and customs of their tribe, at a time when the tribal relations and government were existing, would be upheld, in the absence of a federal law rendering such tribal laws and customs invalid.


75 See Kobogum, 43 N.W. at 605; Compo, 16 N.W. at 295, 301 (noting that generally “marriages which are valid where made and not fraud on any other jurisdiction, are valid everywhere”). In Kobogum the court stated:

The decisions in Alabama, Tennessee, Missouri, and Texas . . . all sustain the right of Indians to regulate their own marriages, and there is no respectable body of authority against it; on the contrary, it is a principle of universal law that marriages valid by the law governing both parties when made must be treated as valid everywhere.

43 N.W. at 605.
Oklahoma courts, however, did not always defer to tribal customs if they felt that a marriage was contrary to that state’s public policy.\textsuperscript{76} For example, in Blake v. Sessions, the court examined whether a marriage between James Grayson and Myrtle Segro was valid under Oklahoma law.\textsuperscript{77} James was one-quarter African and three-fourths Creek Indian.\textsuperscript{78} Myrtle was one-fourth white and three-fourths Creek Indian.\textsuperscript{79} The court noted that even if the marriage “had been celebrated and solemnized by all the priests, bishops, ministers, and civil authorities, authorized to perform marriage ceremonies in this state,” it would still have been “unlawful.”\textsuperscript{80} The court rejected the argument that Creek tribal law rather than Oklahoma law determined the marriage’s validity because it held that forbidding interracial marriage was “entirely within the [police] power of the state.”\textsuperscript{81}

Instead of focusing on whether Oklahoma had the power to prohibit interracial marriages, the Blake court should have focused on whether a marriage that was valid under the law of the sovereign at the time of celebration would be recognized by Oklahoma.\textsuperscript{82} James and Myrtle were each of Creek descent, and they celebrated their marriage according to Creek law on Creek lands.\textsuperscript{83} The tribe’s sovereign power to determine who could marry whom would militate in favor of the marriage’s validity.\textsuperscript{84}

Indeed, in a factually similar case the same court just seven years later held a tribal interracial marriage was valid because tribal law and not state law determined its validity. In Scott v. Epperson, the Oklahoma

\textsuperscript{76} See Blake, 220 P. at 878, 879.
\textsuperscript{77} See id. at 878.
\textsuperscript{78} Id. at 877.
\textsuperscript{79} Id. at 878.
\textsuperscript{80} Id.
\textsuperscript{81} Blake, 220 P. at 879. The court rejected plaintiff’s assertion that:

[T]he marriage law of the state is not applicable to marriages between citizens of the Creek Nation, and that the Legislature of the state cannot pass any laws regulating marriages between Indians, and assert as a reason therefor that the United States reserved the right to legislate and regulate marriages between citizens of the Five Civilized Tribes, and that the state statute has no application.

\textit{Id.} It reasoned that “the laws regulating marriages come clearly within the police power of the state, and, in the exercise of the state’s sovereign right, it has the sole and only power within the state to regulate who shall, or who shall not, marry.” \textit{Id.}

\textsuperscript{82} See id. at 878–79; see also Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (striking down Virginia’s antimiscegenation law).
\textsuperscript{83} See Blake, 220 P. at 876–79.
\textsuperscript{84} See, e.g., James, 155 P. at 1122; Cyr, 116 P. at 934.
Supreme Court considered the validity of the marriage between Lucy Grayson, who was three-quarters Seminole and one-fourth African-American, and James Scott, who was a full-blood Creek Indian. The Oklahoma Supreme Court held the marriage between Lucy and James valid, reasoning that those provisions prohibiting interracial marriage were intended to prevent future marriages rather than annul existing ones.

The Scott and Blake decisions stand in opposition to each other since both marriages had been valid under tribal law. Moreover, neither party in either Blake or Scott was attempting to skirt Oklahoma law by marrying on tribal land. These cases can only be reconciled if Oklahoma law and thus Oklahoma public policy rather than Creek law governed the marriage at issue in Blake. Yet, the law which created the state of Oklahoma provided that Native law would not be preempted by the new state’s law. Oklahoma courts sometimes ignored this provision and ruled as if tribal authority had been destroyed upon the creation of the state.

If those courts were correct and tribal authority had been destroyed upon Oklahoma statehood, then the marriage in Blake should have been evaluated in light of existing Oklahoma state law and the

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85 See 284 P. at 19.
86 See id. at 20. The court held:

We are of the opinion that there was no inhibition against the marriage of Lucy Grayson, who was of African descent, and James Scott, a full-blood Indian, in the Indian Territory in 1903 . . . .

But it is contended that even though James Scott and Lucy Grayson were legally married in 1903, the marriage relation could not be maintained between them after statehood by reason of the applicable provisions of the statutes and constitution, which were put in force over the Indian Territory at statehood.

Id.

87 See id. at 21 (“We are of the opinion that section 7499 was never intended as an annulment act, but as to those domiciled within the state it was merely intended to prohibit future marriages between such persons.”).
88 Compare Scott, 284 P. at 21 (finding an interracial marriage valid under tribal law), with Blake, 220 P. at 878 (invalidating an interracial marriage under Oklahoma state law).
89 See Blake, 220 P. at 878.
91 See id. at 11–12 (discussing the “misconception that Oklahoma had already obtained full jurisdictional powers everywhere within the state”).
public policy behind it and not tribal law as it existed at the time of the marriage.\textsuperscript{92} Moreover, if tribal authority had been destroyed, the court would not have had to decide whether marriages performed on tribal land would be recognized outside of the tribe’s jurisdiction.\textsuperscript{93} Rather, the court could have ruled the marriage invalid because it was invalid under existing Oklahoma law.\textsuperscript{94} Tribal law, however, had not been preempted or destroyed when Oklahoma became a state, and consequently Oklahoma law did not govern a marriage celebrated by a tribal member on Native lands in accord with local custom.\textsuperscript{95} Had the \textit{Blake} court followed the majority of courts and applied tribal law to determine the validity of the marriage, James and Myrtle’s marriage would have been valid.\textsuperscript{96}

Oklahoma courts did apply the majority rule when determining the validity of interracial marriages across state lines. For example, in \textit{Eggers v. Olson} an interracial couple permanently residing in Oklahoma married in Arkansas to evade the Oklahoma law banning interracial marriages.\textsuperscript{97} The Oklahoma court held the marriage invalid because the law of the domicile at the time of the marriage—here, Oklahoma—determines the validity of the marriage at the time of its

\textsuperscript{92} See \textit{Blake}, 220 P. at 878.
\textsuperscript{93} Id.
\textsuperscript{94} See \textit{In re Walker’s Estate}, 46 P. 67, 69 (Ariz. 1896); see also Wilbur’s Estate v. Bingham, 35 P. 407, 409 (Wash. 1894) (holding that intermarriage between Indian and white was not valid in light of governing territorial law, notwithstanding that the marriage was in accord with tribal custom). The \textit{In re Walker’s Estate} the court held:

There are not two sovereignties here, one for the power owning the reservation and one for the territory. There is only one sovereignty here,—that of the United States,—which delegates its power to the territory to legislate on all rightful subjects of legislation; and the legislative acts of the territory are operative in all parts of the territory, including Indian and all other executive or legislative reservations, unless expressly forbidden by the congress of the United States.

46 P. at 69.

\textsuperscript{95} See Leeds, \textit{supra} note 90, at 10–12.
\textsuperscript{96} See, e.g., \textit{In re Paquet’s Estate}, 200 P. at 914 (suggesting that an interracial marriage invalid under Oregon law would have been valid had it been celebrated in accord with tribal law on tribal lands).
\textsuperscript{97} 231 P. 483, 483–84 (Okla. 1924) (“About two years prior to her death she [Emily Lewis, a Choctaw Indian] went out of the state with a negro by the name of William Yates, and married him at Ft. Smith in the state of Arkansas on April 13, 1914, and after about a week returned to her home with him in Haskell county, where they lived together until her death.”).
celebration. The Oklahoma court was correct to apply Oklahoma law. The Oklahoma court was correct to apply Oklahoma law.

State attempts to prevent interracial marriage imposed numerous social and legal burdens. Socially, these laws destroyed otherwise healthy families. Legally, different states’ laws regarding the validity of interracial marriages meant that a marriage might be permissible in certain states but impermissible in others. For example, Oklahoma law prevented individuals of African descent from marrying individuals not of African descent. Arizona law, on the other hand, prevented whites from marrying non-whites. As a result, a marriage between someone of African descent and a full-blooded Indian, would be valid in Arizona but not in Oklahoma.

Further, Arizona’s law had a special twist, which prohibited individuals who were part Caucasian from, in reality, marrying anyone. In State v. Pass, the court explained that “a descendant of mixed blood

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98 See id. at 485. The court reasoned:

[T]he marriage of William Yates with Emily Lewis was prohibited by the laws of this state, [Oklahoma], and they could not, while citizens of this state, evade the law of marriage by going out of the state and marrying under the laws of another state and then return to this state to live and maintain the marriage assumed in that state, which was prohibited in this state, and expect the marriage to be recognized and protected in this state. The inhibition is not only against the form but the substance also.

Id.; see also Stevens v. United States, 146 F.2d 120, 122–23 (10th Cir. 1944) (upholding determination that evasive, interracial marriage was void under Oklahoma law); Baker v. Carter, 68 P.2d 85, 86 (Okla. 1937) (“If it is a fact that plaintiff is of African descent and the defendant is a full-blooded Indian, then their marriage is a nullity. This is so even though the marriage was contracted in another state, the parties being residents of this state.” (citations omitted)); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 283 (1971) (declaring that the validity of a marriage celebrated in accord with the law of the state of celebration is determined by the law of the state which had the most significant relationship to the couple at the time of marriage, which is generally the state of domicile at the time of the marriage).

99 See Eggers, 231 P. at 485–86. Whether Oklahoma could maintain such a law without violating federal constitutional guarantees is, of course, a separate issue. Antimiscegenation laws were not struck down until 1967. See Loving, 388 U.S. at 12.

100 See In re Paquet’s Estate, 200 P. at 914 (invalidating marriage of couple that had been together for over three decades).

101 Eggers, 231 P. at 484 (“These provisions of our law apply to all persons, citizens, residents, and transients in the state, and are intended to prohibit marriage of the descendants of the African race with any other race in this state.”).

102 Pass, 121 P.2d at 884 (“The evident purpose of the miscegenation statute was to prevent the named races, to wit, Indians, Negroes, etc., from mixing their blood with the blood of the white man.”).

103 Compare Eggers, 231 P. at 484, with Pass, 121 P.2d at 884.

104 See Pass, 121 P.2d at 884.
. . . cannot marry a Caucasian or a part Caucasian, for the reason he is part Indian. He cannot marry an Indian or a part Indian because he is part Caucasian. For the same reason a descendant of mixed Negro and Caucasian blood may not contract marriage with a Negro or a part Negro, etc.”

Although recognizing that this result was “absurd,” the court did not strike down the statute. Rather, it expressed hope that “the legislature will correct it by naming the percentage of Indian and other taboed blood that will invalidate a marriage.”

Generally, laws prohibiting miscegenation were alleged to promote an important public policy. Similarly, polygamous marriages were seen as invalid because they violated an important public policy. Considering the strong public policy rationale for invalidating these marriages, it might be thought surprising that some courts felt

105 Id.
106 Id.
107 Id.
108 See, e.g., State v. Miller, 29 S.E.2d 751, 752 (N.C. 1944) (“The section of the Constitution and the statute referred to above, provide in substance, that all marriages between a white person and a negro or between a white person and a person of negro descent to the third generation, inclusive, shall be void.”); In re Atkins’ Estate, 3 P.2d 682, 686 (Okla. 1931) (Riley, J., dissenting) (“[T]he pretended marriage between this Indian and negro was illegal and void. No marriage in fact could have been consummated in Oklahoma, at the time heretofore indicated or thereafter, between a negro and an Indian or white, either by ceremony, common law, or statute.”). In Grant v. Butt the court explained:

Section 1438 of the Code 1932, provides: “It shall be unlawful for any white man to intermarry with any woman of either the Indian or negro races, or any mulatto, mestizo, or half-breed, or for any white woman to intermarry with any person other than a white man, or for any mulatto, half-breed, Indian, negro or mestizo to intermarry with a white woman; and any such marriage, or attempted marriage, shall be utterly null and void and of none effect . . . .”

17 S.E.2d 689, 692 (S.C. 1941).

109 See Whitney v. Whitney, 134 P.2d 357, 359 (Okla. 1942) (“But, if one of the parties to a so-called common law marriage has a living spouse of an undissolved marriage, the common law marriage attempted is as polygamous and plural and, therefore, as void as a ceremonial marriage attempted under the same circumstances.”); Pennegar v. State, 10 S.W. 305 (Tenn. 1889). In Heflinger v. Heflinger the court stated:

Undoubtedly, the general rule is that a marriage valid where performed is valid everywhere; but there are exceptions to the rule as well established as the rule itself. These exceptions are generally embraced in two classes: First, marriages deemed contrary to the laws of nature as generally recognized in Christian countries, and include only those which are void for polygamy or incest; second, marriages forbidden by statute because contrary to the public policy of the state.

118 S.E. 316, 320 (Va. 1923) (citing Commonwealth v. Lane, 113 Mass. 458 (1873); Pennegar, 10 S.W. at 305).
compelled to recognize tribal marriages that were otherwise considered void under state law.

C. Why Must Tribal Marriages Be Recognized?

Courts offered surprisingly different reasons as to why tribal marriages had to be recognized.\(^\text{110}\) For example, the Minnesota Supreme Court noted that the “general rule” in Minnesota was “that marriages valid by the laws of the country where they are entered into are binding here” and that “the same rule must be adopted in relation to Native American marriages, where the tribal relation still exists."\(^\text{111}\) This justification implies that tribal marriages, like foreign polygamous marriages, should be given deference. The court, however, did not seem to suggest that tribal marriages should be given more deference than marriages entered into under a foreign nation’s laws.

In contrast, the Nebraska Supreme Court suggested that tribal practices were owed greater deference than foreign polygamous marriages.\(^\text{112}\) In *Ortley v. Ross*, the Nebraska Supreme Court held that a polygamous marriage was valid.\(^\text{113}\) The court noted that the union at issue would not have been valid “if this marriage had taken place between citizens of the United States in any state of the Union.”\(^\text{114}\) It noted, however, that it applied “a liberal rule” when determining the validity of tribal marriages.\(^\text{115}\) Specifically, it cited the Michigan Supreme Court’s decision in *Kobogum v. Jackson Iron Co.* for the proposition that “marriages valid by the law governing both parties when made must be treated as valid everywhere.”\(^\text{116}\)

\(^\text{110}\) See *Earl*, 44 N.W. at 255; Morgan v. M’Ghee, 24 Tenn. (5 Hum.) 13, 14–15 (1844).

\(^\text{111}\) *Earl*, 44 N.W. at 255; *see also* Morgan, 24 Tenn. (5 Hum.) at 14 (“Our courts of justice recognize as valid all marriages of a foreign country, if made in pursuance of the forms and usages of that country; and there is no reason why a marriage made and consummated in an Indian Nation should be subject to a different rule of action.”).

\(^\text{112}\) *Ortley*, 110 N.W. at 983.

\(^\text{113}\) *Id.* (“as the alleged marriage between the father and mother of the plaintiff was polygamous”).

\(^\text{114}\) *Id.*

\(^\text{115}\) *Id.*; *see also* Boyer v. Dively, 58 Mo. 519, 529 (1875) (“Although located within the State lines, yet so long as their tribal customs are adhered to, and the Federal Government manages their affairs by agents, they are not regarded as subject to the State laws, so far at least, as marriage, inheritance, etc. are concerned.”).

\(^\text{116}\) *Ortley*, 110 N.W. at 983 (citing *Kobogum*, 43 N.W. at 605); *see also* Johnson v. Johnson’s Adm’r, 30 Mo. 72, 73 (1860) (“It is well settled, as a general proposition, that a marriage, valid according to the law or custom of the place where it is contracted, is valid everywhere.”).
In Kobogum the court noted that the “United States supreme court and the state courts have recognized as law that no state laws have any force over Indians in their tribal relations.”117 As such, the court reasoned that the state law prohibiting polygamous marriages did not invalidate a tribal polygamous marriage under tribal law.118 The court, however, still had to decide whether this valid tribal law marriage would also be recognized by Michigan.119

On this point, the Kobogum court noted that no federal laws or treaties addressed or “interfer[ed] with” Indian marriage usages.120 Thus, the court suggested, the federal government might have prohibited polygamous unions but chose not to and instead permitted tribal law and custom to govern domestic relations.121 The court reasoned that by thus refraining from regulating Native American domestic relations law, the federal government made it possible for the tribes to choose whether to recognize polygamous unions.122

The court’s analysis, however, is faulty. For example, the court noted that it “must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usage are so regarded. There is no middle ground which can be taken, so long as our own laws are not binding on the tribes.”123 Here the court implied that jurisdictions which refuse to recognize Native American polygamous marriages would also refuse to recognize all non-polygamous Native American marriages. Moreover because non-polygamous marriages entered into in foreign countries are recognized, the court implied that polygamous marriages entered into in foreign countries must also be recognized.124 The court’s statement

117 43 N.W. at 605 (citations omitted).
118 Id. (“The testimony now in this case shows what, as matter of history, we are probably bound to know judicially, that among these Indians polygamous marriages have always been recognized as valid . . . .”).
119 A finding that one jurisdiction permitted certain unions would be no guarantee that such a union would be recognized in a different jurisdiction. Suppose, for example, that State A recognized polygamous unions, but State B did not. A court determining whether State B recognized a polygamous marriage entered into in State A might admit that the union was recognized in State A but nonetheless deny its validity in State B. See Ortley, 110 N.W. at 983 (noting that “the alleged marriage between the father and mother of the plaintiff was polygamous”).
120 43 N.W. at 605.
121 See id.
122 See id.
123 Id.
124 See Royal v. Cudahy Packing Co., 190 N.W. 427, 428 (Iowa 1922) (recognizing the contested marriage because, although the deceased could have taken four wives, the “marriage between deceased and claimant was not in itself polygamous”).
that either all or no marriages are valid where celebrated must be accorded recognition is simply false.\textsuperscript{125} Indeed, the Michigan Supreme Court later held that polygamous marriages need not be recognized even if valid where celebrated.\textsuperscript{126}

The court seemed to suggest that it would afford Native American polygamous marriages the same deference as foreign polygamous marriages. But a polygamous marriage valid in another country would likely nonetheless be denied recognition in the United States.\textsuperscript{127} This would suggest that Native American polygamous marriages also should not be recognized. The \textit{Kobogum} court reasoned that tribes “were placed by the constitution of the United States beyond our jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India.”\textsuperscript{128} But the relevant question is not whether such marriages are valid where celebrated but whether they will be recognized here. Foreign polygamous marriages valid where celebrated were generally not recognized elsewhere, and the court’s analysis suggested that the Native American polygamous marriages should not have been recognized.\textsuperscript{129}

The \textit{Kobogum} analysis suggests that the recognition of both foreign and tribal polygamous marriages depends upon state public policy and not federal law.\textsuperscript{130} But if that were true, neither kind of polygamous marriage would be recognized as a general matter, although there might be individual instances in which plural marriages would be recognized for certain purposes or because of compelling individual circumstances.\textsuperscript{131} Such exceptions would be rare.\textsuperscript{132} Indeed, many

\textsuperscript{125} \textit{Kobogum}, 43 N.W. at 605.
\textsuperscript{126} See \textit{In re Miller’s Estate}, 214 N.W. 428, 429 (Mich. 1927).
\textsuperscript{127} See \textit{Ex parte Chace}, 58 A. 978, 980 (R.I. 1904) (“[A] polygamous marriage, although valid and binding in the country where it was contracted, would probably be denied validity in all countries where such unions are prohibited.”).
\textsuperscript{128} 43 N.W. at 605.
\textsuperscript{129} See \textit{Earle v. Earle}, 126 N.Y.S. 317, 320 (N.Y. App. Div. 1910) (“The [polygamous] marriage, being odious by common consent of the nations, is not protected by the rules of international law . . . .”).
\textsuperscript{130} See \textit{Kobogum}, 43 N.W. at 605.
\textsuperscript{131} Polygamous marriages have sometimes been recognized for certain purposes. At issue in \textit{In re Dalip Singh Bir’s Estate} was the estate of an individual who had died intestate. See \textit{In re Dalip Singh Bir’s Estate}, 188 P.2d 499, 499 (Cal. Dist. Ct. App. 1948). The California appellate court recognized the inheritance rights of both wives. See \textit{id.} at 502. A different case in which a polygamous marriage might be recognized might involve an individual who had remarried based on the reasonable belief that her spouse was dead but subsequently discovered her first husband was alive after all. See \textit{Steinke v. Steinke}, 357 A.2d 674, 683 (Pa. Super. Ct. 1975). The second (and plural) marriage might be recognized as long as the first husband divorced his wife. See \textit{id.} (“There is also what might be described as a
states refuse to recognize foreign polygamous marriages for any purpose, even if validly celebrated elsewhere.\footnote{133}

This refusal to recognize foreign polygamous marriages is supported by federal case law. The Supreme Court, in \textit{Lee Lung v. Patterson}, upheld a refusal to permit the second (polygamous) wife of Lee Lung to enter the United States because she was not viewed as his valid wife.\footnote{134} Had she been recognized as his lawful spouse, she would have been permitted entry.\footnote{135} The court noted that a federal law prohibiting polygamous marriages negated the argument that the federal government would recognize such unions.\footnote{136}

Just as a state might refuse to recognize a polygamous union celebrated in another country on the basis of public policy, states seem free to refuse to recognize a polygamous union celebrated according to tribal usages.\footnote{137} If Native American polygamous unions were treated the same as foreign polygamous unions, state courts would almost always refuse to recognize them.\footnote{138} But just the opposite

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\footnote{132} See \textit{Commonwealth v. Mash}, 48 Mass. (7 Met.) 472, 473 (1844) ("[A] woman whose husband suddenly left her without notice, and saying, when he went out, that he should return immediately, and who is absent between three and four years, though she have made inquiry after him, and is ignorant of his being alive, but honestly believes him to be dead, if she marries again, is guilty of polygamy.").

\footnote{133} See, e.g., \textit{United States v. Tenney}, 11 P. 472, 479 (Ariz. 1886) ("Every bigamous or polygamous marriage is void . . ."); \textit{State v. Graves}, 307 S.W.2d 545, 547 (Ark. 1957) ("The general rule is, of course, that a marriage valid where it is celebrated is recognized as being valid everywhere. But there are certain exceptions to the rule: (1) Polygamous marriage." (citation omitted)); \textit{Marianacci v. Marianacci}, 299 N.Y.S. 146, 149 (Fam. Ct. 1937) ("The law does not recognize polygamous marriages, and the court will not, by even indirect, sanction or acquiesce in such marriages."); United States \textit{ex rel. Devine v. Rodgers}, 109 F. 886, 887 (E.D. Pa. 1901) (suggesting that no foreign polygamous unions would be recognized as valid).

\footnote{134} See 186 U.S. 168, 173 (1902).

\footnote{135} See \textit{United States v. Gue Lim}, 176 U.S. 459, 468–69 (1900) ("When the fact is established to the satisfaction of the authorities, that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of a class mentioned in the treaty as entitled to enter, then that person is entitled to admission without the certificate.").

\footnote{136} See \textit{Lee Lung}, 186 U.S. at 173; \textit{see also} \textit{Rohwer v. Dist. Ct. of First Judicial Dist.}, 125 P. 671, 674 (Utah 1912) (noting that “Congress had passed laws whereby polygamous and plural marriages were prohibited”).

\footnote{137} \textit{See James}, 155 P. at 1122; \textit{Cyr}, 116 P. at 934.

\footnote{138} \textit{Cf. In re Dalip Singh Bir’s Estate}, 188 P.2d at 502. The \textit{Dalip Singh Bir} court reasoned, "'Public policy' would not be affected by dividing the money equally between the two
is true. As a general matter, such marriages contracted by at least one tribal member on Native lands were recognized as long as it was also valid in light of tribal law or custom. 139 This surprising result was not adequately explained in any of the opinions.

One plausible explanation of the tendency of state courts to recognize Native American plural marriages involves deference to federal law. The Kobogum court correctly noted that there were no federal laws or treaties “on the subject of Indian marriages.” 140 This comment, however, incorrectly suggests that no applicable federal laws existed when, in fact, some federal treaties were relevant. For instance, as the court noted, “numerous” treaties between the United States and this tribe “recognize” inheritance tribal practices. 141 The court’s reference to these treaties suggests that it recognized polygamous tribal marriages not just because they were valid where celebrated but also because federal treaties required that the unions be recognized, at least for certain purposes such as inheritance rights.

Many courts seemed to recognize Native American plural marriages merely because they were valid where celebrated. Such a justification, however, does not explain why Native American polygamous marriages were recognized but foreign polygamous marriages were not. It seems that these courts were implicitly relying on federal inaction and action as the legal foundation for recognizing Native American polygamous marriages but not foreign polygamous marriages. 142 Federal inaction supported their recognition because Congress refused to supplant tribal laws and customs with respect to marriage, thereby validating a marriage as long as it involved at least one tribal member, was celebrated on Native lands, and was in accord with tribal law or custom. 143 Federal action supported the recognition of Native American polygamous unions because the federal government had signed a treaty agreeing that tribal family relations as defined by tribal custom and law would be recognized by the United States. 144

wives, particularly since there is no contest between them and they are the only interested parties.” Id.

139 See James, 155 P. at 1122; Cyr, 116 P. at 1122.
140 See 43 N.W. at 605.
141 Id.
142 See Hallowell, 210 F. at 799 (“[T]he government has never recognized any distinction as to the right of inheritance among the Indians between the children of the first wife and the children of a polygamous consort, where the Indians by their customs, while in a tribal state, permitted polygamy.”).
143 See, e.g., James, 155 P. at 1122; Cyr, 116 P. at 934.
144 See Kobogum, 43 N.W. at 605.
Federal laws and treaties preempt state laws. Therefore, a treaty requiring that Native American polygamous families be recognized in light of tribal law requires states to recognize such families even if the states could have refused to recognize foreign polygamous families not covered by a similar treaty.

If the United States entered into a multilateral treaty specifying that polygamous marriages which were valid where celebrated would be recognized here, then states would have to recognize foreign polygamous marriages even if those unions violated an important public policy of the state. The existence of a treaty validating Native American marital unions (at least for purposes of inheritance laws) meant that states had to recognize those marriages, while the absence of a treaty requiring that foreign polygamous unions be recognized left the states free to decide whether to recognize those marriages.

III. Application of the Tribal Marriage Recognition Practices to Interstate Recognition of Same-Sex Unions

Commentators sometimes suggest that the recognition of same-sex unions will lead to a parade of horribles including the recognition of polygamous unions. Although the unions are distinguishable, Native American polygamy cases provide some important lessons for those interested in securing marriage equality.

145 See U.S. Const. art VI, § 2. The Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.


147 Cf. In re Marriage Cases, 183 P.3d 384, 434 n.52 (Cal. 2008), superseded by constitutional amendment, Cal. Const. art. I, § 7.5. The court commented that “[a]lthough the historic disparagement of and discrimination against gay individuals and gay couples clearly is no longer constitutionally permissible, the state continues to have a strong and adequate justification for refusing to officially sanction polygamous or incestuous relationships because of their potentially detrimental effect on a sound family environment.” Id.
A. The Danger of Recognizing Same-Sex Unions

Opponents of marriage equality for same-sex couples have offered a variety of public policy arguments to justify their position.148 Some commentators imply that same-sex marriage is too novel and contentious to permit.149 Others argue that recognition of such unions would be dangerous and might lead to the recognition of a whole host of currently prohibited relationships.150

Same-sex marriage, however, is becoming much less novel. Further, jurisdictions recognizing same-sex marriage and civil unions have not experienced any of the dire consequences predicted by same-sex marriage opponents.151 Many other arguments offered against same-sex marriage have been similarly unpersuasive because they were based either on errors in logic or on wildly implausible empirical claims. For example, the New York Court of Appeals justified its state ban on same-sex marriage on three grounds.152 First, it found that “the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships.”153 Second, the court reasoned that “[h]eterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not.”154 Third, the court found that “[t]he
Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.”  

These justifications, however, are specious. The first rationale presents a false dichotomy and then suggests that the Legislature acted reasonably when choosing one option over the other. But the Legislature did not have to choose between permitting different-sex couples to marry and permitting same-sex couples to marry. On the contrary, as Chief Justice Kaye pointed out in dissent, “[t]here are enough marriage licenses to go around for everyone.”

Suppose that a legislature banned marriages between the elderly because their sexual relations were less likely to be procreative. Even if such a law did not offend due process guarantees, one would wonder why it would be necessary to choose between permitting the elderly and permitting the non-elderly to marry. Permitting the elderly to marry would in no way undermine the ability or desire of the non-elderly to marry, just as permitting same-sex marriage would in no way undermine the ability or desire of opposite-sex couples to marry. Such a policy is a specious attempt to justify a policy that had been adopted for other reasons.

The second rationale was no more persuasive than the first. After all, many same-sex and opposite-sex couples marry but have no interest in raising children. Marriage provides benefits both to society and the individuals themselves that are unrelated to the having or raising of children. Consequently, the fact that a couple—be they elderly or of the same-sex—will not have children should not be a bar to their being able to marry.

Even if the third justification were true and it would be better for children to grow up with a mother and a father rather than two mothers or two fathers, that would not be an adequate reason to prevent same-sex couples from marrying. No state precludes all but the

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155 Id.
156 Id. at 30 (Kaye, C.J., dissenting).
157 Cf. Hernandez, 855 N.E.2d at 30 (“Plainly, the ability or desire to procreate is not a prerequisite for marriage. The elderly are permitted to marry.”).
158 See Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (“[T]he right to marry is of fundamental importance for all individuals.”).
159 Hernandez, 855 N.E.2d at 31 (Kaye, C.J., dissenting) (“Marriage is about much more than producing children.”).
160 See Michael S. Wald, Adults’ Sexual Orientation and State Determinations Regarding Placement of Children, 40 Fam. L.Q. 381, 386 (2006) (“[T]he claim that children raised with two heterosexual parents do better with respect to their academic, social, emotional, or behavioral development than children raised by two same-sex parents is not supported by the evidence.”).
most optimal parents from marrying, and with good reason. If the state were to do that, many children would be denied the opportunity of being in a good—even if not optimal—home. By allowing the state to ban same-sex marriage, the state would be permitted to reduce the number of marital homes in which children might thrive.

It was almost as if the court believed that same-sex couples would abstain from raising children if not permitted to marry. But that has not been the experience in New York, where a growing number of unmarried same-sex couples are having and raising children. Indeed, New York permits each member of a same-sex couple to be recognized as the legal parent of the same child. Consequently, this rationale for denying same-sex couples the right to marry makes even less sense. In the end, the New York court justifies the state’s same-sex marriage ban by appealing to the interests of children, even though unmarried same-sex couples are having and raising children and even though prohibiting same-sex marriages will deprive children of the benefits that permitting their parents to marry might offer.

As this case illustrates, many of the purported public policy reasons cited to support same-sex marriage bans, like similar policies against interracial marriage, are specious. Arguably, the right to marry a same-sex partner, like the right to marry a different-sex partner, is protected by the Federal Constitution. This article’s focus, however, is not on whether the Federal Constitution protects such a right but merely on the lessons offered by the Native American polygamy cases for interstate recognition practices.

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161 See Hernandez, 855 N.E.2d at 32 (Kaye, C.J., dissenting) (discussing the “tens of thousands of children . . . currently being raised by same-sex couples in New York”).


163 See Hernandez, 855 N.E.2d at 32 (Kaye, C.J., dissenting) (“Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare . . . .”)

164 See Matthew Coles, Lawrence v. Texas and the Refinement of Substantive Due Process, 16 Stan. L. & Pol’y Rev. 23, 49 (2005) (“The most obvious constitutional problem with the exclusion of same-sex couples from marriage is that it interferes with the federal constitutional right to marry.”).
B. The Defense of Marriage Act

As a general matter, tribes no longer recognize polygamous marriages.165 Recently, however, two same-sex tribal marriages have been celebrated.166 It might seem that these marriages, like tribal polygamous marriages, would have to be recognized in all states.

If states were required to recognize tribal same-sex marriages, the jurisprudence suggests that states would be bound to recognize such unions only if they were (1) contracted on Native lands, (2) in accord with tribal custom or law, and (3) by at least one tribal member.167 Such interjurisdictional recognition is, however, not required because the Federal Defense of Marriage Act ("DOMA" or "the Act") specifically authorizes the non-recognition of same-sex marriages celebrated elsewhere.168 The Act reads:

No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.169

If DOMA were repealed, then, subject to the limitations mentioned above, some same-sex marriages would be entitled to recognition as long as such marriages were still permitted by tribal law.170 Although

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165 See Fletcher, supra note 17, at 54 (“Times have changed. Most, if not all, Indian tribes no longer recognize polygamous marriages and Indian people tend to utilize the divorce laws as much as non-Indian people.” (citations omitted)).

166 See Jeffrey S. Jacobi, Note, Two Spirits, Two Eras, Same Sex: For a Traditionalist Perspective on Native American Tribal Same-Sex Marriage Policy, 39 U. Mich. J.L. Reform 823, 824–27 (2006) (discussing two Cherokee women who obtained a marriage license in Oklahoma and subsequently wed in a ceremony presided over by a Cherokee nation certified minister); see also Bill Graves, Coquille Tribe Allows Same-Sex Marriage, PORTLAND OREGONIAN, May 22, 2009, at B3. (“A Coquille Indian Tribe law allowing same-sex marriage took effect this week, and two women plan to marry Sunday on the tribe’s Coos Bay reservation. Tribal member Kitzen Branting, 26, and her partner, Jeni Branting, 28, of Edmonds, Wash., will become the first same-sex couple to legally marry in Oregon, though their marriage will be recognized only by the tribe.”).

167 See supra text accompanying notes 32–33 (specifying these limitations).

168 Fletcher, supra note 17, at 70 (“DOMA allows, however, that if a tribe authorizes or recognizes same-sex marriage, states and other tribes have no obligation to recognize that [relationship].” (citing Federal Defense of Marriage Act, 28 U.S.C. § 1738C (2006))).

169 28 U.S.C. § 1738C.

170 See Fletcher, supra note 17, at 55 (“[T]here remains the distinct possibility that one or more of the 560-plus federally recognized Indian tribes will take action to recognize
such interjurisdictional recognition might have symbolic value, very few same-sex marriages would meet the relevant criteria. As such, the issue of interjurisdictional recognition of same-sex tribal marriages would rarely, if ever, arise. Nonetheless, it would be worthwhile to consider some of the possible effects of a repeal of DOMA.

C. The Lessons of DOMA and the Native American Polygamous Marriage Cases

Although President Obama said he would support DOMA’s repeal, the United States Department of Justice recently filed a brief in support of DOMA’s constitutionality. Further, there has been little or no effort in Congress to repeal DOMA. Given this, it seems quite unlikely that Congress will either repeal DOMA or affirmatively act to protect same-sex relationships.

Even if Congress did repeal DOMA, it is unclear whether Congress could require states to recognize same-sex marriages validly celebrated elsewhere. Opponents of such a measure might argue that Congress cannot force states to recognize marriages valid in other states without violating a principle of federalism. It should be noted, however, that DOMA may violate principles of federalism.  

same-sex marriage in their jurisdictions.

171 See Jacobi, supra note 166, at 827 (“Unlike the Cherokee, not all federally recognized Native American tribes have the ability to issue marriage licenses, and those that can issue marriage licenses do so rarely.” (citing Sheila K. Stogsdill, Tribe Mulls Their Laws on Marriage, DAILY OKLAHOMAN, May 18, 2004, at 3A)).

172 See Stephen Dinan & Christina Bellantoni, Gay Man Eyed for Pentagon Post: Obama Still Criticized for Slow Action on Pledge, WASH. TIMES, June 18, 2009, at A1 (discussing the view of gay rights groups with respect to “how far Mr. Obama still has to go to make good on his campaign promises . . . to repeal the 1996 Defense of Marriage Act”); Editorial, A Bad Call on Gay Rights, N.Y. TIMES, June 16, 2009, at A20 (criticizing the Department of Justice’s brief in support of DOMA).

173 See Carolyn Lochhead, Activists Shrug at Obama’s Action, S.F. CHRON., June 18, 2009, at A1 (stating that “there is no effort to repeal DOMA”).


176 See Mark P. Strasser, “Defending” Marriage in Light of the Moreno-Cleburne-Romer-Lawrence Jurisprudence: Why DOMA Cannot Pass Muster After Lawrence, 38 CREIGHTON L. REV. 421, 430 (2005). States are completely left out of the DOMA scheme:

DOMA does not permit each state to decide whether to recognize a marriage celebrated in another state, as one might expect a federalism statute to do. It does not even permit each state to refuse to recognize a marriage validly celebrated elsewhere if that marriage violates an important public policy of
After all, DOMA did not give states the power to refuse to recognize any marriage that violates public policy. Instead, it picks out only one kind of marriage and subjects that union to unique treatment. If Congress had been genuinely interested in promoting federalism, it would have given states the option not to recognize any marriage validly celebrated elsewhere or, perhaps, the option not to recognize any marriage that violated an important public policy. DOMA masquerades as a statute promoting states’ rights but is really designed to impose undeserved burdens on a disfavored minority. Similarly, the proposed Federal Marriage Amendment is argued to strengthen state power in terms of federalism, even though it strips states of the power to require the recognition of same-sex marriage valid in the domicile at the time of celebration.

Similar arguments that Congress’s requiring the recognition of same-sex unions celebrated elsewhere would somehow violate the Tenth Amendment are also erroneous. The Tenth Amendment has been construed as not limiting the powers of Congress expressly conferred by the Constitution. Here, Congress’s exclusive power to make treaties and fashion choice of law rules grant it, and not the states, the power to require the recognition of same-sex marriages.

Federalism does not bar Congress from requiring recognition of same-sex unions if it desires to do so. First, the Native American polygamy cases suggest that the federal government could enter into a treaty with another country, e.g., Canada, that included a provision specifying that same-sex marriages validly celebrated there would be the forum state. Rather, it picks out one kind of marriage, namely, same-sex marriages, and imposes this unique disability on them.

Id.

177 Id.

178 Id.


180 See U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

181 See New York v. United States, 505 U.S. 144, 156 (1992) (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . . .”)

182 See supra notes 172–177 and accompanying text.
recognized here.\footnote{183} Second, many supporting the constitutionality of DOMA have suggested that Congress has broad and possibly plenary powers with respect to fashioning choice of law or full faith and credit rules.\footnote{184} But if Congress has plenary powers with respect to such rules, then it could require recognition of same-sex unions validly celebrated in another state without violating constitutional guarantees.

Perhaps Congress may not have plenary power under the Full Faith and Credit clause to modify the faith and credit to be given to marriages. Even so, it might be noted that the statute hypothesized here would be less subject to constitutional attack than is DOMA which seems to violate equal protection guarantees.\footnote{185} Further, those who believe that the Clause permits Congress to increase but not decrease the credit due to other states’ judgments or laws would argue that a statute requiring recognition of same-sex unions validly celebrated elsewhere would not violate constitutional guarantees.\footnote{186} Thus, it would seem that Congress has the power to require states to recognize same-sex unions validly celebrated in other states. Further, the Native American polygamous marriage jurisprudence suggests that it

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\item \footnote{183} See generally Missouri v. Holland, 252 U.S. 416, 422 (1920) (suggesting that the treaty power is very broad). Indeed, the Court suggested that treaties would be valid and binding as long as made under the authority of the United States. See id. at 432 (“[T]reaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land.”).
\item \footnote{184} See, e.g., Daniel A. Crane, The Original Understanding of the “Effects Clause” of Article IV, Section 1 and Implications for the Defense of Marriage Act, 6 GEO. MASON L. REV. 307, 336 (1998) (“[E]vidence clearly demonstrates that the Framers intended that Congress be granted plenary power to determine the extent of faith and credit to be accorded state acts, records, and proceedings in sister states.”); Mark D. Rosen, Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires, 90 MINN. L. REV. 915, 965 (2006) (“On numerous occasions, however, the Court has indicated in dicta that Congress has the power under the Effects Clause to create full faith and credit rules that differ from those that the Court itself has identified.”); Mathew D. Staver, Transsexualism and the Binary Divide: Determining Sex Using Objective Criteria, 2 LIBERTY U. L. REV. 459, 468 (2008) (“Under the Full Faith and Credit Clause, the Constitution gives the Congress the power to determine the ‘effects’ of an act, record, or judicial proceeding of another state.”).
\item \footnote{185} See U.S. CONST. art IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”); Strasser, supra note 176, at 436 (suggesting that DOMA is unconstitutional because it is motivated by animus); Mark Strasser, Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution, 58 U. PITZ. L. REV. 279, 279 (1997) (suggesting that DOMA is unconstitutional for a variety of reasons).
\item \footnote{186} See Joseph William Singer, Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 44 (2005) (“There is no question that Congress can increase the Full Faith and Credit due to state laws and judgments.”).
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would not be unprecedented for Congress to require the recognition of marriages that are viewed by the states as violating local public policy. Thus, there would be no constitutional bar to Congress’s requiring interstate recognition of same-sex unions validly celebrated in the domicile.

**Conclusion**

Past cases regarding the recognition of Native American polygamous practices suggest that Congress can require states to recognize marriages that are thought to violate an important state public policy. Moreover, existing jurisprudence suggests both that such a requirement would not be unprecedented and that the states would have to recognize such unions as a matter of federal supremacy.

Same-sex marriages are sufficiently different from polygamous marriages that the recognition of one will hardly require the recognition of the other. For example, states recognizing same-sex unions do not also recognize polygamous unions. Nonetheless, Native American polygamy cases illustrate that Congress not only can but has required states to recognize marriages even in states with a public policy prohibiting such marriages.

While Congress may not require states to recognize same-sex marriage in the foreseeable future, good policy reasons would support such a statute. Something as fundamental as one’s marriage should not be permitted to go in and out of existence depending upon where one’s plane lands. Similarly, one should not be forced to sacrifice one’s marriage for a new job to support one’s family. The current system puts interests at risk that are simply too important to be left to the wishes, whims, or prejudices of individual legislatures. It can only be hoped that Congress will sometime soon repeal DOMA and secure for same-sex couples and their families some of the benefits and security that most other people simply take for granted.
BRAVE NEW WORLD: THE USE AND POTENTIAL MISUSE OF DNA TECHNOLOGY IN IMMIGRATION LAW

Janice D. Villiers*

Abstract: DNA technology revolutionized criminal law, family law and trust and estates practice. It is now revolutionizing immigration law. Currently the Department of Homeland Security does not require DNA tests, but it recommends these tests when primary documentation, such as marriage licenses, birth certificates and adoption papers are not available to prove the relationship between the U.S. citizen petitioner and the beneficiary who is seeking permanent resident status in the United States. DNA tests are attractive to the government as a result of administrative convenience and as a means of countering fraud, but adoption of a wholesale policy of DNA testing poses a host of potential problems. In an area of law where family reunification is described as the primary goal, an increase in the use of DNA sometimes results in separating families and other unintended consequences. By promoting the use of DNA evidence, the social interests that are paramount in a family relationship could become subservient to genetic interests. The beneficiaries could become mere genetic entities, whose biological relationship through their genes is paramount. This promotes the view that shared genes are the principal means of identifying human relationships and that one should be entitled to legal benefits solely on this basis. Quality control in the collection, storage and testing of samples, access of individuals to testing facilities, especially in developing countries, privacy interests and the potential for misuse of the results of these tests, particularly in preventing the admission of aliens on health grounds are among the potential problems identified in this article. Using examples from disciplines where DNA evidence has been adopted—criminal, family and estates and trusts law—this article will present a workable policy for the use of this technology in immigration law.

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INTRODUCTION

Deoxyribonucleic acid (DNA) technology has revolutionized criminal law.\(^1\) DNA technology has helped to exonerate wrongly convicted individuals and solve long unsolved cases.\(^2\) Reports in the popular press and the success of organizations like the Innocence Project demonstrate the positive results from the use of DNA evidence in criminal cases.\(^3\) Partially because of its success in criminal law, DNA evidence is now used in other areas of the law including family, trusts and estates, and immigration law.\(^4\)

Despite the perceived neutrality of science, immigrants have not fared well when the government has employed genetics and other heredity based testing to screen potential immigrants from entering the country.\(^5\) For instance, eugenics—a forerunner of modern genetics—

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\(^{2}\) See id. at 256–63.


\(^{5}\) See Staff Report of the Select Comm’n on Immigration and Refugee Policy, ED211613, U.S. Immigration Policy and the National Interest 177–80 (1981) [here-
was used to discourage the immigration of certain less favored groups and played a significant role in immigration policy. The early proponents of the eugenics movement were concerned about the genetic makeup of immigrants. New immigrants were “considered culturally different and incapable of this country’s version of self-government, not because of their backgrounds but because they were thought to be biologically and inherently inferior.” They were therefore “disliked and feared.” Prominent scholars of the day believed that biology prevented these new immigrants from becoming “100 percent American.”

Scientists argued that the improvement of the American stock required the exclusion of feeble-minded people. Some immigration authorities allowed scientists to conduct tests on immigrants upon arrival in the United States to screen out those immigrants they deemed to be “moron[s].” In 1924, The National Origin Quota Act, known as the Immigration Act of 1924, established a system which restricted immi-

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6 See Watson & Berry, supra note 5, at 17–23.
7 See id. at 18 (“[b]y making conscious choices about who should have children, eugenics believed they could head off the ‘eugenic crisis.’”). According to Watson, Galton, a British citizen, espoused “positive eugenics,” encouraging genetically superior people to reproduce. Id. at 18–21. On the other hand, the American focus was on eliminating bad genes, based on family studies of “degeneration” and “feeble-mindedness.” Id. at 21.
8 Immigration Policy, supra note 5, at 178.
9 Id.
11 Paul Spickard, Almost All Aliens: Immigration, Race, and Colonialism in American History and Identity 271 (2007). Spickard reports that in 1912, H.H. Goddard, a former schoolteacher and University of Southern California football coach convinced the authorities to allow him and two assistants to test immigrants arriving at Ellis Island. Id.

One assistant would scan the room for people who, to his eyes, looked stupid. They were pulled out of line and tested by the second assistant. If the test found them to be, in Goddard’s terminology, an “idiot,” an “imbecile,” or a “moron,” they were denied entry to the country. Goddard claimed that forty percent of steerage passengers were “feeble-minded.”

Id. A similar test was used for assignment of soldiers in World War I. Id. Carl Brigham, an army tester identified ethnic differences and claimed that “Alpine and Mediterranean ‘races’—that is, people of central and southern European origin—were ‘intellectually inferior to members of the Nordic race.’” Id.; see also Rachel Silber, Note, Eugenics, Family and Immigration Law in the 1920s, 11 Geo. Immigr. L.J. 859, 862 (1997) (“Human progression, eugenicists found, had multiple stages. The highest stage of human progression was that of the white race, though scientists disagreed whether Nordic or Teutonic genes were the most important.”).

12 See Spickard, supra note 11, at 271.
migration to two percent of the number of foreign-born persons for each nationality enumerated in the 1890 census.\textsuperscript{13} This system, which favored some nationalities over others, remained essentially unchanged until 1965.\textsuperscript{14}

Today, DNA testing is used to “screen” potential immigrants before entry into the United States.\textsuperscript{15} This type of “screening” occurs when a United States citizen applies for his foreign-born child to join him in the United States as a lawful permanent resident, commonly known as a green card holder.\textsuperscript{16} If the father is unable to provide his child’s birth certificate or his petition has some irregularity or missing information, the United States Immigration and Citizenship Service (USCIS) may suggest DNA testing to prove the paternal relationship.\textsuperscript{17} Although DNA tests are not currently required, they may be considered as secondary documentation when primary documentation such as marriage licenses, birth certificates and adoption papers are not available.\textsuperscript{18} These tests are promoted as a means of thwarting fraud, but adoption of a wholesale policy of DNA testing poses a host of potential problems.\textsuperscript{19}

Using examples from areas of law in which DNA evidence has already been adopted—criminal law, trusts and estates law, and family law—this article proposes a workable policy for the use of this technology in immigration cases. Part I discusses immigration law’s goal of family reunification. Part II introduces some potential problems that may arise.


\textsuperscript{14} \textit{See} id.; \textit{Spickard}, supra note 11, at 337–41.

\textsuperscript{15} Cronin Memorandum, supra note 4.

\textsuperscript{16} \textit{See} id. at 1.

\textsuperscript{17} \textit{See} Memorandum from Michael L. Aytes, Assoc. Dir., Domestic Operations, to Field Leadership 3 (Mar. 19, 2008) (on file with USCIS) [hereinafter Aytes Memorandum]; \textit{see also} Cronin Memorandum, supra note 4 (“Since blood parentage testing can be a valuable tool to verify a relationship, it may generally be required when initial and secondary forms of evidence have proven insufficient to prove a claimed relationship.”). Michael D. Cronin, then “Acting Executive Associate Commissioner of the INS instituted USCIS policy concerning DNA testing in a July 2000 memorandum.” \textit{See} Aytes Memorandum, supra, at 2. The policy allows field offices to “suggest” DNA testing when other forms of evidence as to the child’s parentage have proved inconclusive. \textit{See id.}

\textsuperscript{18} \textit{See} Aytes Memorandum, supra note 17, at 2; Cronin Memorandum, supra note 4. The memorandum from Cronin states that while 8 C.F.R. 204.2(d)(2)(vi) allows directors “to require Blood Group Antigen or Human Leukocyte Antigen (HLA) blood parentage tests, there is no similar statutory or regulatory authority allowing them to require DNA testing.” Cronin Memorandum, supra note 4.

\textsuperscript{19} \textit{See}, e.g., Rachel L. Swarns, \textit{DNA Tests Offer Immigrants Hope or Despair}, N.Y. TIMES, Apr. 10, 2007, at A1 (showing adoption of DNA testing in the immigration context poses problems).
If no limits are placed on how DNA evidence is used in immigration proceedings. Part III describes how DNA testing is used in criminal law, trusts and estates law and family law. Part IV then discusses more thoroughly potential problems that may arise from the use of DNA evidence in immigration proceedings. Part V presents some potential solutions to these problems. Finally, the article concludes by arguing that more oversight of the DNA testing companies and also policies regarding quality assurance and privacy are necessary and that immigration law—like family law—should embrace a more expansive concept of paternity.

I. THE GOAL OF FAMILY REUNIFICATION

_The family is the first social unit. All good citizenship and all good government rest upon the integrity of the home._

In America, the family is fundamental, not only as a social unit, but also as the bedrock of the nation. Since the passage of the Immigration and Nationality Act (INA) in 1952, one of the guiding principles of immigration law has been to reunite families. The structure of the current statute illustrates this policy. The statute imposes a priority system related to the closeness of the family member to the U.S. citizen or lawful permanent resident. Immediate relatives are at the top of this priority system for lawful permanent resident status. Immediate relatives are defined by the statute as spouses of citizens, children (under twenty-one) of citizens and parents and their spouses, and parents of citizens and their spouses.

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21 See _id._ at 864.


24 See _id._ § 1153(a).

25 _Id._ § 1151(b)(2)(A)(i).
of citizens over twenty-one. The statute does not impose quotas on immediate relatives, or "beneficiaries" as they are known. Consequently, beneficiaries can join their citizen family members in the United States with minimum delay.

After immediate relatives, the family-based preference order is as follows. The first preference allows unmarried sons and daughters to be sponsored by their United States citizen parents. The second preference category allows lawful permanent residents to sponsor their spouses and unmarried children no matter what age. The third preference permits married children over twenty-one to be sponsored by their United States citizen parents. Finally, in the least favored group are brothers and sisters of United States citizens. Literally hundreds of thousands of people from this last category are waiting for admission into the United States. As a result, many wait sometimes ten years or more to join their siblings in the United States.

II. THE PROBLEM OF DNA USE IN IMMIGRATION

Before DNA testing became readily available, the USCIS verified family relationship by government documents, school records or photographs or, when these were not available, affidavits from either family

26 See id. §§ 1101(b)(1), 1151(b)(2)(A)(i) (providing that "the children, spouses, and parents of a citizen of the United States" will be defined as "immediate relatives," and are not subject to numerical limitations imposed upon other family-sponsored immigrants).


28 Id. Immediate relatives are not subject to numerical limits on family-based visas issued annually; therefore, this is a highly favored category. Id.

29 Id.; see also 8 U.S.C. § 1153(a)(1) ("unmarried sons and daughters of citizens"). The INA defines “child” as an unmarried person under twenty-one years of age. 8 U.S.C. § 1101(b)(1). “Son” and “daughter” refers to those who do not fall within the definition of “child” because they are either married, or over twenty-one years of age, or both. See Fragomen & Bell, supra note 27, at 5.


31 Id. § 1153(a)(3).

32 Id. § 1153(a)(4).


34 Fragomen & Bell, supra note 27, § 3:1.1. According to the State Department Visa Office, as of January 2009, “pending active family-based preference system cases registered with U.S. consulates totaled 2,723,352.” Nat’l Immigration Project, supra note 33, at § 4:31. Family-based fourth preference cases, where a United States citizen applies for his or her sibling, account for about forty-five percent of this total (over 1.2 million). Id. As of January 2009, Mexico’s family-based preference registrants totaled 961,744, and those born in the Philippines totaled 401,849. Id.
members or medical professionals.35 The unavailability of a birth certificate creates a presumption of ineligibility against the beneficiary.36 Although secondary evidence is acceptable, the credibility and authenticity of such evidence is closely scrutinized.37 In the past, if none of these forms of evidence was available, the USCIS would deny the application.38 The advent of DNA testing, therefore, offered hope to families who did not have these types of documents by offering another avenue by which they could prove family relationships.39 DNA testing, however, can be used against immigrants.40 For instance, suspicious documents will trigger an investigation which may include checking the authenticity of the supporting documents and/or requiring blood tests or “suggested” DNA testing.41 Refusal to take such a test in turn can lead to denial of the petition despite the documentary evidence.42

Deoxyribonucleic acid is an organic polymer that exists in the cells of all living organisms.43 The substance is used to assemble and regulate all life forms.44 Each individual (except an identical twin) has unique DNA in the nucleus of every cell.45 Accordingly, DNA testing for identi-
fication purposes can be performed on semen, blood, hair and other tissues—even by cheek swab at home. Early forensic testing was called “restriction fragment length polymorphism” (RFLP) where an enzyme was used to break DNA into small pieces called “restriction fragments.” This technique analyzes differences within multiple samples. Although it is still used, its utility is limited because the test requires large amounts of non-degraded DNA, a substance which is difficult to find outside of the human body. Polymerase Chain Reaction (PCR) or “molecular Xeroxing” is a more advanced technique that requires only small DNA samples for testing. This method uses an enzyme called a “polymerase” to produce millions of copies of the initial DNA sequence.

In the immigration context, DNA testing is an emerging industry that the government, scientists and laboratories welcome. It is expected to become routine. Currently, the USCIS may only suggest

Each human cell contains about two meters of DNA located in a compartment called the nucleus. Here it is tightly packaged into twenty-three pairs of chromosomes, each of which contains a single DNA molecule of, on average, roughly 150 million base pairs. The totality of nuclear DNA in a cell—which in most people is virtually identical in every cell in the body—is popularly known as a “genome.”

Id.

46 See Luftig & Richey, supra note 43, at 611; Press Release, Identigene, Identigene DNA Paternity Test Kit Store Sales Rocket Through the New Retail Paradigm for Genetic Testing (May 11, 2009) (on file with Identigene Public Relations) (discussing the increase in use of over-the-counter DNA paternity test kits at local pharmacies). Identigene DNA Paternity Test Kits allegedly became the first kits sold over the counter in March 2008. See Press Release, Identigene, supra. These kits permit testing of DNA through a cheek swab collected in the privacy on one’s own home. See id.


48 See id. at 26.

49 See Luftig & Richey, supra note 43, at 610; see also Lynch et al., supra note 1, at 25–48 (discussing thoroughly DNA profiling techniques). Exposure to heat, humidity, light and the chemicals found at a crime scene leads to decay of DNA samples, making them unsuitable for RFLP analysis. See Lynch et al., supra note 1, at 31.

50 See Lynch et al., supra note 1, at 31 (noting that testing can be done using only “a blood spot the size of a large pinhead”); Luftig & Richey, supra note 43, at 610. This technique, invented by Kary Mullis in 1986, is revolutionizing “not only forensic DNA science, but all of molecular biology.” See Luftig & Richey, supra note 43, at 610; see also Cronin Memorandum, supra note 4 (acknowledging rapid changes in parentage testing technology and recommending the PCR test through buccal (mouth or cheek cavity) swabs instead of drawing blood).

51 See Lynch et al., supra note 1, at 31.

52 See Press Release, DNA Diagnostics Ctr., DDC Lab Director Hosts Immigration Workshop at International DNA Symposium (Oct. 18, 2007) (on file with author).

53 See id. A press release from the DNA Diagnostics Center (“DDC”) reporting on the pre-Symposium activities of the October 2007 Eighteenth International Symposium on
Human Leukocyte Antigen (HLA) or DNA testing when an applicant cannot provide documentary proof of the family relationship through labs accredited by the American Association of Blood Banks (AABB). Under current policy, however, USCIS cannot require such testing of the applicant.

In light of society’s preoccupation with scientific accuracy, the Department of Homeland Security (DHS) may be pressured to change the policy. Other countries currently use DNA testing in family reunification cases. France statutorily implemented the use of DNA testing in 2007, and Switzerland has used DNA testing since 2004. Further, several other European countries use such tests in family reunification cases. Even if the current non-mandatory testing policy remains the

Human Identification where a workshop entitled “Immigration DNA Profiling Issues” was sponsored to explore the application of DNA tests to prevent fraud in immigration cases. See id. Representatives of the U.S. State Department, U.S. Department of Homeland Security, scientists and immigration experts gathered to discuss anticipated changes. See id. Dr. Michael Baird of DDC stated “DNA testing for immigration is a rarity right now. However, DNA testing is expected to play an integral part in the immigration process in the near future.” See id.

Davis, supra note 35, at 132–33. HLA is a tissue-typing test developed to determine if an organ transplant recipient will accept or reject the donated organ. Id. at 132. Because HLA antigens are inherited, it is possible to use the test to determine parentage with a high degree of certainty. Id. at 132–33. “The process is accurate, reliable and scientifically and legally valid; therefore, the State Department should encourage and facilitate the use of DNA fingerprinting to determine the parentage of naturalized United States citizens who are seeking visas for their families.” Id. at 146. Johnny, a Chinese refugee from Vietnam escaped with his uncle and younger brother to a refugee camp in Hong Kong. Id. at 130. The uncle, to keep the family together, claimed Johnny as his son, and migrated to the United States. Id. As an adult Johnny petitioned for his parents in China, but the petition was denied, until Johnny established the familial relationship with blood grouping and DNA tests. Id. at 130–31.

Aytes Memorandum, supra note 17, at 2. For a listing of accredited testers, see AABB, AABB Accredited Relationship Testing Facilities, Mar. 1, 2010, http://www.aab.org/Content/Accreditation (follow “Relationship (DNA) Testing Laboratories” hyperlink; then follow “AABB Accredited Relationship Testing Laboratories” hyperlink). There are stringent guidelines to assure that the tests are accurate. Christian M. Rultberg et al., STRBase: A Short Tandem Repeat DNA Database for the Human Identity Testing Community, 29 NUCLEIC ACIDS RES. 320, 320 (2000). The accredited laboratories are permitted to use only the polymerase chain reaction-short tandem repeats and the restriction fragment length polymorphism (RFLP) methods of DNA testing. Id. at 321.


See id. at 1530 (stating that DNA testing for immigration purposes is used in “Germany, Austria, Belgium, Denmark, Italy, Lithuania, Norway, the Netherlands, Britain and Sweden”).
same in the United States, genetic identity will likely be viewed as paramount, a reflection of the applicant’s real identity. Moreover, relationships forged by genetic connections may be seen as superior to those established by other unscientific means.

In 2007, the *New York Times* reported that several families willingly submitted to DNA tests to prove paternity, only to discover that the citizen petitioner was not biologically related to the beneficiary.59 One such family was the Owusu family.60 Mr. Owusu, a U.S. citizen father, petitioned to bring his four sons from Ghana to the United States after his wife’s death.61 When DHS requested DNA testing to expedite the petition, Mr. Owusu and his sons complied willingly.62 When the results came back, Mr. Owusu was heartbroken to discover that his eldest son was the only boy who was genetically related to him.63 Faced with the results of the tests, Mr. Owusu had to choose between abandoning three boys he saw as his own sons or fighting to once again reunite his family and facing additional immigration hurdles in the process.64 In a society structured by social, rather than genetic essentialism, all four boys would unquestionably be his sons and would be able to join him in the United States without unnecessary delay.65 Instead, his eldest son was the only one granted a visa.66

If DNA evidence were to be the first line of evidence used in reunification cases and not merely a last resort as it is now, it could have a devastating effect on the purported reunification goal of the Immigration and Nationality Act.67 By promoting the use of DNA evidence, so-

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60 See id.
61 See id.
62 See id.
63 See id.
64 See Swarns, *supra* note 19.
65 Compare id., with LeFevre v. Sullivan, 785 F. Supp. 1402, 1407 (C.D. Cal. 1991) (holding that though DNA testing was “relevant” in a trusts and estates case to proving paternity, paternity must be established “by clear and convincing evidence that the father has openly and notoriously held out the child as his own”), and Steven W. v. Matthew S., 39 Cal. Rptr. 2d 535, 539 (Ct. App. 1995) ( awarding custody to social father rather than biological father under the best interest of the child standard in a child custody case, noting “the strong social policy in favor of preserving the on-going father and child relationship” and that “[t]his social relationship is much more important, to the child at least, than a biological relationship of actual paternity”).
cial interests could become subservient to genetic interests. The beneficiaries could become mere genetic entities, whose genetic relationship is paramount. Familial relationships—like Mr. Owusu’s with his four sons—that were forged by years of interaction, care and sacrifice could be devastated by one simple test.\textsuperscript{68}

In a legal regime where genetic essentialism reigns, Mr. Owusu’s three younger children are orphans.\textsuperscript{69} Without more information about their genetic father—or fathers—or any biological connection to Mr. Owusu, they lose their immigration priority.\textsuperscript{70} Mr. Owusu could attempt to adopt his own children, under the laws of his former country, and then apply to the USCIS to bring them here.\textsuperscript{71} Ironically, unless he adopts his own sons they would be given less priority than a stepchild through a second marriage.\textsuperscript{72} For example, if Mr. Owusu married a woman with a son under the age of eighteen, that stepson would be given immigration preference over Mr. Owusu’s three sons even though each would be equally genetically unrelated to Mr. Owusu.\textsuperscript{73}

It is not surprising that the DHS would welcome the use of DNA in resolving difficult questions of proof. Immigration law is rife with the potential for fraud.\textsuperscript{74} Science and scientific evidence like DNA testing

\begin{footnotes}
\item[68] See Swarns, \textit{supra} note 19; see also 8 C.F.R. § 204.2(d) (2009) (explaining the test).
\item[69] See Swarns, \textit{supra} note 19; see also 8 C.F.R. § 204.2(d).
\item[70] See Swarns, \textit{supra} note 19; see also 8 C.F.R. § 204.2(d).
\item[71] See 8 U.S.C. § 1101(b)(1); Swarns, \textit{supra} note 19. The Immigration and Nationality Act allows parents to petition for adopted children to become permanent residents of the United States. 8 U.S.C. § 1101(b)(1). The children must be adopted before the age of sixteen after having two years legal custody and residence with the adopting parent. \textit{Id.} Naturally, this would add one additional layer of legal entanglement for people like Mr. Owusu. See id.; Swarns, \textit{supra} note 19. He would have to adopt his own child, under Ghanaian laws, before that child could join him in the United States. See 8 U.S.C. § 1101(b)(1); Swarns, \textit{supra} note 19. The social stigma, questions and expense that would arise in his local community when a father files to adopt a child born in wedlock and presumed to be the child of the father, could be daunting.
\item[72] See 8 U.S.C. § 1101(b)(1) (B).
\item[73] See \textit{id.} The definition of a child under the Immigration and Nationality Act is an unmarried person, under twenty-one years of age and includes a step-child, even if he or she is not born in wedlock, as long as the child was under eighteen at the time the stepparent relationship was created. See \textit{id.}; see also Palmer v. Reddy, 622 F.2d 463, 463–64 (9th Cir. 1980) (discussing the stepchild preference of the INS); \textit{In re} McMillan, 17 I. & N. Dec. 605, 606–07 (B.I.A. 1981) (explaining the INS stepchild preference and that “the mere fact of a marriage which technically creates a step relationship does not in itself establish a stepparent-stepchild relationship for purposes of the immigration laws”).
\item[74] See Swarns, \textit{supra} note 19; U.S. State Dep’t, Bureau of Population, Refugees, & Migration, Fraud in the Refugee Family Reunification (Priority Three) Program: Fact Sheet, Feb. 3, 2009, http://www.state.gov/g/prm/ (follow “What We Are Saying” hyperlink); then
offer the illusion of certainty and neutrality. DNA testing has no political bias. As such, DNA testing’s scientific neutrality seems to present the perfect solution to difficult immigration questions where the potential for errors and fraud is rampant. Federal officials understandably see the certainty and neutrality of genetic testing as an easy way to verify that a beneficiary is related to a U.S. citizen or lawful permanent resident.

DNA testing is particularly helpful for beneficiaries emigrating from developing and war-torn countries—marriage and birth certificates may be missing or can be easily forged for a fee. For example, DNA testing has been used in the admission of refugees. Since the 1980s, the United States has implemented a Refugee Admissions Program based on family ties to reunite refugees with their U.S. citizen or lawful permanent resident family members. In the chaos of the condi-

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76 See Swarns, supra note 19; U.S. State Dep’t, Bureau of Population, Refugees, & Migration, supra note 74. But see Borenstein, supra note 75, at 853–56 (discussing that despite the view of DNA as “the epitome of reliable evidence,” DNA can nevertheless become unreliable due to human fallibility among other factors).
77 See Swarns, supra note 19; U.S. State Dep’t, Bureau of Population, Refugees, & Migration, supra note 74; see also Borenstein, supra note 75, at 848 (discussing the benefits of using DNA evidence). But see Borenstein, supra note 75, at 853–56 (“Even though it may be viewed by some as nearly infallible, DNA evidence is susceptible to the same kinds of problems that afflict other types of evidence.” (citing Adam Liptak, The Nation; You Think DNA Evidence Is Foolproof? Try Again, NYTimes, Mar. 16, 2003, at D5)).
79 See id. Coordination and management of the Refugee Admissions Program occurs through the State Department’s Bureau of Population, Refugees and Migration (PRM). See id. The Refugee Admissions Program handles three categories of cases. See id. Priority One and Two cases gain access to the program through an individual referral by the United Nations High Commissioner for Refugees, a U.S. Embassy or qualified non-governmental organization. See id. They may also be designated as qualifying for the program by virtue of their need for resettlement. See id. Priority Three (P-3) cases include individuals seeking family reunification with certain legal residents in the United States. See id. Reuniting refugees with their family members is a goal of this program, and in the chaos of the conditions that generate refugees, government issued identity documents are frequently unavailable. See Cianciarulo, supra note 78, at 481; U.S. Dep’t of State, Bureau of Population, Refugees, Migration, supra note 74. The program offers an interesting case study where P-3 refugees were DNA tested for family reunification purposes. See U.S. Dep’t of State, Bureau of Population, Refugees, & Migration, supra note 74.
tions that generate refugees, government issued identity documents are frequently unavailable. In response to reports of fraud, program administrators used DNA testing in approximately three thousand refugee cases—primarily with refugees from Somalia and Ethiopia.

In some cases, the DNA test is a welcome relief, an opportunity to prove a relationship where no other proof exists. In other circumstances, however, the test reveals long-hidden and shameful secrets that can cut to the core identity of the bewildered and unsuspecting petitioner or beneficiary. Stories such as Mr. Owusu’s are not rare. One DNA testing expert estimates that in 2004 about fifteen to twenty percent of the 75,000 DNA tests in immigration cases did not produce a match. Moreover, the government’s growing reliance on DNA testing places a financial burden on immigrants. In fact, testing of a parent or child often costs $450 or more.

When the genetic relationship revealed by DNA testing shows that the social relationship between parties does not rest upon a firm genetic foundation, those who are disappointed do have alternatives. For instance, a U.S. citizen can adopt a child who is under sixteen and bring him to the United States. When the child is adopted, he will be granted automatic citizenship under the Child Citizenship Act of 2000. Unfortunately, officials usually do not inform petitioners—even in cases where fraud is not suspected—of this and other alternative solutions.

81 See Cianciarulo, supra note 78, at 481. Ninety-five percent of the applications of individuals seeking family reunification with certain legal residents in the United States have been African—mainly Somalis, Ethiopians and Liberians. See U.S. Dep’t of State, Bureau of Population, Refugees, & Migration, supra note 74.

82 See U.S. Dep’t of State, Bureau of Population, Refugees, & Migration, supra note 74. DHS/USCIS and PRM tested a sample of approximately three thousand refugee cases—primarily Somali and Ethiopians in Nairobi, Kenya and refugees in Ethiopia, Uganda, Ghana, Guinea, Gambia and Cote d’Ivoire. See id. The subjects were family members applying for P-3. See id. The initial DNA testing was not between the applicants and anchor relatives in United States. See id.

83 See Davis, supra note 35, at 146; Swarns, supra note 19.

84 See Swarns, supra note 19.

85 See id. The estimates were made by Mary K. Mount, a DNA testing expert for the AABB—formerly known as the American Association of Blood Banks. Id.

86 See id.

87 Id.


89 See id.

90 See id.

91 See Swarns, supra note 19.
III. LESSONS ON DNA EVIDENCE FROM OTHER AREAS OF LAW

A. The Role of DNA in Criminal Law

DNA forensics have been widely used since the late 1980s.\(^{92}\) The Federal Bureau of Investigation (FBI) maintains databases of DNA from convicted state and federal criminals.\(^{93}\) Even with this experience and database, law enforcement officials do not base convictions exclusively on DNA evidence.\(^{94}\) Other evidence, including eyewitness testimony, confessions and alibi evidence are vital parts of the prosecution’s case.\(^{95}\) Prosecutors and defense attorneys both caution that DNA evidence may be given undue weight by a jury and trump other more probative evidence.\(^{96}\)

Defendants have also challenged the use of DNA evidence at trial as potentially violating their constitutional rights.\(^{97}\) For instance, involuntary extraction of blood for DNA testing has been challenged under the


\(^{93}\) See DNA Identification Act, 42 U.S.C. §§ 14131–14134 (1994); Borenstein, supra note 75, at 858. In 1994, the federal government passed the DNA Identification Act, which authorized the FBI to establish the Combined DNA Index System Program (“CODIS”) database, which has produced matches to identify suspects in many cases, from DNA samples from approximately 1.6 million convicted criminals. See 42 U.S.C. §§ 14131–14134; Borenstein, supra note 75, at 858. All fifty states have legislation mandating that certain classes of criminals—for instance, convicted sex offenders—submit biological samples for testing. See Moyer & Anway, supra note 92, at 702.

\(^{94}\) See Borenstein, supra note 75, at 849. Professor Borenstein notes that DNA evidence must be assessed along with the probative value of other types of evidence, especially since in most felony cases, biological samples are not an integral part of the evidence presented to the court. Id.

\(^{95}\) See id. at 849–50.

\(^{96}\) See id. at 850. The availability of DNA evidence is such a daunting prospect that it has been used deceptively to elicit a confession from the defendant. See State v. Chirokovskic, 860 A.2d 986, 990–91 (N.J. Super. Ct. App. Div. 2004) (finding a confession inadmissible where law enforcement fabricated a lab report to falsely claim that the defendant’s DNA was recovered at the crime scene.); see also Borenstein, supra note 75, at 851 (“[State v. Chirokovskic] arguably leaves open the possibility that, in rare circumstances, DNA test results could be used in a deceptive manner during interrogating.”). Professor Borenstein points out that there are also no consistent standards for determining when DNA evidence should be admitted and how much weight should be given to such evidence, especially in the non-match context. Borenstein, supra note 75, at 851–53. Other potential problems identified include the standards for testing methods that will be acceptable in various state courts. Id. at 852–83. Yet, should a defendant be exonerated merely because the DNA at the crime scene does not match? See id. at 852.

\(^{97}\) See Moyer & Anway, supra note 92, at 702–03.
Fourth Amendment as an unlawful search and seizure and under the Fifth Amendment as a violation of the right against self-incrimination.\textsuperscript{98} Appellate courts, however, have rejected Fourth Amendment challenges on the ground that the governmental interest in preventing future crimes outweighs the prisoner’s lessened expectation of privacy.\textsuperscript{99} Similarly, the Supreme Court found that extraction of blood and its chemical analysis is not “testimonial or communicative” evidence and therefore DNA testing cannot violate a defendant’s Fifth Amendment right against self-incrimination.\textsuperscript{100} Defendants have also argued that involuntary extraction of genetic information violates their constitutional right to privacy.\textsuperscript{101} This argument is unlikely to be successful because the Supreme Court, in \textit{Whalen v. Roe}, held that a governmental database containing the names and addresses of prescription drug users did not violate the Constitution.\textsuperscript{102}

Moreover, some scholars have expressed concern regarding the expanding use of DNA testing in criminal cases.\textsuperscript{103} DNA was first used in cases involving sex offenders and violent felons.\textsuperscript{104} Now many states have expanded their statutes to require DNA collection from individuals convicted of a wide range of crimes.\textsuperscript{105} In the wake of these laws and others, some have argued for stricter quality control mechanisms and privacy protections as well as a greater consideration of the social, individual and legal issues presented by the embrace of this new technology.\textsuperscript{106}

The use of DNA testing in the criminal context, however, is very different from its use in immigration law. In criminal law, DNA testing plays an important role in convicting or exonerating individuals accused of crimes.\textsuperscript{107} In immigration law, DNA testing is helpful in proving or disproving paternity where other sources are unavailable.\textsuperscript{108} It should not, however, be used to separate families where social familial ties exist.

\textsuperscript{98} Id.
\textsuperscript{101} See Moyer & Anway, \textit{supra} note 92, at 702–03.
\textsuperscript{102} See 429 U.S. 589, 591, 605–06 (1976); \textit{see also} Borenstein, \textit{supra} note 75, at 858–59.
\textsuperscript{104} See \textit{id.} at 773–74.
\textsuperscript{105} See \textit{id.} at 775–77.
\textsuperscript{106} See \textit{id.} at 813–14.
\textsuperscript{107} See Borenstein, \textit{supra} note 75, at 847–48.
B. The Role of DNA in Trusts and Estates Law

Intestacy law permits family members to inherit a decedent’s estate.\textsuperscript{109} This legal fiction is meant to approximate a decedent’s desires when he fails to execute a will.\textsuperscript{110} Though intestacy statutes differ somewhat from state to state, all give priority to the decedent’s spouse and children.\textsuperscript{111}

New York’s Estates Powers and Trusts Law (EPTL), however, permits non-marital children to inherit as well if a DNA test administered during the decedent’s lifetime proves paternity.\textsuperscript{112} Prior New York law based on English common law gave no rights to a non-marital child.\textsuperscript{113} This law was seen as a punitive measure against the parents’ fornication.\textsuperscript{114} Gradually, though, attitudes shifted with respect to “illegitimate” or “bastard” children.\textsuperscript{115} As such, the common law rule prohibiting illegitimate children from inheriting their parents’ estate was seen as unfairly causing these children to suffer for the acts of their parents.\textsuperscript{116}

The next logical shift is one where the parent-child relationship—and not genetics—is paramount.\textsuperscript{117} Trusts and estates law scholars argue that “the existence and nature of the parent-child relationship”

\textsuperscript{109} Restatement (Third) of Prop.: Wills and Other Donative Transfers § 2.2 (1998).

\textsuperscript{110} Id. Section 2.2 of the Third Restatement of Property provides:

An intestate decedent’s surviving spouse takes a share of the intestate estate as provided by statute. The exact share differs among the states. Not infrequently, the spouse takes the entire intestate estate if the decedent leaves no surviving descendants or parents and, in some states, if the decedent also leaves no other specified relative such as a descendant of a parent. . . . Under the Revised Uniform Probate Code, the surviving spouse takes either the entire intestate estate or a specified lump sum plus a specified percentage of the excess, if any, depending on what other relatives survive the decedent.

\textsuperscript{111} See id.


\textsuperscript{113} See Megan Pendleton, Note, Intestate Inheritance Claims: Determining a Child’s Right to Inherit When Biological and Presumptive Paternity Overlap, 29 Cardozo L. Rev. 2823, 2828 (2008) (discussing the history of Lord Mansfield’s Rule and the view that a child born out of wedlock was the child of no one and therefore could not inherit).

\textsuperscript{114} See id. at 2828–29.

\textsuperscript{115} See id. at 2829.

\textsuperscript{116} See id.

\textsuperscript{117} See Ilene Sherwyn Cooper, Advances in DNA Techniques Present Opportunity to Amend EPTL to Permit Paternity Testing, 71 N.Y. St. B.J. 34, 34 (1999); Pendleton, supra note 113 at 2859.
should be the “the threshold inquiry” in inheritance cases.\textsuperscript{118} In fact, the Uniform Parentage Act allows judges in paternity suits discretion to allow genetic testing in order to establish paternity.\textsuperscript{119} This discretion either to allow or forbid DNA testing allows the judge to base his finding of paternity “on the nature of the parent-child relationship, rather than biology or presumptions alone.”\textsuperscript{120}

The shift in trusts and estates law toward relying on paternal relationships and not genetics should also be implemented in the immigration context. I propose that when a genetic relationship cannot be established through documentation, the parent-child relationship should allow immigration benefits to accrue.

New York Family Court statutes provide that DNA tests can be admitted into evidence to prove paternity in cases where an illegitimate child’s inheritance is disputed.\textsuperscript{121} Posthumous DNA testing is allowed in cases where a child had been born out of wedlock but the decedent had “openly and notoriously acknowledged the child as his own.”\textsuperscript{122}

In New York, a child born in a marriage is presumed to be legitimate.\textsuperscript{123} A non-marital child can inherit if he proves paternity by one of four ways: 1) a paternity judgment from a court; 2) an acknowledgment signed by the putative father and filed in Albany; 3) a positive match between his DNA and DNA of the father taken during the father’s life; or 4) clear and convincing evidence of paternity coupled with open and notorious acknowledgment of paternity.\textsuperscript{124} Once a child proves open and notorious acknowledgment, New York courts have allowed the use of DNA, whether pre or post-mortem, to satisfy the clear and convincing evidence prong of the test.\textsuperscript{125}

For example, in \textit{In re Poldrugovaz}, the court allowed the child to use posthumous DNA testing to establish clear and convincing evidence of paternity because the child provided “some evidence that the decedent openly and notoriously acknowledged the non-marital child as his own.”

\begin{itemize}
\item\textsuperscript{118} See Pendleton, \textit{supra} note 113, at 2859.
\item\textsuperscript{119} Id.
\item\textsuperscript{120} Id.
\item\textsuperscript{121} N.Y. Fam. Ct. Act § 532(a) (McKinney 2009). The establishment of a bona fide parent-child relationship is paramount in my proposal although the EPTL bases such a relationship on the genetic connection. See N.Y. Est. Powers & Trusts Law § 4–2.1(a)(2)(D).
\item\textsuperscript{124} N.Y. Est. Powers & Trusts Law § 4–2.1 (a)(2).
\item\textsuperscript{125} See id.; Anne R., 634 N.Y.S.2d at 343.
\end{itemize}
own.” The court noted that the child must also establish that DNA testing “is practicable and reasonable under the circumstances.” This holding both clarified and lowered the evidentiary requirement New York courts had previously used. The previous evidentiary standard—established in In re Davis—required a child to show clear and convincing evidence that the decedent openly and notoriously acknowledged paternity. By lowering the standard of proof so that only some evidence of open and notorious acknowledgement is required, the threshold question becomes whether the decedent made some kind of open and notorious acknowledgement of the child. Only after that question is answered in the affirmative will the court admit evidence of posthumous genetic testing to establish paternity. As a result, the parent’s open and notorious acknowledgement of paternity takes precedence over and becomes more important than the results of the genetic tests.

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127 Id. at 263. The Appellate Division, Second Department clarified its holding in Matter of Davis. Id. at 257–58. In light of Poldrugovaz, the Appellate Division remitted Matter of Davis to the Surrogate’s Court. See In re Davis, 869 N.Y.S.2d 99, 100–01 (App. Div. 2008).
128 See Poldrugovaz, 851 N.Y.S.2d at 254.
129 See In re Davis, 812 N.Y.S.2d 543, 546–47. (App. Div. 2006). Professor Margaret V. Turano, in her commentary in McKinney’s Estates, Powers, and Trusts Law, approves of the reasoning of the Appellate Division, Second Department as striking an appropriate balance in the objectives of the statute:

The Legislature wanted to protect nonmarital children but not to invite everyone on earth to offer their DNA for comparison to decedent’s. When a petitioner can prove paternity by DNA that was gathered during a decedent’s lifetime, the balance holds. When the decedent widely acknowledged the child as his own, it is appropriate to use any DNA available (whether from blood or tissue and even if gathered posthumously), to make the proof required by subparagraph (A)(2)(C). Without open and notorious acknowledgement, however, to permit proof by posthumously-obtained DNA would be like inviting the whole hopeful world to jump into the fray.

N.Y. Est. Powers & Trusts § 4-1.2, supp. cmnt. (McKinney 2006). The Court in Poldrugovaz cites, with approval, Professor Turano’s commentary. See 851 N.Y.S.2d at 258.
130 See Poldrugovaz, 851 N.Y.S.2d at 258.
131 See id.
132 See id. In Poldrugovaz, the petitioner submitted: the report of the medical examiner; her own affidavit attesting to, among other things, her resemblance to the decedent and a meeting she had with the decedent at which, she contends, the decedent acknowledged in the presence of another person that she was his child; individual photographs of the decedent and the petitioner which, she contends, evince their like and familial features; and the affidavits of several other acquaintances of the decedent who attest that the decedent openly acknowledged that he was the petitioner’s father. See id. at 256. The court found this was sufficient evidence of open and notorious acknowledgement to warrant posthumous DNA testing. See id. at 264–65.
Some courts have even ignored DNA test results in favor of evidence of a social bond between parent and child.\textsuperscript{133} In \textit{Le Fevre v. Sullivan}, the United States District Court for the Central District of California disregarded DNA test results conducted prior to the putative father’s death.\textsuperscript{134} The court reasoned that DNA evidence could not be admitted because under the Social Security Act an illegitimate child could only be recognized as the child of the putative father if the father had acknowledged that the child was his in writing.\textsuperscript{135} The court also noted that the child could prove entitlement to the decedent’s estate if she could establish entitlement under California’s intestacy laws.\textsuperscript{136}

The child did not bring forth any evidence to prove that paternity was presumed under California law.\textsuperscript{137} Moreover, the court upheld the Administrative Law Judge’s decision that California law did not allow “DNA testing . . . to provide presumptive proof of parentage.”\textsuperscript{138} Instead, the court acknowledged that DNA testing—though “relevant” to the question of paternity—was not sufficient to establish paternity under California law.\textsuperscript{139} Rather, paternity must be established “by clear and convincing evidence that the father has openly and notoriously held out the child as his own.”\textsuperscript{140}

Although some courts have held that paternity should not be decided on the basis of DNA testing alone, some scholars argue that intestate succession should rely more heavily on DNA testing.\textsuperscript{141} For instance, Beckstrom proposes to solve the difficulty of intestate succession by relying on genetics.\textsuperscript{142} He proposes that a decedent’s assets should be given to individuals most able to perpetuate the decedent’s genes.\textsuperscript{143} Empirical evidence—such as actual wills and surveys of individuals—


\textsuperscript{134} See \textit{id.} In \textit{Le Fevre}, a daughter born out of wedlock applied for insurance benefits under the Social Security Act. See \textit{id.} at 1403. Although she presented DNA test results as evidence, the court held that those test were not sufficient to meet the “openly held out” standard required under the Social Security Act. See \textit{id.} at 1407.


\textsuperscript{136} \textit{Le Fevre}, 785 F. Supp. at 1405.

\textsuperscript{137} \textit{Id.} at 1405–06.

\textsuperscript{138} \textit{Id.} at 1406–07.

\textsuperscript{139} See \textit{id.}

\textsuperscript{140} \textit{Id.} at 1407.

\textsuperscript{141} See, e.g., \textit{Le Fevre}, 785 F. Supp. at 1406–07; Cooper, \textit{supra} note 117, at 34–35.


\textsuperscript{143} See \textit{id.} at 14–15.
suggest that when given a choice, genetics is not always at the forefront of the testators’ wishes.\textsuperscript{144}

This standard of whether the father had “openly held out” the child as his own is a standard that could be employed in the immigration context when faced with questions of disputed paternity and there is no DNA match. Open and notorious acknowledgment of the child is a reliable indication of the father’s intent not only in trusts and estates, but also in immigration cases involving DNA.\textsuperscript{145}

C. The Role of DNA in Family Law Models

1. The Best Interest of the Child Standard

A paramount goal in both immigration and family law is family reunification.\textsuperscript{146} In the latter field, the family as a social structure is the source of proper care and education of children and the optimal means of providing for the physical and emotional needs of each member.\textsuperscript{147} In English common law, this philosophy contributed towards keeping marriages intact.\textsuperscript{148} Under Lord Mansfield’s Rule, husbands could not deny paternity of a child born to their wives during the marriage.\textsuperscript{149} If a child was born during a marriage, his actual paternity was inferior to the presumed paternity of the husband.\textsuperscript{150} A woman could not deny the fatherhood of a man whom she had allowed to act as the father of her child.\textsuperscript{151}

\textsuperscript{144} See id. at 15, 17, 51–53.
\textsuperscript{145} See Pendleton, supra note 113, at 2827, 2859.
\textsuperscript{146} See Dreyfuss & Nelkin, supra note 4, at 321–22; supra note 22 and accompanying text.
\textsuperscript{147} See Dreyfuss & Nelkin, supra note 4, at 321.
\textsuperscript{148} See id. at 321–22.
\textsuperscript{149} Id.; see Goodright v. Moss, (1777) 98 Eng. Rep. 1257 (K.B.); see also Andrews, supra note 123, at 119–20 (explaining Lord Mansfield’s Rule). Lord Mansfield’s Rule was overturned two hundred years later by the Michigan Supreme Court in Serafin v. Serafin. Andrews, supra note 123, at 120; see also Serafin v. Serafin, 258 N.W.2d 461, 463 (Mich. 1977) (“Neither is the peace of general society fostered by continued adherence to Lord Mansfield’s rule.”). There, the court ruled that since the adverse consequences of illegitimacy no longer applied, the policy considerations favored a change in the rule but left intact the presumption of legitimacy, which can be rebutted by evidence that the husband is not the child’s biological father. Serafin, 258 N.W.2d at 462–63.
\textsuperscript{151} See Goodright, 98 Eng. Rep. at 1258; Runner, supra note 150, at 115–16; N.Y. JUD. CT. ACTS LAW § 532 & cmt (McKinney 2009).
Family law today still values the social relationship between children and fathers because it helps maintain the stability of the family and the society. Even when the public policy underpinnings of Lord Mansfield’s rule lost their force, the presumption of paternity remained. Although this presumption could be rebutted with blood tests and, eventually, DNA evidence, the law still recognized concepts such as equitable adoption and estoppel as exceptions that would prevent a husband denying his duty to support the non-biological child.

Mandatory use of DNA in immigration law would place the preeminence of the family in jeopardy by replacing social relationships with genetic relationships. In the immigration context, the results can be particularly devastating because the parties are frequently separated by many miles and maintaining the social relationship is challenging.

2. Genetic Essentialism

Genetic essentialism or biological determinism is the belief that the sum and substance of each of us is our DNA. Professor Bender argues that although Aldous Huxley’s novel *Brave New World* did not use the term “genetic essentialism,” he “was satirizing and warning against” a world in which genetics “defines our family and our history and predicts our futures.”

Scientists have allied with government to promote genetic essentialism. Scholars such as Mary R. Andrlik and Mark A. Rothstein present three different arguments to support their view that federal welfare policy has influenced the prevalence of identity testing. First, they point specifically to statutes such as the Family Support Act of 1988, the Omnibus Budget Reconciliation Act of 1993, and the Personal Responsibil-

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158 See id.
ity and Work Opportunity Act of 1996, which helped to grow the commercial identity-testing industry.\textsuperscript{159}

Second, Anderlick and Rothstein argue that the focus on genetic testing has firmly established the concept that biological or genetic relationship and parental status are entwined.\textsuperscript{160} They note that since genetic essentialism has become part of the “cultural atmosphere” it has become “easy to slide into the view that [DNA] is the essence of fatherhood.”\textsuperscript{161} They further argue that this reliance on DNA testing could be used to argue that the absence of a genetic match could be used to terminate a parent’s duty of support.\textsuperscript{162}

Their third argument supports the cynical view that it is “all about the money.”\textsuperscript{163} Government promotion of testing, they contend, is designed to increase financial support by parents and thereby reduce public spending on child welfare programs.\textsuperscript{164} Some members of the fathers’ rights movement complain that “DNA testing stacks the deck against them—a positive DNA test will establish support obligations, but a negative test will not eliminate such obligations.”\textsuperscript{165}

Other scholars have proposed that the “intent” and “conduct” of the parties rather than biology or marriage should be the determining factor of a legal family.\textsuperscript{166} These arguments have been reflected in court decisions. For instance, in \textit{Steven W. v. Matthew S.}, the California Supreme Court decided a complex parental rights case by looking primarily to the social bonds between child and parent.\textsuperscript{167} At issue in that case was whether a boy, Michael, was to be raised by either Steven, the

\begin{footnotesize}
\begin{enumerate}
\item See \textit{id.}
\item Id.
\item See Anderlik \& Rothstein, \textit{supra} note 157, at 218.
\item See \textit{id.}
\item See \textit{id.}
\item See \textit{id.} at 219.
\item See Deborah H. Wald, \textit{The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage}, 15 AM. U. J. GENDER SOC. POL’Y & L. 379, 381 (2007) (discussing a variety of scenarios where the traditional rules are inadequate—for example, surrogacy, same sex parents, etc. and public policy dictates a more expansive view of parenthood).
\item See \textit{Steven W. v. Matthew S.}, 39 Cal. Rptr. 2d 535, 539 (Ct. App. 1995).
\end{enumerate}
\end{footnotesize}
man who raised him, or Matthew, his biological father.\textsuperscript{168} Upon Michael’s birth, Steven had assumed the role of father, until blood tests revealed that Matthew was the biological father.\textsuperscript{169} In the ensuing custody and visitation dispute, the court held that in the best interests of the child, Michael’s social relationship with Steven trumped the biological one with Matthew.\textsuperscript{170} The court explained that:

\begin{quote}
[I]n the case of an older child [over two years of age] the familial relationship between the child and the man purporting to be the child’s father is considerably more palpable than the biological relationship of actual paternity. A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved. . . . This social relationship is much more important, to the child at least, than a biological relationship of actual paternity.\textsuperscript{171}
\end{quote}

The court also noted that Steven “developed the enduring father-child relationship with Michael” by “openly [holding] Michael out as his son to his family, to the school, to the world.”\textsuperscript{172} The court explained that Steven had “signed the birth certificate, gave Michael his surname, and participated in all aspects of his emotional and financial support for the first four years of the child’s life.”\textsuperscript{173} Finally, the court cited “the strong social policy in favor of preserving the on-going father and child relationship” when it upheld Steven’s right to custody and visitation.\textsuperscript{174}

\textsuperscript{168} See id. at 536–37. Julie, the biological mother, lived with Steven, but maintained a secret, sexual relationship with her husband, Matthew. Id.

\textsuperscript{169} See id. at 537.

\textsuperscript{170} See id. at 539.

\textsuperscript{171} See id. (alteration in original) (citing Susan H. v. Jack S., 37 Cal. Rptr. 2d. 120, 124 (Ct. App. 1994); see also Atkinson, 408 N.W.2d at 519 (applying equitable parenthood theory to find, over the objection of the mother, in favor of a husband who was not genetically related to a marital child). In Atkinson v. Atkinson, the Court found that a husband who is not the biological parent of a child may be the legal parent of the child where (1) the husband and child acknowledge a relationship as father and child, or where such a relationship was fostered by the mother of the child prior to the filing of divorce, (2) the husband wants parental rights, and (3) the husband is willing to pay child support. See 408 N.W.2d at 519.

\textsuperscript{172} See Steven W., 39 Cal Rptr. 2d at 539.

\textsuperscript{173} Id.

\textsuperscript{174} Id.; see also Atkinson, 408 N.W.2d at 519–20 (adopting an “equitable parent” doctrine based upon the best interests of the child to give custody of child to non-biological father); Andrews, supra note 123, at 130–32 (recognizing the importance of Atkinson in the development of equitable adoption, in the elevation the psychological well-being of the child,
Professor Jacobs argues that paternity laws should recognize a child’s right to have a relationship with both a biological and a social father.\textsuperscript{175} She observes that “biological fatherhood has been subordinated to social fatherhood to preserve an intact familial relationship.”\textsuperscript{176} She notes, however, that “biological fatherhood has served as the sole means to establish the legal benefits and obligations of paternity.”\textsuperscript{177} She advocates the abandonment of the traditional two-parent paradigm in favor of a multiple parent model.\textsuperscript{178} Moreover, she challenges courts to recognize a social father’s right to share, with the biological father, the responsibilities and benefits of fatherhood—thereby “protect[ing] the institution of parenthood and acknowledge[ing] that parentage is defined by much more than DNA.”\textsuperscript{179}

The American Law Institute recognizes parents by estoppel and de facto parents.\textsuperscript{180} Equitable adoption and virtual adoption may also establish paternity despite the lack of a genetic relationship.\textsuperscript{181} These
doctrines allow a court to decree that a parent has adopted a child if the parent makes certain promises or acts in a manner that creates a responsibility on the part of the parent even if there is no court order or formal legal contract between the parent and child. If, for example, an adult took a child into his home for an extended period of time and then denied parentage, equity would hold the parent responsible for the child’s welfare, as if the child had been formally legally adopted. Adoption by estoppel is similar, and has most often been invoked when a parent dies without a will and a minor child whom she supported makes a claim on the estate based on the doctrines of equitable adoption or equitable estoppel. It is possible for a child to make this claim even when the child is not named in the parent’s will.

The Revised Uniform Parentage Act provides obstacles to challenging the paternity of a child with a presumed father. This federal law requires that, in the best interests of the child, a proceeding to adjudicate parentage may only be commenced within two years after birth. Moreover, it allows a court to deny a request for genetic testing if (1) the conduct of the mother or presumed father estopps that party from denying parentage; and (2) disproving the relationship would be “inequitable.” The Revised Uniform Parentage Act therefore acc-

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182 See Rein, supra note 181, at 767.
183 See id. at 766–67.
184 See 2 Am. Jur. 2d Adoption § 60 (2004); Tracy Bateman Farrell, Annotation, Modern Status of Law as to Equitable Adoption or Adoption by Estoppel, 122 A.L.R. 205, 205, 230 (5th ed. 2004).
185 See First Nat’l Bank v. Phillips, 344 S.E.2d 201, 205 (W. Va. 1985) (holding that if equitable adoption were established by clear, cogent and convincing evidence, even when there is an intestate death, an equitably adopted child could inherit as the sister of another child of the adoptive parent).
186 See Unif. Parentage Act, Prefatory Note, 9B U.L.A. 297–98 (2002). The federal incursion into the paternity arena in 1973 established a civil scheme for establishing parentage for non-marital children in an effort to ensure that these children have two parents providing financial and emotional support. See id.
187 See id. § 607(a) at 341.
188 See id. § 608(a) at 341–43; Anderlik & Rothstein, supra note 157, at 227. The concept of “parent by estoppel” contemplates a man who believed in good faith that he was the child’s father, lived with the child and accepted responsibilities of parenthood for at least two years, and is therefore estopped to deny parental obligation. See Am. Law. Inst., supra note 180, § 2.03(1)(b).
knows the importance of a social-parental relationship that is more important than the genetic relationship in the best interest of a child over two-years old.189

IV. Potential Problems

A. Quality Control of Samples

In the criminal context, questions concerning DNA testing procedures reflect unresolved disputes in the scientific community.190 These concerns should also give us pause in the immigration context, especially because USCIS relies on testing of family members in foreign countries.191 Although the immigration regulations require that petitioners and beneficiaries seek the services of an American Association of Blood Banks (AABB) approved genetics lab, the laboratory techniques at even these labs may not be as sophisticated as those in the United States.192 There are, however, strict policies regarding collection and chain-of-custody of the samples.193

The integrity, competency and fallibility of the technicians, and the handling and labeling of samples in the United States and in the foreign country become crucial in immigration cases.194 For instance, if

189 See Unif. Parentage Act § 608(a) at 341–43.

190 See Anderlik & Rothstein, supra note 157, at 225; Borenstein, supra note 75, at 851–55.

191 See Cronin Memorandum, supra note 4.

192 See Aytes Memorandum, supra note 17, at 3–4.

193 See U.S. Dept. of State, Bureau of Consular Affairs, DNA and Parentage Blood Testing, http://travel.state.gov/visa/immigrants/info/info_1337.html (last visited Mar. 29, 2010). The manual states: “[u]nder no circumstance should any other party, including those being tested, be permitted to carry or transport blood or tissue samples or test results.” Id.

194 See Borenstein, supra note 75, at 855–56; Cronin Memorandum, supra note 4. Dr. Robert E. Wenk, director of an AABB-accredited lab that performs DNA tests for U.S. immigration, recently uncovered a new type of fraud. E-mail from Dr. Robert E. Wenk, Director, BRT Laboratories, to author (Jan. 6, 2010, 11:02 A.M. EST) (on file with author). Dr. Wenk found:

[There have been instances] in which close blood relatives of a petitioner (or the petitioner himself/herself) substitute their blood samples for those of beneficiaries who are unrelated to the petitioner but pretend to be. Corrupt blood collectors in one West African nation engaged in systematically substituting the blood samples in over 3% of alleged families emigrating from that nation. When examined by an unsuspecting lab, the DNA profiles of the blood falsely demonstrate a relationship, enabling the non-relative beneficiaries (impostors) to immigrate. Since the substituted blood samples often are actually those of the petitioner’s relatives who already immigrated to the U.S., the DNA profile of the relative and the one reused by the impostor are identical so that I termed this kind of DNA identity theft “genotype recycling”. My
the technicians improperly collect or store the samples, they could become contaminated and the results would be useless. Consequently, adequate provisions for the storage of the DNA collected by these private companies is imperative.

B. Privacy Interests

Our legal system provides that there is a privacy interest in medical information and financial records that requires an affirmative waiver of those rights before the information can be released. Yet there appear to be no safeguards on the use of DNA information once it is submitted to DHS. For instance, it is unclear if relatives of individuals whose DNA is stored can also be tracked using that information. If mitochondrial DNA is stored, rather than nucleic DNA, the siblings of the owner of the banked DNA could potentially be identified because all of a woman’s offspring have the same mitochondrial DNA sequence. There is a genuine concern that this DNA, once entered in the data-

detailed findings of the systemic fraud will be published in the Journal of Forensic Sciences (March 2011). In searching my lab’s data of emigrants from other nations, I found non-systematic (single cases) of the same fraud. I plan to publish these “sporadic genotype recycling” cases of fraud, as well. As a result of reporting my findings to the fraud unit of the State Dept., all overseas sample collection procedures have been changed. Buccal (cheek) swabs are collected now instead of blood. Now, there is very strict oversight of sample collectors and sample labeling, packaging and shipping by cleared embassy officers. In addition, a lab (based in the U.S.) can detect genotype recycling as a quality control procedure by searching for identical DNA profiles in its database. Finally, the U.S. plans to establish its own database of DNA-tested immigrants that will allow electronic searches for reused DNA profiles. With a common database, a petitioner will be unable to use more than one lab to avoid fraud detection.

Id. 195 See Borenstein, supra note 75, at 855–56.
196 See Julie A. Braun et al., Recent Developments in Medicine and Law, 35 Tort & Ins. L.J. 487, 526 (2000); Hibbert, supra note 103, at 784–85.
197 See Hibbert, supra note 103, at 786–87; Swarns, supra note 19.
198 See Hibbert, supra note 103, at 786–87.
199 See id. at 783–84 (describing the arrest and conviction for rape of the brother of an individual whose DNA was banked, because the DNA was so similar that the laboratory suggested that the DNA might belong to the relative, and questioning the ethical and legal legitimacy of this practice of genomic intrusion by asking whether a sibling loses “privacy expectations of being free of searches merely because he is related to an offender”); see also Frederick R. Bieber, DNA Fingerprinting and Civil Liberty, 34 J.L. Med & Ethics 222, 226 (2006) (relating several examples where analyzing DNA of family members has been used to identify suspects, leading to arrests and confessions).
bank, could be used against the immigrant and his relatives by law enforcement.

Over thirty years ago, Justice William Brennan identified potential privacy hazards in storing medical information in computer databases.\(^{200}\) He noted that the “central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.”\(^{201}\) Aside from this general predicament, genetic information stored in governmental or private databases has even greater potential for abuse and privacy infractions.\(^{202}\)

Nevertheless, for undocumented immigrants, courts have denied the expectation of privacy.\(^{203}\) Likewise, in February 2007 the Department of Justice departed from its prior policy that only convicted felons were required to provide DNA evidence.\(^{204}\) The Department supplemented its prior mandate with one to collect DNA from arrested undocumented workers and thereby expanded its governmental powers.\(^{205}\)

Information is timeless; yet, DNA tests can provide information protected by the Fourth Amendment.\(^{206}\) This predicament can pose problems for petitioners, beneficiaries and their relatives identifiable by the DNA. Accordingly, procedures must be instituted for the samples and/or results to be discarded so that they cannot be used again for other purposes.

C. Grounds of Inadmissibility

The INA provides that aliens seeking to enter the United States as permanent residents or on a temporary basis as non-immigrants may be deemed inadmissible based on health concerns such as “communicable disease of public health significance,” physical or mental disor-

\(^{200}\) See Whalen v. Roe, 429 U.S. 589, 606 (1977) (Brennan, J., concurring); Hibbert, supra note 103, at 819.

\(^{201}\) Whalen, 429 U.S at 607 (Brennan, J., concurring).

\(^{202}\) See Moyer & Anway, supra note 92, at 706–07, 714 (discussing federal and state legislation governing the use of genetic information and predicting that “as early judicial decisions shaped the future of DNA forensics, so too will early decisions shape the future of genetic engineering and genetic privacy”).


\(^{205}\) See id.

\(^{206}\) See U.S. Const. amend. IV.; Preston, supra note 205 (discussing the potential of DNA profiles to reveal intimate information).
ders, or as persons determined to be drug abusers or addicts. Consequently, government access to health information hidden in DNA may be damaging to a beneficiary. In addition, information from these tests may make a petitioner or beneficiary unattractive to insurance companies or employers. Thus, discrimination in hiring or in obtaining health or life insurance could ensue if these tests reveal a potential for future health problems.

The INA provides inadmissibility on such health grounds and further creates a catch-all category making inadmissible those “likely at any time to become a public charge.” If there are no clear limits on the use of the DNA information collected from petitioners and beneficiaries, this “public charge” category could be used to deny entrance based on present or future health risks. For example, if the DNA test shows that the beneficiary carries the gene for breast cancer, the results could be used to deny admission. Similarly, HIV positive individuals may be denied admission because the potential cost of health care for someone who develops AIDS is staggering and would undoubtedly implicate a “public charge” concern.

The routine collection and storage of this DNA material, given voluntarily, for an important purpose, could devolve into a means of keeping a check on potential criminal immigrants in an anti-immigrant environment. Although this might seem far-fetched, it is no more unbelievable than former New York Mayor and presidential candidate Rudolph Giuliani’s suggestion that the New York legislature seek to collect DNA samples from each newborn for the state databank.

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208 Id. § 1182(a)(1)(A)(i), (iii), (iv), (a)(4)(A). The totality of the circumstances approach was used by the INS in determining who is likely to become a public charge includes (I) age; (II) health; (III) family status; (IV) assets, resources and financial status; and (V) education and skills. Id. § 1182(a)(4)(B). Fortunately a “properly filed, non-fraudulent I-864” Affidavit of Support, is a legally binding document that is normally sufficient to overcome the public charge ground of inadmissibility. Id. § 1183, 1183(a); State Dept. Releases Guidance on Affidavits of Support, 75 Interpreter Releases, June 29, 1998, at 865, 879.
210 See id. § 1182(a)(1)(A)(i), (a)(4)(A). The Department of State recognizes that the public charge ground may be appropriate even when a valid affidavit of support is provided by the petitioner. “Chronic illness, physical or mental handicaps, extreme age or other serious conditions” are among the conditions identified. See id. § 1182(a)(4)(B) (stating that factors and affidavit are only considerations in the decision whether an alien is admissible); see also Affidavits of Support on Behalf of Immigrants, 8 C.F.R. § 231a (2009).
211 See David Seifman, Getting DNA Samples at Birth Fine with Rudy, N.Y. Post, Dec. 17, 1998, at 34.
very justification for this measure was to facilitate his or her apprehen-
sion should the child grow up to be a criminal.212

V. Potential Solutions

DNA tests offer administrative convenience and perceived accuracy, yet the USCIS should resist any pressures to require the test for all family-based applicants. Instead its current policy on the use of such tests should be maintained. Specifically, the USCIS should recommend DNA tests to prove the biological relationship between the petitioner and beneficiary only if a set of documents is questionable or unavailable. In many such cases, DNA testing will confirm the relationship and parties will be reunited. If the results demonstrate that there is no genetic relationship, however, a procedure consistent with the legislative intent of the INA should be employed.213 In crafting the INA, Congress recognized the importance of reunification of families as a primary goal of the statute.214 Indeed, for immigrant families, adjusting to cultural, financial, and even language differences, the vital supportive role that a family can play cannot be underestimated. Accordingly, the USCIS should recognize social fatherhood to allow families to remain intact.

Advocates of DNA testing will point out that such tests can eliminate the potential for fraud.215 Yet, it cannot be assumed that should DNA show no match, there is necessarily attempted fraud. In fact, as Mr. Owusu’s story demonstrates, DNA testing can reveal unexpected results for parties with good intentions.216 Furthermore, familial bonds can be strong where there is no blood or adoptive relationship.217 Therefore, the equitable concept of estoppel should be employed to permit these families to reunite.

212 See id.


214 See H.R. Rep. No. 82-1365, at 29.

215 See Press Release, Indentigene, supra note 52 (noting the hope that DNA testing will be used to counter the problem of fraud in some areas of the world); see also Davis, supra note 35, at 145–46 (DNA is dispositive in the resolution of immigration cases where parentage is at issue).

216 See Swarns, supra note 19.

217 See id.
In addition, the government is capable of detecting immigration fraud without blindly relying on the results of a DNA test. Several precautions to discourage fraudulent applications derived from the Immigration Marriage Fraud Amendments Act of 1986 illustrate this truth.\textsuperscript{218} For example, the Act authorizes granting two-year conditional permanent residence for beneficiaries married less than two years and then requires a joint filing of a petition (Form I-751) to remove the conditional permanent residence status.\textsuperscript{219} This burden serves to deter sham marriages.\textsuperscript{220} In addition, a marriage is presumed to be fraudulent, and the alien is subject to deportation, if the marriage was entered into within two years prior to obtaining lawful permanent residence, is judicially annulled, or terminated within two years after the lawful permanent resident’s entry in the United States.\textsuperscript{221} In all subsequent deportation proceedings, the alien has the burden of rebutting the presumption that she attempted to evade the immigration laws.\textsuperscript{222} Finally, the penalties for marriage fraud are substantial—imprisonment for up to five years and/or up to a $250,000 fine.\textsuperscript{223} Likewise, a finding of fraud will bar the alien from obtaining permanent residence, even through a subsequent marriage to another United States citizen or lawful permanent resident that is genuine.\textsuperscript{224} Given the utility of these

\begin{footnotesize}
\begin{enumerate}
\item<sup>219</sup> See 8 U.S.C. § 1186a(b)(3)(B), (g)(1) (2006). The IMFA established a procedure for the removal of the conditional residence. See id. § 1186a(d)(2)(A). Ninety days prior to the second anniversary of the granting of the lawful permanent residence status, the couple must file a joint petition that establishes that the marriage is valid under the laws where it occurred, was not judicially annulled or terminated (except through the death of a spouse), was not entered into to obtain immigration benefits, and no fee was paid for the filing of the petition. See id. § 1186a(d)(1)(A). An interview with both parties may be required. See id. § 1186a(c)(1)(B).
\item<sup>220</sup> See id. § 1186a(c)(1)(B), (d)(1)(A), (d)(2)(A).
\item<sup>221</sup> Id. § 1227(a)(1)(G)(i).
\item<sup>222</sup> See Rodriguez v. INS, 204 F.3d 25, 28 (1st Cir. 2000) (finding that the state court judgment ending a marriage that was based upon a finding of fraudulent intent to evade the immigration laws was a “presumption plus” that was not sufficiently rebutted).
\item<sup>223</sup> See 8 U.S.C. § 1325(c).
\item<sup>224</sup> See id. § 1154(c) (providing a bar to permanent residence on the basis of an immediate relative petition if one engages in fraud or attempts or conspires to engage in fraud); see also In re Isber, 20 I. & N. Dec. 676, 677 (B.I.A. 1993) (“[The Marriage Fraud Amendments’s] language was intended to prohibit ‘approval of a petition for an alien whose prior marriage was determined by the Attorney General to have been entered into for the purpose of evading the immigration law’” (quoting S. Rep. No. 748 (1965), \textit{reprinted in} 1965 U.S.C.C.A.N. 3228, 3341–42 (emphasis added))); \textsc{Nat’l Immigration Project}, \textit{supra} note 33, § 4:40 n.7 (3rd ed. 2009) (indicating that “a finding of fraud . . . does not preclude approval of a second spousal visa petition filed by a petitioner on behalf of the same beneficiary if new evidence can be presented to overcome the earlier finding”).
\end{enumerate}
\end{footnotesize}
mechanisms, in cases of claimed social fatherhood similar penalties could be used to discourage fraud.

A useful example in the New York district is the Stokes interview, a mechanism currently used to discourage marriage fraud. The Stokes interview is a secondary interview where the USCIS officer separates the parties and questions them using questions that a couple living together should be able to answer. To compare their responses, they may be asked about their courtship, the marriage ceremony and honeymoon, color of their toothbrushes or sleeping attire. Inconsistencies in Stokes interview responses then help the USCIS detect marriage fraud. Similarly, in family-based cases when the DNA results are inconclusive or show no familial relationship and the parties make an equitable claim of social fatherhood, procedures like the Stokes interview could be implemented to combat fraud and yet allow for a more thorough determination of the case.

**Conclusion**

More oversight of the DNA testing companies and stronger policies regarding quality assurance and privacy are necessary before the results of such testing are made paramount in family-based immigration cases. Although the economic efficiency and administrative ease of DNA testing may lull us into complacency, the potential for its abuse is substantial and, once released, the DNA genie cannot be put back in

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225 See Stokes v. INS, 393 F. Supp. 24, 27 (S.D.N.Y. 1975); see also Nat’l Immigration Project, supra note 33, at § 4:40. Stokes v. INS was a class action in the Immigration and Naturalization’s New York district in response to perceived abuses by examiners—interviews with few due process safeguards and extremely personal questions. See Stokes, 393 F. Supp. at 27; Nat’l Immigration Project, supra note 33, § 4:40. The Stokes judgment provides for “adjudicatory proceedings” before a “presiding immigration officer” with many due process safeguards, including, inter alia:

(1) written notice to the parties of their rights, including the right to an attorney;
(2) the right to present evidence, including live witnesses, to cross-examine, and to rebut adverse evidence;
(3) the right to inspect the record of proceedings;
(4) the right to subpoena witnesses and documents;
(5) verbatim record of the proceeding (done by recording);
(6) referral back to the presiding officer for further adjudicatory proceedings after an investigation, if any; and
(7) a decision based solely on evidence of record.

Nat’l Immigration Project, supra note 33, § 4:40.

226 See Nat’l Immigration Project, supra note 33, § 4:40.

227 See id.

228 See id.
the bottle. Therefore, we should proceed with caution. Additionally, the legislative intent of the INA is consistent with the movement in family law towards the recognition of social fatherhood and the equitable concept of estoppel. Consequently, immigration law should accept this more expansive view of fatherhood and allow fathers who are not the biological parent to sponsor and be sponsored for lawful permanent residence.
Abstract: This paper investigates the economic relationships between farmers and middlemen in Vietnam’s Mekong Delta and places it in the context of the new rule of law movement. The new rule of law movement, which has grown in the wake of the collapse of formerly centrally planned economies, argues that the rule of law is a prerequisite for economic growth and that transition economies can only succeed by adopting strong formal legal rights and institutions. Notwithstanding more than two decades of an aggressive rule of law reform program, Vietnam’s formal legal system remains weak. Using survey data from a sample of fruit farmers and middlemen we find that participants in the farm-gate market for pomelos carry out relatively complex transactions by granting buyers credit with little explicit reliance on formal legal structures. The development of complex markets for fruit in the Mekong Delta in the absence of strong legal rights provides lessons for proponents of the new rule of law movement. First, in the absence of formal structures, private parties find ways of structuring transactions in order to assure contract performance. Second, development of formal legal structures is a very long term proposition with uncertain results. And finally, the experience of farmers and middlemen suggests that formal law and the development of formal legal institutions appear to trail economic development and should not therefore be considered an essential component of short-term economic reform efforts.
INTRODUCTION†

This paper is a reflection on recent field research investigating the economic relationships between farmers and middlemen in Vietnam’s Mekong Delta. Based on our study we find that participants in the farm-gate market for pomelos carry out relatively complex transactions by granting buyers credit with little explicit reliance on formal legal structures.¹ We also find that farmers do not yet rely to a large degree on reputation or extensive relationships. Instead, farmers appear to rely on a portfolio approach in their sales to generate information about new buyers.² As new buyers prove themselves reliable partners farmers shift more business to them. Further, as parties search for and find more reliable partners, the structure of this market appears to be migrating over time towards more relational contracting to support complex transactions. This snapshot of the fruit markets of the Mekong Delta suggests that first, notwithstanding the lack strong legal rights, parties are able to engage in complex transactions, and second, that developing formal legal structures is a complicated and long-term process with uncertain results.

Given the continuing debate over the importance of the formal legal system in creating conditions conducive to economic development, these conclusions are significant. Throughout the 1990s and until now, general components of the World Bank’s prescription for developing and post-Soviet transition economies (the “Washington Consensus”) include market liberalization and strengthening of the rule of law to support the development of markets.³ Critics of the Washington Consensus approach to rule of law reforms criticize its focus on formal legal

† Unless specified to the contrary, all references to Vietnamese law can be accessed at http://vbqppl.moj.gov.vn/pages/vbpq.aspx. In addition, the authors provided all translations of Vietnamese, unless otherwise stated.


institutions in the form of legal transplantation and legal education as ineffective and a throw-back to the failed law and development movement of the 1960s and 1970s. To the extent there is controversy, it is a tension between the academy, once burned, and development institutions busily engaging in projects and lending activity.

This Article does not intend to resolve the debate over the efficacy of this “new” rule of law movement. Rather, it calls into question whether the strong legal rights engendered in the formal legal institutions favored by its activist approach are a prerequisite for economic growth and whether projects intended to improve the rule of law should be a high priority reform item in the short term. Indeed the experience of farmers and middlemen in Vietnam’s Mekong Delta, far removed from the influence of legal reform projects and formal rule of law activities, suggests the creation of strong legal rights of the type endorsed by the new rule of law movement are a “trailing edge” reform rather than a “leading edge” reform. Thus, notwithstanding a perceived demand for

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5 This tension is evident in the contributions of authors to the Northwestern University Law Review Colloquy’s symposium on the future of the law and development movement. See generally Symposium, The Future of Law and Development, 104 Nw. U. L. Rev. Colloquy 164 (2009) (discussing from multiple authors’ perspectives three main issues: whether “Law and Development” is really a field, what scholars have learned from this topic, and where attention should turn in the future).

6 See generally Thomas C. Heller, An Immodest Postscript, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 382, 382–95 (Erik G. Jensen & Thomas
action, such measures should not be a high profile short term reform item.7

The new rule of law movement prescription starts from the assumption that strong legal rights are fundamental to a functioning market economy.8 The theoretical basis for the movement—that where legal rights are strong, parties can engage in anonymous market transactions with assurance that private contractual promises are backed by a reasonably efficient public enforcement regime—is attractive.9 Strong public enforcement institutions (that is, the “rule of law”) can provide a backdrop against which parties feel confident in engaging in transactions with strangers often with many terms still left undefined.10 Consequently, a system of strong legal rights working in the background can generate high levels of “generalized trust” even among strangers and translate into a greater willingness of economic actors to make long-term investments and engage in complex transactions, thus facilitating economic development.11

The new rule of law movement found a home in the context of post-Soviet transition economies.12 Following the shift to markets, formal legal structures designed to support central planning systems found themselves hopelessly obsolete.13 Because of this obsolescence, generalized trust suffered as formal structures and institutions were unable to keep up with changes on the ground.14 This economic transition pro-

C. Heller eds., 2003) (discussing the new rule of law and the possible extensions of its concepts to future reform programs).

7 Thanks to Thomas Heller of Stanford for this conceptualization of law as a “trailing edge” issue in the development process.

8 See Hernando de Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else 50 (2003). Hernando de Soto is an eloquent proponent of the view that strong formal property rights are necessary for economic growth. He is, however, not the only proponent. See, e.g., Armen A. Alchian & Harold Demsetz, The Property Right Paradigm, 33 J. Econ. Hist. 16, 16 (1973) (“Capitalism relies heavily on markets and private property rights to resolve conflicts over the use of scarce resources.”).

9 See de Soto, supra note 8, at 54–55. Examples of such legal rights include property and contract rights. See id.


13 See id. at 173–74.

14 See id.
vided an urgent impetus to rule of law activities that was missing during the height of the law and development movement. Such activities in transition countries included a host of top-down efforts to re-write legislation, as well efforts to reorient and train the judiciary not unlike many of the efforts of the law and development movement of the past.

Vietnam is one such country in the midst of economic transition from central planning. Early on in its reform process, Vietnam embarked on an ambitious effort to remake its formal legal structures from the top-down to support the development of the new market economy. Though this effort has been aggressive in many respects, it has fallen short of a complete remake of Vietnam’s legal system and institutions. Consequently, the country still has relatively weak formal legal institutions and confidence in its formal institutions remains low. Vietnam has enjoyed significant economic growth over the past two decades in the face of these challenges. The development of informal institutions in support of complex commercial relationships has played an important role in that success.

Economists John McMillan and Christopher Woodruff investigated informal structures supporting economic exchange amongst Vietnamese manufacturers in the mid-1990s through a series of surveys and interviews. This Article builds on their work and demonstrates that more than a decade later, and more than two decades since Vietnam initiated its economic and legal reform efforts, the task of creating

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15 See id. at 182.
18 See id. at 442.
19 See id. at 882.
strong legal rights and robust formal legal institutions is not a simple technical challenge. Informal legal institutions and private ordering, or “personalized trust,” dominate the economic lives of market participants in Vietnam despite the country’s aggressive reform agenda. In that sense, nearly a quarter century of top-down rebuilding of formal legal structures has yet to take effective hold.

Similarly, our survey data from the market for pomelos in the Mekong Delta suggests that rather than conduct commerce in the shadow of formal legal institutions farmers engage in transactions with middlemen backed entirely by personalized trust. Although the majority of pomelo transactions are still carried out on the spot market, in about a third of sales, farmers structure complex transactions by the extending trade credit to middlemen. This credit is sometimes, but not always, backed by extensive relationships. In any event, farmers do not rely on formal legal structures to assure contract performance. In other words, farmers in the Mekong Delta contract with middlemen in the absence of the formal law and legal institutions, rather than in its shadow.

To the extent the new rule of law movement focuses on developing formal legal structures from the top-down, the movement threatens to repeat the mistakes of the law and development movement of the 1960s and 1970s. The development of complex markets for fruit in the Mekong Delta is backed by a bottom-up private ordering process and not by any changes in formal legal structures. In fact, market participants appear to treat such structures as irrelevant for the most part. They rely neither on formal contracting nor on formal dispute mechanisms in their commercial dealings. Therefore, this Article suggests that by treating the development of legal institutions as a mere top-down technical problem that can generate the generalized trust required in a market economy, the new rule of law movement may repeat the mistakes of the past and ultimately fail to be of consequence.

Part I provides a brief overview of the new rule of law movement. Part II describes Vietnam’s reform efforts in the past several decades,

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22 See Milhaupt & Pistor, supra note 4, at 4–8 (challenging the view that legal reform is a simple technical exercise).

23 See generally Durlauf & Fafchamps, supra note 11, at 1646–47 (explaining that personalized trust, which arises from repeated interpersonal interaction takes time and effort to establish but does not always yield the most efficient outcome).


25 See Trubeck & Santos, supra note 4, at 9.
focusing on relevant developments in reform of its legal system and introduces the work of McMillan and Woodruff, noting that their empirical study and subsequent research confirm that public confidence in formal legal institutions remains low in Vietnam notwithstanding many years of active engagement by the central government and foreign donors in legal reform programs. Part III details the structure of the fruit markets of the Mekong Delta, presenting findings and analysis from our survey of 180 pomelo farmers and forty-seven middlemen. Part IV demonstrates that, during the decade between the work of McMillan and Woodruff and our study, top-down rule of law activities appear to have had little impact on the operation of complex market transactions in the Mekong Delta. This Article concludes that the creation and development of strong legal rights through formal institutions is likely a trailing edge issue with an uncertain effect on the quality of economic growth over time. Our conclusion implies that the urgency of the new rule of law movement may be misplaced.

I. THE NEW RULE OF LAW MOVEMENT

The role of law in facilitating economic growth in developing and transition economies is controversial among academics and policymakers. On the one hand, legal academics have largely discredited the law

See, e.g., Kenneth W. Dam, The Law-Growth Nexus: The Rule of Law and Economic Development 273–77 (2006) (arguing that the origins of legal systems should not be determinative of economic development); Milhaupt & Pistor, supra note 4, at 5–8 (arguing for a more complex and contextualized understanding of the relationship between law and development); Stephen Haggard et al., The Rule of Law and Economic Development, 11 Ann. Rev. Pol. Sci. 205, 281 (2008) (reviewing the empirical work on the rule of law and economic development and arguing that formal legal institutions may not be a prerequisite for growth); Rafael La Porta et al., The Economic Consequences of Legal Origins, 46 J. Econ. Lit. 285, 326 (2008) (concluding that the origin of legal systems are important in economic development); Frank Upham, Mythmaking in the Rule-of-Law Orthodoxy, in Promoting the Rule of Law Abroad: In Search of Knowledge 75, 75–101 (Thomas Carothers ed., 2006) (arguing for a more contextualist understanding of the rule of law); see also Carothers, supra note 12, at 163–77 (discussing the challenges of aiding other countries with rule of law development); Randall Peerenboom, Varieties of Rule of Law: An Introduction and Provisional Conclusion, in Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S. 1, 38–39 (Randall Peerenboom ed., 2004) (discussing the rule of law controversy as understood in the context of economic reform and transition in Vietnam and China); Law Reform in Developing and Transitional States (Tim Lindsey ed., 2007) (arguing, in general, for a more contextualized approach to the rule of law debate); Trubek & Santos, supra note 4, at 3–14 (identifying and analyzing the role of law in economic development); Williamson, supra note 3 (laying out the “Washington Consensus” for the first time); Economics and the Rule of Law: Order in the Jungle, Economist, Mar. 15, 2008, at 83–85 (discussing the contradictory research regarding rules of law). But see Rodrik, supra note 4, at 986
and development movement of the 1960s and 1970s. On the other hand, the collapse of the former Soviet Union and the transition of formerly centrally-planned economies to market economies along with interest by financial economists in the role of institutions has garnered new attention to the role of law. This development followed logically as the formal legal structures of formerly centrally-planned economies were wholly out of touch with the emerging market economies in which they existed. Rule of law projects have thus arisen all over the world as core components of international aid programs. By one estimate, since 1990 the World Bank alone has invested approximately $2.9 billion in rule of law technical assistance projects. Economic transition has provided a new generation of academics, particularly financial economists, opportunities to infer linkages between formal legal systems and economic development.

This movement places law and the creation of formal legal structures at the very center of the effort to generate and support economic growth in transition and developing countries. The movement’s proponents reason that centrally-planned economies lacked appropriate legal and regulatory structures to support markets and that efficient markets and economic growth in transition economies require the rule


See Trubek, _supra_ note 4, at 80–85. Douglass North received a Nobel Prize for his work analyzing the role of institutions in setting the rules of the game for economies. See generally North, _supra_ note 28. Rafael La Porta and his co-authors attribute the origin of legal systems to strength of legal rights and to economic success. See Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer & Robert W. Vishny, _Legal Determinants of External Finance_, 52 J. Fin. 1131, 1149–50 (1997). See generally World Bank, _supra_ note 3, at 87–97 (noting the importance of developing new formal legal institutions for transition economies).

See Trubek, _supra_ note 4, at 82–86; see also Carothers, _supra_ note 12, at 331–43 (describing the aid programs, including rule of law programs, that have arisen as a result of the promotion of democracy). See generally Legal Vice Presidency, _supra_ note 3 (providing a comprehensive review of the World Bank’s activities in legal and judicial reform).

See Trubek, _supra_ note 4, at 74.

See Legal Vice Presidency, _supra_ note 3, at 2; Trubek, _supra_ note 4, at 82–86.

See Trubek, _supra_ note 4, at 81–86.
of law and formal legal structures, in particular the protection of property rights and the efficient enforcement of contracts. Curtis J. Milhaupt and Katharina Pistor highlighted the importance of formal legal structures to this view when they summarized the movement’s rights-based argument in the following way: “[L]aw fosters economic activity (exclusively) by protecting property rights. A legal system that clearly allocates and protects property rights (a rule of law) precedes economic development and is a precondition to economic success. . . . The quality of property rights protections, in turn, determines economic outcomes.”

In the context of transition economies, an assimilation of this point of view must be understood as a redefinition of the role of the state from that of participant to arbiter of the rules of the marketplace. Rule of law support efforts are intended to increase a generalized sense of trust amongst market participants so that in the event they must rely on formal legal institutions to ensure contract performance or to protect property rights, “courts [will] have the power and the capacity to judge objectively and [such] judgments [will be] enforced.” In this way, the new rule of law movement embraces the state not as a market participant but more suitably as a market referee.

International financial institutions adopted this line of reasoning during the 1990s. The World Bank, for example, funded over six hundred projects related to rule of law activities during the 1990s. Key elements of such programs have included assisting development of the legislative process, legislative drafting exercises (focused mostly on developing legal rules for the economic sphere), support for modernizing and training the judiciary, and support for increasing the independence of judiciaries. These rule of law efforts espoused by the

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34 See Milhaupt & Pistor, supra note 4, at 4.
35 See id.
36 See Trubek, supra note 4, at 86–91. This differs from the general perspective on the role of law as an instrument of state policy that dominated the law and development movement. See id. (discussing these differences).
37 See World Bank, supra note 3, at 87. “The developing countries’ transition toward market economies necessitated strategies to encourage domestic and foreign private investment. This goal could not be reached without modifying or overhauling the legal and institutional framework and firmly establishing the rule of law to create the necessary climate of stability and predictability.” Legal Vice Presidency, supra note 3, at 2.
38 See Trubek, supra note 4, at 91.
39 See Legal Vice Presidency, supra note 3, at 3.
40 See id.
41 See id. at 3–4. In Cambodia, for instance, the World Bank funded efforts to assist the Cambodian government establish a comprehensive legal and regulatory framework for the
World Bank became an integral component of the “Washington Consensus” and a central component of many countries’ transition and reform efforts.\(^\text{42}\)

Milhaupt and Pistor note that such efforts tend to treat law and legal reform as a technical, rather than a political or social, challenge.\(^\text{43}\) They are right to be skeptical. Were the law and legal reform no more than a technical problem, like the size of the money supply, it would be possible to make a number of readily obvious changes to key legal institutions and then see the effect in the economy.\(^\text{44}\) In fact, the law and development movement of the 1960s and 1970s focused its efforts on rebuilding developing country legal institutions along the lines of Western legal institutions with little success.\(^\text{45}\) The failure of that movement lends credence to skeptics of its tenets.

Nevertheless, in some respects, post-transition rule of law efforts—that is, the new rule of law movement—mimic many of the strategies of the failed law and development movement.\(^\text{46}\) Though the circumstances of transition make the impetus for rule of law efforts more obvious, to a large extent the efforts simply revive the failed approaches of the law and development movement’s “legal liberalism.”\(^\text{47}\) To the extent this is true, it raises questions about the efforts’ ultimate utility. As previously noted, the law and development movement failed, in part, due to its heavy emphasis on the transplantation of formal legal institutions (particularly from the United States and Western Europe), legal education sector. \(\text{Id.} \) at 26–27. In China, the World Bank financed efforts to assist the Chinese legislature in drafting laws in the following areas: contracts, insurance, partnerships, futures market, bidding, sole enterprises, and trusts and estates. \(\text{Id.} \) at 28–29. Additionally, in Tanzania, the Bank sponsored efforts in the Ministry of Justice and Constitutional Affairs through four activities—capacity building, international study tours for ministry staff, consultative stakeholder workshops, and a public awareness campaign on the changes in the legal system. \(\text{Id.} \) at 24–25. In Kenya, the World Bank supported efforts to assist Kenya to create an independent judiciary. \(\text{Id.} \) at 20.

\(^{42}\) Williamson, \(\text{supra} \) note 3, at 7–8. This consensus included a series of other policy and institutional reforms, protection of property rights among them, that if adopted were expected to lead to economic growth. \(\text{See id.} \) This view has been challenged by Rodrik among others. \(\text{See Rodrik, \(\text{supra} \) note 4.} \)

\(^{43}\) Milhaupt & Pistor, \(\text{supra} \) note 4, at 20.

\(^{44}\) \(\text{See id.} \) at 20–21.

\(^{45}\) \(\text{See Trubek, \(\text{supra} \) note 4, at 76–78.} \)

\(^{46}\) \(\text{See David M. Trubek & Marc Galanter, Scholars in the Fun House: A Reply to Professor Seidman, 1 Res. L. & Soc. 31, 32 (1978).} \)

\(^{47}\) \(\text{See id.} \) Trubek and Galanter characterized “legal liberalism” in 1974 as a belief “that establishment in the Third World of legal systems similar to those of the United States and Western Europe promoted development because they would foster equality, enhance participation in public life, and lead to more effective mastery of the world.” \(\text{Id.} \)
structures, and legislation, and an inability to be culturally aware of the informal institutions that form the backbone of many legal cultures. Therefore, to the extent the new rule of law movement translates its understanding of the law’s role concretely in the form of project and programs, it threatens to devolve into the mere technical formalism of legislative drafting exercises, judicial training, and formal process thereby repeating many of the mistakes of the law and development movement.

Consider the similarities between the new rule of law movement and the failed law and development movement of the 1970s. First, both start from an assumption that strong legal rights are a prerequisite to economic growth and development. Second, both include a focus on creating strong legal rights through a re-creation of aspects of U.S. and Western-styled formal legal institutions, including legislative drafting training of the judiciary and the bar, among other activities. This focus on formal institutions and formal structures is ultimately an oversimplification of the Washington Consensus, but the translation of a nuanced understanding of the development of formal and informal legal institutions to an action plan is often vulnerable to dangerous simplifications. Such simplifications are sometimes necessary to translate nuanced understandings of the interplay between institutions and development into projects and programs financed by bilateral and multilateral donors. These projects and programs are, however, then susceptible to a counting bias. They tend to be designed to facilitate the counting of outputs in the formal system rather than the deepening of informal institutions, hence the focus on legislative drafting and the training of judges and lawyers.

48 See Trubek, supra note 4, at 78; Trubek & Galanter, supra note 27, at 1080.


50 See Trubek & Galanter, supra note 27, at 1079.

51 See id. at 1080, 1082. Professor Brian Tamanaha describes modernization theory, a motivating force in the law and development movement, as a view that “development was an inevitable, evolutionary process . . . that would ultimately produce economic, political and social institutions similar to those in the West.” Brian Z. Tamanaha, The Lessons of Law-and-Development Studies, 89 Am. J. Int’l. L. 470, 471 (1995) (reviewing Law and Crisis in the Third World (Sammy Adelman & Abdul Paliwala eds., 1993) and 2 Law and Development: Legal Cultures (Anthony Carty ed., 1992)). Although not explicitly adopting modernization theory, the new rule of law movement shares many of its attributes. See id.

52 See Quinn, supra note 16, at 456–57.
The world envisioned by rule of law advocates is one of high levels of generalized trust backed by protection of property rights by formal legal institutions permitting complex one-off transactions with strangers. Nevertheless, such a world does not exist. Following the demise of the law and development movement, legal scholars and economists began to focus on the role of private ordering and informal institutions over formal legal institutions and formal structures in order to develop a more nuanced understanding of legal culture.\textsuperscript{53} Indeed, the definition of legal institutions, once narrow, has broadened to include these informal structures.\textsuperscript{54} However, deepening such structures through technical assistance projects and donor-funded programs specifically presents many of the same challenges of an earlier era. Their informality presents challenges to donors designing fundable projects. In fact, forming or reforming social networks and informal legal institutions is neither a simple nor a short-term task.

\begin{itemize}
  \item \textsuperscript{54} See Macauley, supra note 10, at 55–57.
\end{itemize}
One general conclusion of the recent scholarship in this area is that strong social networks and informal institutions can create opportunities for repeated interactions and thereby facilitate economic activity in the absence of formal legal structures.55 This is because extensive relationships and relational contracting can provide important mechanisms for transmission of information about markets, reputations of market actors as well as the development of social norms.56 In countries where legal rights are weak, trust generated by social norms and relational contracting can be highly personalized.57 Participation in social networks facilitates the development of such trust and social capital because it provides opportunities for parties to develop extensive relationships with potential counterparties and to exchange information about other market actors.58 Thus, personalized trust and social capital can be important in promoting economic activity in the absence of formal legal institutions.59

In the language of private ordering, trust is an inherently calculative process.60 Before one decides to commit to a transaction and leave herself vulnerable to opportunism, she must make a calculation—explicit or implicit—about the likelihood of the counter-party in the transaction to make good on his commitments.61 Where legal rights are weak, parties may hesitate to make long-term investments or engage in transactions with strangers lest they be unable to adjudicate their rights in the event of default.62 In such circumstances, high levels of personal-

56 See Durlauf & Fafchamps, supra note 11, at 1645, 1653–56.
57 See Landa, supra note 53, at 350–51.
58 See id. at 357–61.
59 See Durlauf & Fafchamps, supra note 11, at 1646.
60 See Russell Hardin, Trust & Trustworthiness 3–7 (2002). Hardin refers to trust as an encapsulated interest; one trusts because the counter party’s interest encapsulates your interest. See id. at 3. Trust can be defined as “[a]n action that . . . creates the possibility of mutual benefit, if the other person is cooperative, and the risk of loss to oneself if the other person defects.” James C. Cox, How to Identify Trust and Reciprocity, 46 Games & Econ. Behav. 260, 263 (2004); see also Hardin, supra at 11–12 (discussing that trust involves not only an expectation that someone will act for your benefit, but also relevant motivation that the person will act in that way, as well as a certain risk).
61 See Oliver E. Williamson, Calculativeness, Trust, and Economic Organization, 36 J.L. & Econ. 453, 463–65 (1993). Other authors, while not as explicit in their support of this economic view of trust, nevertheless embed concepts of an implicit calculation in their descriptions of trust. See Hardin, supra note 60, at 3–7.
ized trust can be critical to successful contracting. Groups, social, and trading networks can facilitate complex transactions by enlarging the shadow of the future. In other words, as a trading pair’s time horizon expands through networks that give rise to relational contracting, one can raise the expected value of continuing the relationships as well as the cost of a counter-party’s defection. The higher those costs, the higher the level of personal trust.

Extensive social and trading networks can also permit interactions with strangers by creating avenues for the development of reputation mechanisms. Reputation can be an important device for generating personalized trust. Parties with good reputations, who can credibly signal their value as a business partner, may find it easier to engage with strangers in complex transactions. The existence of a reputation also extends the time horizon by permitting strangers engaged in one-off transactions to affect the future business prospects of a party who defaults on contractual commitments. In a business segment where reputation is important, new entrants may make investments that gen-

63 See Durlauf & Fafchamps, supra note 11, at 1648–49. The development of personalized trust in developing countries through the use of relational contracting and reputation mechanism has been studied by, among others, Landa and Fafchamps. See Marcel Fafchamps, The Enforcement of Commercial Contracts in Ghana, 24 WORLD DEV. 427 (1996); Landa, supra note 53.

64 See Axelrod, supra note 53, at 124, 126–32 (arguing that “enlarging the shadow of the future” is among the strongest incentives to promote cooperation and self-enforcement of commitments). Dixit notes in his review of the literature that as the probability of meeting in the future rises so do the costs of defection. See Avinash K. Dixit, Lawlessness and Economics: Alternative Modes of Governance 67–76 (2004). Bernstein and Landa both describe how social networks are the locus of the development of personalized trust and enlarge the shadow of the future and undergird economic activity. See Bernstein, supra note 53, at 119–24; Landa, supra note 53, at 350.

65 See Axelrod, supra note 53, at 124, 126–32.

66 See id.


69 See Bernstein, supra note 53, at 119–24.

erate positive reputations in order to stimulate business opportunities.\textsuperscript{71}

The key lesson of the work examining social networks is that strong formal legal rights and institutions may not be a prerequisite for sustained economic growth. If that is the case, then new rule of law efforts motivated by the perceived need to provide nascent market economies with formal protection of property rights and contract enforcement may be misplaced. At the very least, to the extent more subtle and complex understandings of the rule of law and its relationship to economic growth are lost in the translation to technical assistance projects and activities, the new rule of law movement risks suffering the irrelevance of the law and development movement. This is particularly true as the object of attention—social networks and informal institutions—are almost by definition impossible to quantify in a way that motivates the funding agencies at the center of the new rule of law. The experience of Vietnam with reform of its economy and legal system provide an important point of reference for the new rule of law movement with respect to how market participants rely on social networks and relational contracting in the absence of strong formal legal institutions. Indeed, following nearly a quarter century of legal reform, the present provides an opportune moment to take stock of the new rule of law developments in Vietnam.

II. VIETNAM IN TRANSITION

Vietnam began its transition from central planning to a market economy in the mid-1980s.\textsuperscript{72} The \textit{Doi Moi}, or Renovation, era has been characterized by increasing liberalization of the economic arena.\textsuperscript{73} By 1989, for example, Vietnam had substantially freed up agricultural production by almost completely privatizing the agricultural sector.\textsuperscript{74} This was followed by across the board price liberalizations, devaluation

\textsuperscript{71} See Bernstein, \textit{supra} note 53, at 140–42 (describing how ethnic and cultural ties dominate reputation markets in New York’s diamond industry); Landa, \textit{supra} note 53, at 355–57 (describing how family and ethnic ties can facilitate the transmission of information about reputation).


\textsuperscript{73} See \textit{id.} at 51 (discussing the beginnings of the \textit{Doi Moi} era).

of the exchange rate, and a reduction in subsidies to state enterprises.\textsuperscript{75} As a result of successful implementation of the reform program, Vietnam enjoyed a period of rapid growth averaging between eight to nine percent per year over the past two decades.\textsuperscript{76}

Agriculture has been one of the most important beneficiaries of Vietnam’s economic reform program and is an important part of the country’s economic life.\textsuperscript{77} The economic liberalization of the late 1980s helped spur a massive expansion in rice output, allowing Vietnam to move from a net rice importer in 1988 to the world’s third largest rice exporter in 1989.\textsuperscript{78} During the 1990s with the growth in the production of coffee, Vietnam became the second largest coffee exporter in the world, behind only Brazil.\textsuperscript{79} Notwithstanding the success of its agricultural sector, just over twenty percent of the country’s gross domestic product is generated by the agricultural sector.\textsuperscript{80} Overall, Vietnam remains a mostly poor, rural country with more than seventy-three percent of its population residing in rural areas.\textsuperscript{81}

Formal institutions and legal structures designed for a centrally planned economy are generally inappropriate for a post-transition economy where markets, and not the central plan, dictate allocation of capital and investment decisions. Indeed, in the context of central planning, formal legal institutions were not appropriate avenues for commercial or economic disputes. Under that rubric, when actual production of goods or services deviated from the plan, parties had their disagreements resolved by higher authorities or the planning ministry rather than courts or the formal legal system.\textsuperscript{82} Instead, the primary function of the formal legal system in centrally planned regimes was to manage criminal law issues on behalf of the state, not to protect private


\textsuperscript{76} See David O. Dapice, \textit{Overview of Vietnam’s Economy After the Crisis} 1 (June 2000) (working paper, on file with the Kennedy School of Government); \textit{see also National Accounts and State Budget, 2008 Stat. Y.B. Vietname} (Gen. Stat. Office of Vietnam) 71 (listing the growth rates of the GDP).

\textsuperscript{77} See Dao Xuan Sam, \textit{supra} note 72, at 25–26.

\textsuperscript{78} See Leipziger, \textit{supra} note 75, at 6.


\textsuperscript{80} \textit{National Accounts and State Budget, supra} note 76, at 72.


\textsuperscript{82} See McMillan & Woodruff, \textit{Dispute Prevention, supra} note 21, at 640–41; McMillan & Woodruff, \textit{Private Order, supra} note 21, at 2443.
property rights or assure the performance of private parties in contract.\textsuperscript{83}

Consequently, when Vietnam undertook a transition to a market economy in 1986, its formal legal institutions were wholly discordant with the requirements of the market.\textsuperscript{84} The backwardness of its formal structures can account for the frenetic pace at which the country’s legislature has passed a host of legislation over the past two decades. In fact, since the reform effort began in 1986, the National Assembly of Vietnam has passed 216 laws and codes (*luat* and *bo luat*).\textsuperscript{85} This is a vast increase in legislative productivity compared to the twenty-seven laws and codes passed by the National Assembly during the entire thirty-three year period from 1953 to 1986.\textsuperscript{86}

Much of this legislation passed by the National Assembly has aimed at modernizing the country’s regulation of its economic sphere in support of Vietnam’s effort to build a legal state (“xây dựng nhà nước pháp quyền”).\textsuperscript{87} For example, the first important piece of legislation following the beginning of the reform agenda was the 1987 Foreign Direct Investment Law.\textsuperscript{88} This law created a legal framework to provide foreign investors some degree of legal certainty and transparency in an effort to stimulate direct investment in Vietnam. By 1990, the company and private enterprise laws permitted domestic investors to incorporate private enterprises subject to certain constraints.\textsuperscript{89} A series of laws focused on reorganizing the structure of the state and the judiciary followed in 1992.\textsuperscript{90} Five of the eight laws passed by the National Assembly that year dealt with the structure and function of formal legal institutions, including the People’s Courts, the State Procuracy, the Govern-

\textsuperscript{83} See McMillan & Woodruff, *Private Order*, supra note 21, at 2421.
\textsuperscript{84} See Pham Chi Lan, *Development for the Legal Environment in Vietnam- Memorable Paths*, supra note 72, at 181–83.
\textsuperscript{86} See id. Between 2002 and 2006, the legislature was particularly active, passing more than 100 of the 216 laws and codes passed since 1953. Id.
\textsuperscript{87} See Truong Hoa Binh, *Reforming the Courts, VIETNAM L. & LEGAL F.*, May 2009, at 4 (discussing the important role of the courts in creating a legal state).
\textsuperscript{90} See Truong Hoa Binh, *supra* note 87, at 4.
ment, the National Assembly and elections. Land and property rights were the subject of legislative attention in 1993 and 1994. Further, the National Assembly adopted the Civil Code in 1995 to address contract and economic relations among private parties. In sum, the focus of most of this legislative activity was to adapt existing regulatory structures to the changes in the real economy in an effort to build a “legal state” in Vietnam.

Although Vietnam’s initial steps towards reforming its formal legal structures were internally generated, international donors have also sponsored a series of rule of law initiatives in the country. The United States, for example, has actively supported rule of law activities in Vietnam. Implementation of the bilateral trade agreement between the United States and Vietnam has required and spurred an increase in legislative activity in Vietnam. In furtherance of these efforts, the United States Agency for International Development (“USAID”) has sponsored a series of initiatives to “improve the rule of law in Vietnam, [92]


as mandated by the WTO and other international commitments.\textsuperscript{97} USAID has undertaken efforts with respect to legislative drafting and legal education among others.\textsuperscript{98} Likewise, the American Bar Association also sponsors a rule of law initiative in Vietnam that provides support to local bar associations, law schools and government departments in the form of legal education programs.\textsuperscript{99}

Even so, the United States is not alone in supporting rule of law activities in Vietnam. International donors have sponsored various rule of law projects in Vietnam since the beginning of economic reform.\textsuperscript{100} These projects ranged from training and capacity building in the judiciary, to support for enforcement of Vietnam’s new anti-corruption legislation, to increasing public education with respect to legal rights and legislative drafting exercises among many others.\textsuperscript{101}

Notwithstanding all of these domestic and international efforts that have gone into building a series of formal legal institutions since 1986, confidence in these institutions remains low. The question remains whether, after more than two decades of reform, rule of law projects will succeed in the creation of strong formal legal institutions and the perception of an effective legal state.\textsuperscript{102}

A. Vietnam’s Formal Legal System

Vietnam’s courts form the backbone of its formal legal structure.\textsuperscript{103} There are three levels of courts in the system. Presently, there


\textsuperscript{98} See USAID & STAR-Vietnam, supra note 97.


\textsuperscript{101} See United Nations Dev. Programme, supra note 95.

\textsuperscript{102} See infra Part III.C.

are 678 district and village level courts, the lowest level trial court.\(^{104}\) There are sixty-three provincial level courts, the next highest level.\(^{105}\) These provincial courts have both trial and appellate jurisdictions.\(^{106}\) Litigants and criminal defendants are limited to only one appeal at the level higher than the one that heard the case at trial.\(^{107}\) So, for example, parties to cases heard at the district and village level may appeal only once, exclusively, to the provincial courts.\(^{108}\) Finally, there are three courts at the highest level, the Supreme People’s Court, which sits in Hanoi with offices in both Ho Chi Minh City and Danang.\(^{109}\) The Supreme People’s Court is made up of 116 judges who sit in panels to hear appeals from the provincial courts and in rare circumstances also act as a trial court.\(^{110}\)

The courts in Vietnam are faced with numerous challenges, some technical in nature, others structural. The most important structural challenge relates to the lack of independence in the court system. Although by statute, courts in Vietnam are independent, they are not so in fact.\(^{111}\) Independence is lacking in at least three important ways.

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\(^{105}\) See Truong Hoa Binh, supra note 87, at 5.


\(^{108}\) See id.


\(^{110}\) See Truong Hoa Binh, supra note 87, at 5–6.

\(^{111}\) See LUẬT TỔ CHỨC TOÀ ÁN NHÂN DÂN [Law on the Organization of the People’s Court] Sổ [No.]: 33/2002/QH10, Dieu [Clause] 11 (requiring that courts adjudicate cases without outside interference). While many recognize the lack of court independence, there remains hope:

In reality, in many cases, the judges and citizen jurors are negatively influenced by lawyers, organizations, individuals, and government organizations in violation of the procedural rules, with large implications to the operations of the court in favor of themselves. For that reason, judges must be aware that they are responsible for the content and public nature of the court process. Because of that judges must be courageous and must stand against these outside influences . . . and should not permit any individual or government agency to interfere in the work of court for any reason.

First, the court system derives its authority from the legislative body directly above it and is not an independent constitutional body. Accordingly, the Supreme People’s Court does not hear constitutional cases nor is it in a position to constrain the behavior of either the executive or the National Assembly. Indeed, in some recent cases the National Assembly has attempted to exert its authority over the courts to order the Supreme Court to rehear a case that Assembly members perceived to be “incorrectly” decided. Similarly, the sixty-three courts at the provincial level submit to the authority of each off the provincial

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112 Hiến pháp Cộng hòa xã hội chủ nghĩa Việt Nam [Const. of the Socialist Republic of Vietnam] art. 83 (indicating that the courts are subject to the oversight and control of the National Assembly).

113 See Quinn, supra note 16, at 437.

114 See, e.g., Lê Kiên, Tìm cơ chế sửa sai [Searching for Mechanisms to Fix a Verdict “Can’t Be Wrong”], Pháp luật, Aug. 13, 2009, at 3 (describing how the National Assembly has inserted itself in the legal process); Mai Minh, Bây giờ đỏ môi một vụ án [Seven Years Chasing One Case], Pháp luật, Aug. 14, 2009, at 5 (recounting the underlying facts of a contract dispute); Nghĩa Nhân, Án dừng tiến cùng the xả lại [A Case Stood in Its Tracks Can Still be Reheard], Pháp luật, Aug. 17, 2009, at 3 (detailing an interview with the Chairman of National Assembly Judiciary Committee regarding the potential review of a contract case). A recent contract case between two domestic parties provides an example of how the National Assembly at times exerts its influence over the courts in cases of particular interest. See Mai Minh, supra. In 2002, Chau Tuan, a private company entered into a contract to sell one metric ton of unrefined sugar with a sugar content of forty-eight percent to another company, Tien Son. Id. Chau Tuan sourced the required sugar from a middleman two steps removed from the manufacturer and took delivery without testing the actual sugar content and made delivery to Tien Son six months after signing the contract. Id. Tien Son accepted the delivery without testing the actual sugar content and in turn sold the unrefined sugar on to another middleman. Id. The unrefined sugar was resold a number of times until it was ultimately sold to a Chinese buyer. Id. Prior to taking delivery at the border, the Chinese buyer tested the actual sugar content and found it to be less than forty-four percent sugar. Id. The Chinese buyer refused delivery. Id. This set off a cascade of lawsuits as middlemen began suing for damages associated with the deficient product with damages being passed down the line of contract succession. Id. Ultimately, Tien Son sued Chau Tuan seeking 800 million Vietnamese Dong (approximately 54,000 U.S. dollars) in damages. Id. In 2004, the provincial court of Ha Tinh heard the case and awarded Tien Son the damages sought. Id. Chau Tuan appealed the award to the Supreme People’s Court (the next highest level) and sent letters to various government agencies and party bodies seeking assistance. Id. In 2006, the Supreme People’s Court denied Chau Tuan’s final appeal and the original damages award was left in place. Id. The award, however, was not enforced against Chau Tuan. Nghĩa Nhân, supra. Recently, the Law and Justice Committee of the National Assembly undertook an investigation of the case and found numerous mistakes of process and substantive law with respect to both the trial and appeal. Id. The National Assembly committee used its report into the deficiencies associated with this case to urge the Court to find a way to reconsider its decision in this particular case. Id. This has led the Chief Justice to suggest that the Supreme People’s Court change its procedures in order to permit it to rehear special cases at the request of the National Assembly following their final disposition. Id.
assemblies. At the district and village level, local governments have ultimate authority over the operations of the courts. This bureaucratic dependence on the executive decreases the ability of the courts to remain independent in high profile cases that may involve the interests of local governmental authorities.

Second, the enforcement of final judgments has been a continuing problem in the formal legal system. An essential element of a system of strong legal rights is the ability, once having had a dispute adjudicated, to have the judgment enforced in a timely and efficient manner. Although formal legal institutions exist to enforce judgments in Vietnam, they are unable to function appropriately. The structure of the enforcement regime makes it difficult for parties with judgments against state agencies to seek enforcement. Private parties even run into difficulties seeking enforcement of simple judgments against other private parties. This enforcement dilemma is a major stumbling block to the strengthening of formal legal rights in Vietnam.

115 See Truong Hao Binh, supra note 87, at 5.
116 See Truong Trong Nghia, The Rule of Law in Vietnam: Theory and Practice, in The Rule of Law in Asia: Perspectives from the Pacific Rim 123, 131 (2000), available at http://www.mansfieldfdn.org/programs/rol/rol_perspectives.htm (“The socialist Rule of Law state does not separate its power but unites it in the legislative branch . . . which has the authority to make laws, but delegates the administrative authority to the government and judicial authority to the court.”).
118 See McMillan & Woodruff, Dispute Prevention, supra note 23, at 653.
119 See, e.g., Van Đoan, Hôn Đơn Năm Không Thi Hành án [Seven Years of Not Enforcing an Order], PHÁP LUẬT, Aug.15, 2009, at 10 (describing a recent case that provides an example of the difficulties private parties have in enforcing simple judgments against other private parties). In March 2006, a district level court in Long An province awarded the plaintiff in a dispute over a land sale, title to the land, which he had bought but which was then subsequently occupied by the defendant. See id. As part of the judgment, the court ordered the defendant to vacate the land and to dissemble any structures he had illegally built upon the land. See id. The plaintiff immediately sought to have the judgment enforced. See id. Nevertheless, three years later, the local judgment enforcement had not enforced the judgment, citing the necessity of the defendant to voluntarily give up his right to the land. See id.
120 See Law on Enforcement of Civil Judgments, supra note 117, at 19 (describing the weaknesses of the current Vietnamese Ordinance on Enforcement of Civil Judgments which led to confusion and ineffective coordination among civil judgment management agencies and the necessity for legal reform).
Third, although the courts are required to hear and decide cases without outside influence, this ideal is not always met in practice.\textsuperscript{121} Notwithstanding the requirements of the law as written, courts are subject to the control of the Communist Party through the \textit{tham van} or \textit{thinh thi an} (pre-trial conference) “system.”\textsuperscript{122} Through the \textit{tham van} system judges, prosecutors, and the party apparatus meet to discuss the important aspects of cases of particular importance to the Communist Party prior to the public court hearing.\textsuperscript{123} At these meetings, which are closed to representatives of the defendant (in criminal matters), judges are susceptible to pressure to ensure the outcome of proceedings.\textsuperscript{124}

\section*{B. Perceptions of Effectiveness of Formal Legal System}

The lack of structural independence in the judiciary helps create a perception locally that the formal legal system is corrupt and unreliable or at least in certain cases that the actual facts and law will not be determinative of the final outcomes.\textsuperscript{125} In reality, the current local per-

\begin{footnotesize}
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  \item [\textsuperscript{122}] See id. The Vietnamese version is a formalized version of what happens in Chinese courts or previously in the former Soviet Union, where it is known as “telephone justice.” See Kathryn Hendley, “Telephone Law” and the “Rule of Law”: The Russian Case, HAGUE J. ON RULE L. 241, 242 (2009) (describing the Soviet system of “telephone law” in which outcomes of cases allegedly come from orders issued over the phone by those with political power rather than through the application of law). Dang Van Luan, in a 2006 interview, noted that judges are not required to comply with the results of the \textit{thinh thi an} or the \textit{tham van} process. See Phương Thảo, \textit{Ngành Tòa án Trước hết Phải Tụt in [The Court System Above Needs Self-Confidence]}, VIỆT BÁO, Dec. 4, 2006, available at http://vietbao.vn/Xa-hoi/Nganh-Toa-an-truoc-het-phai-tu-tin/30156009/126/.
  \item [\textsuperscript{123}] See Quinn, \textit{supra} note 121, at 11.
  \item [\textsuperscript{124}] See id. The system is potentially subject to abuse. See id. Tan Ngoc Suong, a well-known figure in Vietnam’s Mekong Delta was recently prosecuted in a very controversial case. See \textit{Ulterior Motives Hinted at in Verdict Against Labor Hero}, THANH NIÊN, Nov. 27, 2009, available at http://www.lookatvietnam.com/2009/11/ulterior-motives-hinted-at-in-verdict-against-labor-hero.html. Tan Ngoc Suong, the director of a model cooperative farm, was convicted by a local court of illegally establishing and maintaining a slush fund at the Song Hu farm and sentenced to prison time. See id. On appeal, the verdict was upheld. See id. In response to what Vietnamese observers viewed as an injustice, members of the central government called on the National Assembly to review the case. See id. Local rumors held that parochial land interests motivated this prosecution. See Pha Lê, \textit{Vụ án bà Sương Cần Được Xem Xét ở Cấp Cao Hơn [The Case Should be Considered at a Higher Level]}, PHÁP LUẬT, Nov. 25, 2009, available at http://www.vnexpress.net/GL/Phap-luat/2009/11/3BA16064/ (noting the rumors); \textit{Ulterior Motives Hinted at in Verdict Against Labor Hero}, \textit{supra}.
  \item [\textsuperscript{125}] See Pha Lê, \textit{supra} note 124; \textit{Ulterior Motives Hinted at in Verdict Against Labor Hero, supra}.
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ceptions of the formal legal system in Vietnam are poor and the perceived strength of legal rights so weak that one might expect economic growth to have suffered as a consequence if in fact strong legal rights and formal institutions were a prerequisite to economic growth.\textsuperscript{126}

The work of McMillan and Woodruff helps to explain the seeming paradox of Vietnam’s economic growth.\textsuperscript{127} In a series of papers, they reported the results of surveys of private manufacturing firms conducted in Vietnam’s two major urban centers, Ho Chi Minh City and Hanoi, from 1995 to 1997.\textsuperscript{128} In general, these papers revealed an economy dominated by relational contracting and a lack of trust for the formal legal system.\textsuperscript{129} The picture painted by McMillan and Woodruff’s survey results illustrated widespread reliance on informal contracting to accommodate the perceived weakness of the formal legal structures.\textsuperscript{130} Indeed, few market participants expressed a belief that they could contract in the shadow of the law.\textsuperscript{131} Less than ten percent of respondents thought that the courts or any other governmental agency could assist them in contract enforcement.\textsuperscript{132} In addition, McMillan and Woodruff found that Vietnamese firms compensated for the inadequacy of formal legal structures and weak legal rights through a combination of relational contracting and other informal institutions.\textsuperscript{133} Self-enforcement incentives in the form of reputation and intensive screening of potential business partners were the most common informal institutions that parties reported relying upon.\textsuperscript{134}

Since McMillan and Woodruff’s study, others have investigated the perceived strength of formal legal institutions in Vietnam and have also

\begin{footnotes}
\item[126] See Quinn, supra note 121, at 12–13.
\item[127] See McMillan & Woodruff, Dispute Prevention, supra note 21, at 637; McMillan & Woodruff, Private Order, supra note 21, at 2421–22, 2430–32.
\item[128] See McMillan & Woodruff, Dispute Prevention, supra note 21 at 637; McMillan & Woodruff, Private Order, supra note 21, at 2421.
\item[129] See McMillan & Woodruff, Dispute Prevention, supra note 21, at 637–38, 644; McMillan & Woodruff, Private Order, supra note 21, at 2421, 2430–32.
\item[130] See McMillan & Woodruff, Dispute Prevention, supra note 21, at 640–42; McMillan & Woodruff, Private Order, supra note 21, at 2431–34.
\item[131] See McMillan & Woodruff, Dispute Prevention, supra note 21, at 640; McMillan & Woodruff, Private Order, supra note 21, at 2431.
\item[132] See McMillan & Woodruff, Dispute Prevention, supra note 21, at 641; McMillan & Woodruff, Private Order, supra note 21, at 2431. In the words of one respondent: “[courts] normally just create more problems . . . [I]n Vietnam no one believes we have a good legal system.” McMillan & Woodruff, Dispute Prevention Without Courts, supra note 21, at 640.
\item[133] See McMillan & Woodruff, Dispute Prevention, supra note 21, at 638.
\item[134] See id. at 644. Parties sometimes structure transactions with incentives for self-enforcement through the use of intermediaries (delivery/payment agents) and buying groups. See id. at 647.
\end{footnotes}
found them wanting. According to a survey conducted by the United Nations Development Programme (UNDP) in 2004, only 20% of respondents in rural areas stated that judgments of the courts are “just and fair.” Instead, there is a clear perception that the formal legal system is corrupt and unreliable. For instance, 74% of respondents indicated that the honesty of judges was important to the outcome a formal legal proceeding, while only 65% thought having the law and facts on one’s side was important. Furthermore, according to the World Bank, a simple contractual dispute requires an average of 295 days to each resolution in the courts. The cost of resolving such a dispute is often equivalent to 31% of the contract’s value, thus making resort to courts ineffective as a business matter. Even if one were to get resolution through the courts, the enforcement process is likely to denude the contract of any remaining value.

The lack of confidence in the formal system is shared by firms. A 2009 survey of business in Vinh Long Province conducted as a part of the Vietnam Chamber of Commerce and Industry’s (VCCI) competitiveness study, found confidence in the formal institutions to be relatively low. For example, only 11.5% of respondents felt that local authorities were usually or always predictable in their implementation of central laws. Thirty-six percent reported that government officials used compliance with local regulations to extract rents. The perception of widespread corruption in the formal system likely has an effect on the firms’ perception of the formal legal system. For example, only 27.86% of respondents from Vinh Long felt that the formal legal system always or usually provided a mechanism for firms to appeal the

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137 See id.
138 See id. at 13.
140 See id.; Van Đoàn, supra note 119, at 10.
142 See id.
144 See id.
corrupt behavior of officials. 145 Only 61% of respondents were confident that the legal system would uphold property or contract rights. 146 Not surprisingly, merely one-third of Vinh Long respondents reported using the courts or other formal legal institutions to resolve disputes. 147 A 2005 survey by the Vietnamese Communist Party on perceptions of corruption found it to be rife, especially in the courts. 148 Fifty percent of respondents who dealt with the courts reported having to make payments to court officials in connection with having their cases heard. 149

The reality of corruption in the court system reinforces these perceptions. 150 The case of Mr. Pham Cong Bang, former chief judge of Phu Ninh district in Quang Nam province, is a representative example. 151 Judge Bang was accused of accepting six million Vietnamese Dong from a litigant at his home. In exchange for the cash payment, Mr. Bang was asked to help force the settlement of an economic dispute in favor of one of the parties. 152 Although crooked judges like Mr. Bang can be apprehended, such progress is undercut by the fact that success in prosecuting corruption cases is not high. 153 A report from Dong Nai Province noted that nine of the thirteen corruption cases handled by the courts in that province in 2009 ended in the Vietnamese equivalent of a hung jury (huong an treo). 154

Given the level of activity directed at reforming them and the challenges formal legal institutions in Vietnam continue to face, this Article revisits the role played by informal actors and informal institutions. This Article extends the work of McMillan and Woodruff of more than a decade ago by investigating contracting relationships of fruit farmers

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145 See id.
146 See id.
147 See id.
149 See id.
151 See id.
152 See id.
153 See id.
154 C.T., Dong Nai: Da So Bi Cao Pham toi Tham nhung Duoc Huong an Treo [Dong Nai Province: Majority of Those Accused of Corruption Get Mistrials], CÔNG AN NHÂN DÂN [People’s Police], Dec. 17, 2009.
in the Mekong Delta. In particular, it seeks to understand the role of informal legal institutions in backing trading relationships and preventing or resolving disputes. In general, the results of our study confirm that economic actors rely little on formal legal institutions. In the absence of strong legal rights these actors are nonetheless able to find private ordering solutions to assure reasonable levels of contract performance. The results of our study reinforce the point made by Milhaupt and Pistor among others that legal reform is a very long road measured in decades and not a simple technical fix.

III. Mekong Delta Fruit Markets

The structure of the market for pomelos in the Mekong Delta is characterized by a high degree of competition. The few thousand pomelo farmers in the region sell what are essentially undifferentiated commodities to hundreds of buyers. There are some 300 or so specialist middlemen who float the canals and riverways of the Delta buying fruit from farmers. Middlemen transport the fruit by boat to local floating markets elsewhere in the Mekong Delta—Cai Rang and Phong Dien being the best known of these markets—or to larger wholesale markets in Ho Chi Minh City, approximately 135 kilometers to the north. Ninety-five percent of pomelos are consumed domestically. Fruit that is not consumed domestically is sold to local fruit processors for canning and export. Middlemen play a critical role in connecting isolated Delta farmers to each of the local, regional and international markets.


156 See Quinn & Vu, supra note 2.

157 See generally Milhaupt & Pistor, supra note 4 (discussed supra Part I).


159 See Deutsche Gesellschaft für Technische Zusammenarbeit, supra note 158, at 9.

160 See id. at 18; Quinn & Vu, supra note 2.

161 See Quinn & Vu, supra note 2.

162 See Deutsche Gesellschaft für Technische Zusammenarbeit, supra note 158, at 7.

163 See Quinn & Vu, supra note 2.

164 See id.
We conducted surveys in 2005 and 2006 of 180 pomelo farmers and forty-seven middlemen in three districts at the center of fruit production in Vietnam: Binh Minh and Tra On (in Vinh Long Province) and Chau Thanh (in Hau Giang Province).\textsuperscript{165} Located just north of Can Tho, Vietnam’s fourth largest city, Binh Minh and Tra On districts have relied for many years on fruit production for much of their income.\textsuperscript{166} In 2005, more than half (54.8\%) of Vinh Long’s provincial income came from agriculture and fisheries, including approximately 14\% from the production of varieties of fruit, including lychees, longans, rambutans, mangoes and pomelos.\textsuperscript{167} That same year, an area of about 35,000 hectares in Vinh Long was reserved for growing a variety of fruit, 5300 hectares of which was dedicated to pomelo cultivation.\textsuperscript{168} Though the Mekong Delta has long been a producer of fruit, the large-scale cultivation of fruit, including pomelos, is a relatively recent phenomenon, only developing significantly since the 1990s.\textsuperscript{169} Our surveys provide information about typical pomelo farmers and their market transactions.\textsuperscript{170} In particular, these surveys shed light on how, in the absence of strong legal rights, farmers and middlemen structure their transactions.\textsuperscript{171}

A. Typical Farmer

By almost any definition, farmers’ investments in the cultivation of fruit trees are a long-term investment.\textsuperscript{172} Fruit trees take time to grow and then give fruit (approximately three years to bear fruit).\textsuperscript{173} Investing in fruit is also mutually exclusive with other uses for a farmer’s garden—uses that might be more short term in nature (for example, rice production).\textsuperscript{174} Consequently, farmers investing in fruit production must be reasonably assured that there is a stable market for their fruit

\textsuperscript{165} See id.
\textsuperscript{166} See id.
\textsuperscript{168} Agriculture, Forestry and Fishery, supra note 167, at 94.
\textsuperscript{170} See Quinn & Vu, supra note 2.
\textsuperscript{171} See id.
\textsuperscript{172} See id.
\textsuperscript{173} See Deutsche Gesellschaft für Technische Zusammenarbeit, supra note 158, at 5.
\textsuperscript{174} See Quinn & Vu, supra note 2.
before making such an investment. Even so growth in the production of pomelos in recent years has been rapid. In recent years, the amount of land in Vinh Long province dedicated to the cultivation of fruit trees, particularly pomelos, grew by 24.75% per year.

The Mekong Delta is the agricultural center of Vietnam. Though rice is a staple commodity, fruit production is the primary source of income for many of the Delta’s farmers. Farmers grow a wide variety of fruit, including pomelos, mangos, lychees, rambutans, among many others. For the most part, farmers who grow fruit do so for commercial purposes, selling 91% of their annual harvest for cash. A few thousand such farmers in the Mekong Delta grow pomelos. Two varieties of pomelos—Nam Roi and Da Xanh—account for almost 95% of all cultivation of pomelos.

Pomelo farmers in the survey group grow pomelos on plots averaging 6900 square miles, less than one hectare, in size. Pomelo trees are long-lasting, living between ten and twenty years and giving fruit after just three. Unlike other crops, like rice, pomelo trees require lower intensity to cultivate and are hardy. Farmers report average annual revenues from pomelo sales in the range of 30 million Vietnamese Dong, or approximately $1875, per year. When compared to the cultivation of rice, pomelo cultivation is a profitable endeavor for farmers.

See id.
See Deutsche Gesellschaft für Technische Zusammenarbeit, supra note 158, at 6.
See id.
See Quinn & Vu, supra note 2.
See Quinn & Vu, supra note 2.
See Int’l Food Policy Research Inst., supra note 169, tbl.2–16. This survey was carried out on 1505 fruit and vegetable producers between October and November 2000 by the Ministry of Agriculture and Rural Development (MARD) and the International Research Institute for Fruit and Vegetables (IRIFV). Id. at 1–7.
See Quinn & Vu, supra note 2.
See id.
See id.
See Deutsche Gesellschaft für Technische Zusammenarbeit, supra note 158, at 5.
See Quinn & Vu, supra note 2.
See id. Calculations in this Article were made assuming an exchange rate of 16,000 Vietnamese Dong to one U.S. dollar (the approximate exchange rate at the time of the authors’ study).
See Investment, 2008 Stat. Y.B. Vietnam, supra note 76, at 95; National Accounts and State Budget, supra note 76, at 63, 64, 73. Revenues from fruit sales compare favorably with annual family income from farming for a family of five in Vinh Long, which is approximately $791 per year. See Investment, 2008 Stat. Y.B. Vietnam, supra note 76, at 95; National Accounts and State Budget, supra note 76, at 63, 64, 73.
The typical farmer in the Mekong Delta is isolated. The Delta is comprised of a network of interlaced canals and riverways that make road travel between villages difficult, if not impossible, in some areas. In 2000, for example, only slightly more than 61.7% of communes in Vihn Long province had paved roads that could support automobile transportation to the village center. Even fewer had roads that could support automobile traffic to households outside the commune center. Moreover, with less than 100,000 phone lines (86,452 land and 9930 cell) for a population of over 1,000,000 (as of 2006), few farmers have direct access to much by way of market information. Most must rely on middlemen for such information. Farmers with boats, however, have the ability to sell at least a portion of their fruit on the local markets, floating markets in the Delta, or to the wholesale markets in Ho Chi Minh City. Yet, the large majority, 85%, report that they sell their fruit to the market exclusively through middlemen.

B. Typical Middleman

Middlemen are crucial players in the commerce for fruit. There are approximately 300 middlemen who travel throughout the Mekong Delta buying pomelos from farmers and transporting them to floating and regional markets in the Mekong Delta, markets in Ho Chi Minh City, or to fruit processing factories for the export market. The survey conducted by the authors in 2006 included forty-seven middlemen in Binh Minh, Tra On, and Chau Thanh districts who specialize in buying and selling pomelos. This survey provides information about the typi-
cal middleman operating in the Mekong Delta and his market transactions. 198

On average, these middlemen have been in the pomelo business for almost eleven years. 199 Middlemen tend to specialize, with 97.8% of respondents report buying and selling only a single variety of pomelo. 200 Many are also pomelo farmers themselves. 201 As a result, they are very attuned to the market and fruit quality. 202 More than 95% of middlemen claim that they have a better sense of the quality of the fruit they are buying than the farmers selling it. 203 In addition, middlemen are unanimous in their opinion that they have better market and price information than farmers. 204

Though barriers to entry and exit from the middleman business are relatively low, they are not insignificant. There are no special licensing requirements for middlemen nor are there any formal trade associations or informal ethnic associations that might limit participation in the market. 205 There are, however, three real barriers to entry. First, middlemen face the expense of a boat. The average sized boat is forty-three tons and can cost between $3000 and $5000. 206 Fifty-five percent of surveyed middlemen report owning their own boat, a substantial long-term capital investment, the type which parties might be hesitant to make if the risk of opportunism was high enough. 207

A second barrier to entry is access to credit. Middlemen are highly credit constrained. They require capital to finance their transactions during the two week period they spend traveling through the Delta making purchases from farmers. Such capital requirements can be substantial. The average middleman, for instance, collects fourteen tons of fruit per month. 208 Assuming an average price of approximately 3000 Vietnamese Dong per kilogram, the middleman must be able to fi-

198 See Quinn & Vu, supra note 2.
199 See id.
200 See id.
201 See id.
202 See id. According to middlemen, the thick appearance of the skin and the heavy weight of the fruit are the most important indicators of quality. See id.
203 See Quinn & Vu, supra note 2.
204 See id.
205 See id. That is not to say that ethnic trading specializations never existed in Vietnam. Prior to 1979, for example, trade in rice was commonly understood to be monopolized by ethnic Chinese middlemen in Vietnam’s south. See E.S. Ungar, The Struggle Over the Chinese Community in Vietnam, 1946–1986, 60 PAC. AFF. 596, 604–06 (1987–88).
206 See Quinn & Vu, supra note 2.
207 See id.
208 See id.
finance forty-two million Vietnamese Dong, approximately $2,600, for up to a month while he collects and then markets his fruit.209 Because most middlemen do business as sole proprietors or without any business registration at all, they lack the ability to fund their own capital requirements through formal credit lines at banks. Middlemen often sell their pomelos to wholesalers in the Ho Chi Minh City market on a consignment basis placing further pressure on the capital requirement. Interviews with wholesalers in Tam Binh, the main pomelo wholesale market in Thu Duc District in Ho Chi Minh City, reveal that the majority of wholesalers receive credit from middlemen, sometimes even up to 100%.210

A third barrier to entry is access to a trading network in regional and wholesale markets in Ho Chi Minh City. Interviews by the authors with middlemen in the three biggest floating markets in the Mekong Delta, namely Cai Rang, Phong Dien, and Phung Hiep, reveal that some middlemen find it difficult to sell their pomelos in the largest markets in Ho Chi Minh City because they lack reliable partners there.211 Generally, the longer a middleman has been in the business, the more likely he is to develop useful social networks and relationships with wholesalers in the Tam Binh market in Ho Chi Minh City.

C. Typical Transaction

Farmers normally do not harvest fruit until they have found a buyer.212 Pomelos can be left on the tree for some time without fear of the fruit going bad.213 This allows farmers to wait on the market and, within limits, entertain offers from a number of potential buyers. Farmers can harvest all or just a portion of their crop at any given point once they are ripe. In addition, pomelos also have a relatively long “shelf life” once they have been harvested; their thick skins permit the fruit to hold moisture for a relatively long period, thereby extending

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209 See id.
210 See id. Given the constraints faced by middlemen the provision of credit by farmers to middlemen is critical to the proper functioning of the fruit market. See McMillan & Woodruff, supra note 155, at 1287.
211 See Quinn & Vu, supra note 2.
212 See generally Int’l Food Policy Research Inst., supra note 169, at 2–1 to –3, 2–5 to –13 (discussing patterns and trends in fruit and vegetable production).
213 See Deutsche Gesellschaft für Technische Zusammenarbeit, supra note 158, at 4. Leaving the fruit on the trees for too long, however, may have a negative effect on productivity for the following season.
the post-harvest period during which farmers might be able to entertain market offers.\footnote{214}{See id. at 4–5. This is a significant difference from other fruits which may tend to spoil quickly. See generally Int’l Food Policy Research Inst., supra note 169, at 3–14 to –19.}

Farmers have at least three ways of selling their crop. First, they can sell it on the retail market.\footnote{215}{See Int’l Food Policy Research Inst., supra note 169, at 3–19 to –20.} When selling to retail consumers, farmers typically price by the piece. Selling fruit directly to the retail market, however, can be an expensive proposition. To do so requires adequate transportation, typically in the form of a large boat, as well as time because a large number of sales may be needed to dispose of a few tons of pomelos on the retail market. Additionally, farmers can sell their fruit to middlemen who ply the waterways of the Mekong Delta.\footnote{216}{See McMillan & Woodruff, Private Order, supra note 21, at 2446–47 (stating that wholesalers intermediate ten percent of all sales in Vietnam).}

Middlemen will then resell the fruit in larger markets. A typical purchase arrangement requires the middleman to buy a farmer’s entire garden, not simply fruit of particular sizes or quality.\footnote{217}{See Quinn & Vu, supra note 2.}

One of the authors observed a middleman buying a garden. In this representative transaction, a middleman made an unsolicited approach to a farmer and offered to buy his fruit.\footnote{218}{See id.}

Then, the middleman and the farmer walked around the garden together while the middleman quickly counted and evaluated the general quality of fruit on the trees. They then estimated the total kilos in the garden and agreed upon a price for the whole garden and the payment terms. Another common method of sale is similar to the second, but the farmer agrees to sell something less than his entire garden to the middleman.\footnote{219}{See Int’l Food Policy Research Inst., supra note 169, at 3–17.}

From the middleman’s perspective, this is less than optimal as it raises the costs associated with filling his boat.

Typically, when middlemen make purchases, they leave a deposit, up to thirty percent, and promise to return in several days, or even weeks, while the farmer harvests the garden.\footnote{220}{See McMillan & Woodruff, Private Order, supra note 21, at 2432 (discussing that deposits mitigate damages for farmers when middlemen renege on contracts); Quinn & Vu, supra note 2.} When the middleman returns to collect the fruit, he will usually complete payment and the farmer and middleman then part ways.
When middlemen are unable to get access to working capital, or when the market price is unknown to the middlemen, farmers will sometimes agree to defer receiving payment until after the middleman sells all of the fruit in the floating markets of the Mekong Delta or the wholesale markets in Ho Chi Minh City. The time period over which credit is granted spans anywhere from three days to three months. During this period the farmer bears the risk that the middleman might not return to complete payment.

Through their studies, McMillan and Woodruff find a correlation between the granting of credit and the degree of lock-in between business partners. They conclude that high switching costs are the motivating factors for the granting of credit. Economic lock-in creates a second period effect in what might otherwise be a one-off transaction. In such a situation, lock-in can constrain opportunistic behavior. Yet, monopoly buying practices in fruit markets appear to be extremely rare and there appears to be little economic “lock-in” of the sort envisioned by McMillan and Woodruff. In fact, more than 60% of middlemen report that the market to buy pomelos from farmers is moderate to very competitive. Farmers report a similar story. More than 60% report being approached by more than four middlemen every year, with 46% percent reporting being approached by more than six middlemen every year. 6.8% of farmers report one or fewer approaches per year.

McMillan and Woodruff’s hypothesis suggests that farmers enjoying fewer approaches from middlemen, indicating greater lock-in, should be more willing to grant credit than farmers with enjoying more competitive environments. Here, however, a correlation between the lack of competition—that is, high switching costs—and willingness of

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221 See infra tbl.1, Middlemen Delayed Payment Terms. The provision of credit by the farmer to the middleman transforms what would otherwise be a spot transaction into a complex transaction. See id.

222 See id.

223 See id.

224 See McMillan & Woodruff, supra note 157, at 1287.

225 See id. at 1307–09.

226 See McMillan & Woodruff, Private Order, supra note 21, at 2426.

227 See id. at 2455–56.

228 Compare McMillan & Woodruff, Private Order, supra note 21, at 2422, with Quinn & Vu, supra note 2.

229 See Quinn & Vu, supra note 2.

230 See id.

231 See id.

232 See McMillan & Woodruff, Private Order, supra note 21, at 2431.
farmers to grant credit is lacking. Instead, farmers appear to be uniformly willing to grant credit to middlemen with little regard to the degree of competition for their fruit. Farmers in more competitive markets (greater than six approaches per year) are just as likely to grant credit as farmers in less competitive markets.233

1. Contracts

The form of contract used in the Mekong Delta is befitting of the setting: informal.234 Only about 10% of farmers report relying on written contracts. 46.1% of farmers rely on oral contracts while 42.2% report no agreement at all with buyers, the functional equivalent to an oral contract.235 Middlemen report a similar experience, with 85% relying on oral contracts.236 The prevalence of oral contracts in this market is intriguing because delayed payment terms create risks that are exacerbated by the lack of written documentation, thus giving rise to the potential for disagreement as memories fade.

The survey data further highlights a relationship between reliance on written versus oral contracts and the amount of competition in the market.237 Farmers who report little to moderate competition for their fruit (zero to two approaches per year) rely exclusively on oral contracts to document their sales to middlemen.238 Farmers who report extremely competitive markets, on the other hand, are more likely to rely on written contracts.239 44.4% of farmers who entertain offers from more than twenty middlemen per year also report relying on written contracts.240 Where there is less economic lock-in and competition is more prevalent, it appears clear that buyers are more likely to attempt to protect their positions and demand written contracts.241 The strength of the legal rights created by these written contracts is less obvious.

2. Dispute Resolution

Disputes between farmers and middlemen are not unexpected. Indeed, 45% of middlemen report knowing of disputes in which a

233 See infra tbl.2, Middlemen Approaches to Farmers.
234 See Quinn & Vu, supra note 2.
235 See id.
236 See id.
237 See id.
238 See id.
239 See Quinn & Vu, supra note 2.
240 See id.
241 See id.
farmer broke an agreement.\textsuperscript{242} Thirty-four percent of middlemen report having had problems with farmers themselves.\textsuperscript{243} Of the middlemen who report having performance problems with farmers, half report that farmers cancelled contracts in order to sell the contracted upon fruit to another buyer for a higher price.\textsuperscript{244} Other problems relate to disputes about price and quality of fruit upon delivery.\textsuperscript{245}

Although cheating by middlemen is not altogether common, it is not distant from the minds of many farmers.\textsuperscript{246} Farmers also report having trouble with middlemen, though in smaller numbers. While only 10\% of farmers report having difficulties with middlemen in the previous five years, nearly a third, approximately 31\%, of farmers in the survey report knowing someone who was cheated by a middleman.\textsuperscript{247} The most common problem reported by farmers is the failure of middlemen to make complete payment for fruit that they take.\textsuperscript{248}

For the most part, farmers manage disputes by simply bearing their losses and moving on. Of those farmers who reported problems with middlemen, 44\% terminated their business relationship without resorting to any third-party for assistance.\textsuperscript{249} The next most common response was to attempt to negotiate a solution with the middleman without third-party assistance.\textsuperscript{250} Of those farmers who went to third-parties, only 22\% of farmers went to either the formal dispute resolution system (for example, courts) or a quasi-formal system (for example, local law enforcement or government officials) for help in resolving a contract dispute.\textsuperscript{251} Given the itinerant nature of middleman and the high costs of tracking down those who default, formal dispute reso-

\textsuperscript{242} See id.  
\textsuperscript{243} See id.  
\textsuperscript{244} See Quinn & Vu, supra note 2.  
\textsuperscript{245} See infra tbl.3, Farmer Problems with Middlemen. Here the problems faced by middlemen might be caused by moral hazard. See Quinn & Vu, supra note 2. Farmers might skim the highest quality fruit to sell on the retail market themselves or help dispose of their neighbor’s lower-than-average quality fruit by adding it to their sale thus leaving middlemen with lower than expected quality fruit for the agreed price. See id.  
\textsuperscript{246} See Takamasa Akiyama, Coffee Market Liberalization Since 1990, in World Bank, Commodity Market Reforms: Lessons of Two Decades 83, 85 & 118 nn.3, 6 (Takamasa Akiyama et al. eds., 2001) (noting the persistence of the cheating middleman stereotype in countries such as Vietnam despite the apparent weakness of empirical evidence of actual cheating of farmers by middlemen).  
\textsuperscript{247} See Quinn & Vu, supra note 2.  
\textsuperscript{248} See infra tbl.4, Farmer Problems with Middlemen.  
\textsuperscript{249} See infra tbl.5, Dispute Resolution Methods (Farmers).  
\textsuperscript{250} See id.  
\textsuperscript{251} See id.
olution would not often be cost effective and moving on might be the only option reasonably available to farmers. In the absence of strong legal rights and an effective dispute resolution system, one would expect farmers to rely on private ordering structures, like relational contracting, to increase the likelihood of contract performance. Vietnam’s pomelo farmers, however, do not. The farmer’s live-and-let-live approach has implications for the way farmers do business and make investments often leading them to make suboptimal investments in fruit cultivation. In theory, weak legal rights and a lack of reliance on private ordering structures could limit upward growth potential. One would suspect that this is not an equilibrium position for market participants. The farmer’s approach, however, does not extend to doing additional business with a middleman with whom the farmer had had a previous dispute. In those situations, more than 95% of farmers refused to transact.

Middlemen, on the other hand, exhibit different tendencies with regard to dispute resolution. Where nearly half of farmers will simply bear a loss and move on, only 16% of middlemen are willing to do so in the event of a default by a farmer. More than 80% will attempt to negotiate an equitable solution or go to third parties to seek a resolution. The difference in the approaches of farmers and middlemen in resolving contract disputes is likely a function of the variation in enforcement costs.

Unlike farmers, middlemen seek performance of their contracts when confronted with disputes from identifiable and stationary counterparties. Because farmers are easily located, middlemen can cheaply

252 See id.
253 See McMillan & Woodruff, Private Order, supra note 21, at 2424–35 (discussing the impact of the “shadow of the future” —here, the potential for middleman default and the low probability of redress—on the economic decisions of actors); see also Quinn & Vu, supra note 2. Because a farmer approaches every transaction with the understanding that she will likely have no recourse in the event of dispute (for example, middleman avoiding payment), the present value of the farmer’s enterprise is less than it might otherwise be. See McMillan & Woodruff, Private Order, supra note 21, at 2424–35.
254 But see Ulrike Malmendier, Law and Finance “at the Origin,” 47 J. Econ. Lit. 1076, 1092–94 (2009) (analyzing corporate structures in ancient Rome and suggesting that the presence or absence of formal legal rights is not determinative of the potential size of enterprises). Malmendier argues that law is just one of many factors influencing firm growth, and not necessarily a decisive one. See id.
255 See Quinn & Vu, supra note 2.
256 See id.
257 See infra tbl.5, Dispute Resolution Methods (Farmers).
258 See infra tbl.6, Dispute Resolution Methods (Middlemen).
259 See infra tbl.5, Dispute Resolution Methods (Farmers).
initiate negotiations or bring in third-parties, like local policemen, in order to resolve a contractual dispute.  

In this context, written contracts become valuable, not so much for their legal force, but rather for their moral force. Without this moral force it can be difficult for a middleman, an outsider, to engage a third party, like a policeman, to assist in negotiations with the defaulting farmer, an insider.

Conversely, for farmers, written contracts in complex transactions are less valuable. If the middleman absconds on a promise to pay, he is unlikely to return. Farmers are then left holding an empty promise. Since middlemen are itinerant, farmers’ enforcement costs against middlemen are prohibitively high. Farmers are unlikely to be able to expend the resources necessary to track down middlemen to seek performance. It is no surprise that, in such situations, farmers put little stock in written contracts and formal legal rights. Furthermore, one can see that, absent other changes, more efficient formal legal structure may not do much to address the disparity in enforcement costs that dissuades farmers from attempting to access the formal system.

3. Reputation and Relational Contracting

Where legal rights are weak and parties are engaging in complex transactions, one expects to see parties rely on private ordering struc-

\begin{itemize}
\item[260] See Quinn, supra note 103, at 255 (discussing the role of police in dispute resolution).
\item[261] See McMillan & Woodruff, Private Order, supra note 21, at 2436 (discussing decreased future business in community as retaliation for breach of agreement).
\item[262] See id. at 2436; Quinn, supra note 103, at 255 (discussing the role of third parties in dispute resolution).
\item[263] See infra tbl.4, Farmer Problems with Middlemen. Only half of farmers negotiate with the middleman or seek resolution from the court system, local government or police. Id.
\item[264] See Quinn & Vu, supra note 2; infra tbl.4, Farmer Problems with Middlemen (44.4% of farmers do nothing to resolve disputes with middlemen, suggesting the futility of an attempt).
\item[265] See Quinn & Vu, supra note 2. One expects that a farmer seeking to maximize his investments should want to pair with a middleman in a long-term relationship, thereby creating incentives to guarantee performance. See McMillan & Woodruff, Private Order, supra note 21, at 2426. Nevertheless, only 21% of farmers who report being cheated in the past five years have since established long-term contracting relationships with middlemen. See Quinn & Vu, supra note 2. This result is counter-intuitive as only 27% of farmers in the larger sample rely on relational contracting. See id. This may indicate that farmers, having been cheated, become less willing to enter into relational contracts until they have more information about the quality of their counterparty. See infra Part III.C.2–3.
\item[266] See McMillan & Woodruff, Private Order, supra note 21, at 2431 (discussing farmers’ lack of trust in the legal system).
\end{itemize}
tures, like reputation mechanisms or relational contracting.\textsuperscript{267} Reputation and relational contracting provide parties with an extended time horizon over which to do business, thereby reducing the value of acting opportunistically.\textsuperscript{268} The deterrence provided by an extended time horizon can be a powerful and reasonably low-cost self-help strategy.\textsuperscript{269} Where legal rights are weak, these low-cost contracting strategies can provide a reasonable alternative to formal enforcement mechanisms.\textsuperscript{270}

Not surprisingly, farmers report in large numbers that a buyer’s reputation is important in their decisions whether or not to do business.\textsuperscript{271} Yet, in order for reputation to have a valuable incentive effect, buyers and sellers must be able to costlessly generate and transmit credible reputation information to potential counterparties.\textsuperscript{272} Social institutions can often facilitate functioning reputation markets. In the Mekong Delta, however, it is not clear that there exists an efficient mechanism for middlemen to transmit reputation information—either directly or indirectly—about their quality as business partners to farmers with whom they intend to do business. Rather, highly localized social institutions of the Mekong Delta appear ill-suited to function as efficient reputational intermediaries in the region’s fruit markets for many reasons.

First, farmers are relatively isolated. Their communications and transportation links are not good.\textsuperscript{273} Although farmers can gather informally with their close neighbors and share information among themselves about the reputations of middlemen, such information is

\textsuperscript{267} See Dixit, supra note 64, at 12, 62.
\textsuperscript{268} See id. at 12 (“[R]eputational considerations can deter opportunistic behavior.”).
\textsuperscript{269} See id. (“If the same parties interact with each other repeatedly, and they value the future significantly highly relative to the present, then the prospect of a long-term collapse of the relationship can control the temptation to obtain a short-term gain.”).
\textsuperscript{270} See id. at 62 (noting that relation-based governance has low total costs and works well in small groups within less-developed economies); McMillan & Woodruff, Private Order, supra note 21, at 2425 (providing that “[i]n countries with dysfunctional legal systems . . . relational contracting may replace the law altogether”).
\textsuperscript{271} See Quinn & Vu, supra note 2. Farmers report that they would not do business with someone if they had heard that she had either not paid or otherwise cheated another farmer (90% and 92.2%, respectively). See id.
\textsuperscript{272} See Dixit, supra note 64, at 67–74 (noting that “good information networks” are needed for loss of reputation to deter cheating behavior); McMillan & Woodruff, Private Order, supra note 21, at 2422–30 (“In close-knit communities, where people interact with each other frequently and information flows freely, people may adhere to social norms of cooperation because it is in their long-term interest to do so.”).
\textsuperscript{273} See Quinn & Vu, supra note 2.
highly localized.\textsuperscript{274} Furthermore, a poor reputation in one area will not likely affect a middleman’s reputation in another because farmers, limited in terms of transportation and communications, have little ability to convey such information beyond their immediate circle of relationships absent some other intermediary.\textsuperscript{275}

Second, whereas in other well-known studies of private ordering, strong ethnic, cultural or family ties bind buyers and sellers together, such ties are not significant barriers to entry into Vietnam’s fruit trading business.\textsuperscript{276} In general, the continuity of social relationships and the threat of exclusion from a group can create a powerful incentive for self-enforcement equivalent.\textsuperscript{277} Where buyers and sellers are bound together by such ties, reputation can be a powerful mechanism. In the fruit business, however, there is no evidence that any particular ethnic or family ties bind farmers to middlemen with whom they do business.\textsuperscript{278} Instead, the area studied was dominated by farmers of the majority Kinh group.\textsuperscript{279} The lack of significant entry barriers in the trading business suggests that it would be difficult, if not impossible, to exclude bad actors through ostracism by a group.\textsuperscript{280}

Though there are a number of formal institutions that have the potential of facilitating reputation information, none presently do so. In any event, participation in such institutions is relatively low. For example, only twenty-two percent of farmers report being members of any formal organization at all.\textsuperscript{281} The most common of these is the produc-

\textsuperscript{274} See Dixit, \textit{supra} note 64, at 67–74 (noting the more localized information is, the less useful it is in supporting reputation-based governance).

\textsuperscript{275} See id.

\textsuperscript{276} Compare Quinn & Vu, \textit{supra} note 2, with Grief, \textit{supra} note 67, at 279 (explaining that for medieval traders, family and cultural ties formed the basis for the social institutions that underlay long-distance trade), and Bernstein, \textit{supra} note 53, at 139–41 (discussing diamond traders who were connected by a common cultural and ethnic background), and Landa, \textit{supra} note 53, at 355–56 (discussing ethnic Chinese merchants tied together by common ethnicity and family ties).

\textsuperscript{277} See Bernstein, \textit{supra} note 53, at 138–44; Landa, \textit{supra} note 53, at 351.

\textsuperscript{278} See Quinn & Vu, \textit{supra} note 2.

\textsuperscript{279} See id.

\textsuperscript{280} See id. In other contexts, trading activity in the Mekong Delta had been dominated by ethnic Chinese, but this is not the case in the fruit markets. See Landa, \textit{supra} note 53, at 351; Quinn & Vu, \textit{supra} note 2. Where a majority group does not dominate, ostracism is a more powerful deterrent. See Bernstein, \textit{supra} note 53, at 33 (explaining that in markets where contract enforcement depends on social or reputational damage, the formation of an extralegal contract depends on formation regarding the reputations of market participants).

\textsuperscript{281} See Quinn & Vu, \textit{supra} note 2. National and regional associations can play an information sharing role because they can provide information to farmers who might otherwise be highly localized. See Landa, \textit{supra} note 53, at 359–60. Though there are a number of
tion cooperative (*hop tac xa*), the main function of which is to provide technical and extension services.\textsuperscript{282} Few farmers who participate in these cooperatives report that these organizations provide information about the marketplace, reputations of middlemen, or serve to resolve potential problems with middlemen.\textsuperscript{283} The Vietnam Fruit Association, a trade association for fruit farmers and the fruit industry, also fails to play a significant role as a reputation intermediary.\textsuperscript{284} Although, the association is less localized than cooperatives and might be well placed to provide reputation information, it does not play a gatekeeping role for either farmers or middlemen.\textsuperscript{285} In name, it is a “national” association but it is not truly present in many farming communities.\textsuperscript{286} Even where it is present, it does not appear to be organized to coordinate information sharing of the type that would be useful to farmers or middlemen in assessing the quality of a potential trading partner.\textsuperscript{287}

Finally, as noted above, barriers to entry and exit for middlemen are low.\textsuperscript{288} Ordinarily, market access and the threat of market exclusion can be important incentives for market participants to conform to expectations.\textsuperscript{289} Middlemen neither benefit from, nor are they constrained by, natural territorial monopolies.\textsuperscript{290} They are itinerant, ranging great distances in their buying and selling activities, and can drop in and out of the business at will.\textsuperscript{291} A majority of middlemen lease their boats, fur-

formal associations for farmers, there are no associations presently acting as reputation intermediaries between farmers and middlemen. *See Quinn & Vu, supra* note 2.\textsuperscript{282} *See Quinn & Vu, supra* note 2.\textsuperscript{283} *See id.*\textsuperscript{284} *See infra tbl.7, What Information Do You Get From Local Organizations?*. Outside the fruit market, there are examples of trade associations playing a role as a reputation intermediary. *See Greif, supra* note 67, at 300; Bernstein, *supra* note 53, at 132–35, 138–39. In those cases, however, membership in the association is required to participate in the business activity. *See Greif, supra* note 67, at 279; Bernstein, *supra* note 53, at 132–35, 138–39. In the diamond industry, participation in the diamond association is required in order to participate in the market. Bernstein, *supra* note 53, at 119; *see* Barak D. Richman, *Ethnic Networks, Extralegal Certainty, and Globalisation: Peering Into the Diamond Industry, in Legal Certainty Beyond the State* (Volkmar Gessner, ed., forthcoming).\textsuperscript{285} *Compare* Bernstein, *supra* note 53, at 133–34, 138–44 (examining the diamond association’s role in the market), *with* Quinn & Vu, *supra* note 2 (finding a lack of a role of the Fruit Association in the market).\textsuperscript{286} *See Quinn & Vu, supra* note 2. Less than twenty percent of farmers report being members. *See id.*\textsuperscript{287} *See infra tbl.7, What Information Do You Get From Local Organizations?*, *see also* Quinn & Vu, *supra* note 2.\textsuperscript{288} *See Quinn & Vu, supra* note 2.\textsuperscript{289} *See Bernstein, supra* note 53, at 138–44; Landa, *supra* note 53, at 351–52.\textsuperscript{290} *See Quinn & Vu, supra* note 2.\textsuperscript{290} *See Quinn & Vu, supra* note 2.\textsuperscript{291} *See id.*
ther increasing the variability of their participation. To compound matters, there are no administrative regulations that govern their business activity or formal organizations that they might be required to join to enter this business. Nor is there any formal or informal association of traders that might act to filter bad actors out of the market. In sum, these low barriers to entry and exit make the threat of exclusion of bad actors difficult, if not impossible to effectively enforce.

Farmers’ networks in the Mekong Delta fail to perform private ordering functions for two reasons. First, farmers and their networks do not necessarily overlap with the networks of middlemen. Whereas buyers and sellers in other markets, like the diamond markets of New York City, share important social and cultural ties outside of the diamond trade, that is not necessarily the case in the Mekong Delta. Farmers and middlemen, though they share cultural and ethnic traits, are brought together almost exclusively for the purpose of transacting business. Second, farmers are unable to exclude bad actors from the trade. While in the case of diamond traders, exclusion from the social and cultural group, and thus effectively from the diamond trade, is an effective deterrent to opportunistic behavior, no such power of exclusion exists in the fruit markets of the Mekong Delta. Although there are barriers to entry for middlemen, none are controlled by farmers. In the absence of an excludable common social network, there is little

292 See id. 55.3% of middlemen do not own the boats that they use. See id.
293 Compare Bernstein, supra note 53, at 119–20 n.6 & 121 nn. 11, 13 (discussing the bylaws of the association regulating the diamond marketplace), with Quinn & Vu, supra note 2 (finding a lack of regulations).
294 Compare Bernstein, supra note 53, at 119–21, 138–43 (noting both the formal and informal bonds within the diamond business), with Quinn & Vu, supra note 2 (finding a lack of any informal or formal associations). While this is true at the farm-gate, there is some evidence from interviews with middlemen that at the wholesale level—for example at the Ho Chi Minh City markets—middlemen face higher barriers to entry. See Quinn & Vu, supra note 2.
295 Compare Bernstein, supra note 53, at 138–41 (contending that diamond traders were connected by a common cultural and ethnic background that made reputation a powerful mechanism for self-enforcement), and Landa, supra note 53, at 349, 351–52 (providing that Chinese merchants were bound by common ethnicity and family ties that constrained market behavior), with Quinn & Vu, supra note 2 (finding a lack of barriers to entry and exit into the market for middlemen in the Mekong Delta).
296 See Quinn & Vu, supra note 2.
297 Compare Bernstein, supra note 53, at 139–41 (describing the cultural and reputational bonds between those in the diamond markets), with Quinn & Vu, supra note 2 (finding a lack of any informal association).
298 See Richman, supra note 284; Quinn & Vu, supra note 2.
299 See Quinn & Vu, supra note 2.
room for reputation to be an effective deterrent. Finally, farmers’ networks tend to be highly localized while middlemen can range great distances. The intense localization of reputation information means that the costs to a middleman for opportunistic behavior can be heavily discounted.

At the time of the survey, few farmers appear to have already established long-term relationships with middlemen. Only 27% of farmers surveyed report selling their entire gardens to repeat buyers and a far larger percentage, 68%, report selling their garden to multiple buyers. Although they appear willing to make such investments, farmers report only a minimal premium on the value of a long-term relationship. This value can be ascertained by the size of the premium required to cause a farmer to switch from one buyer to another. In our study, farmers report that they would be willing to leave their current middleman and move to a new middleman for an average price increase in the range of only 5–10%. It may well be that farmers are under pricing the value of relational contracting, particularly if, by entering into complex transactions with middlemen that enable middlemen to access more valuable markets at greater distance.

Notwithstanding the problem of pricing the value of a relational contract, farmers remain faced with the challenge of determining whether a stranger seeking a complex transaction is a good risk or a bad one. In this context, reputation is not a reliable signal and parties have not developed robust relationships. Therefore, to develop relational contracting and move beyond spot market transactions, farmers must engage in other approaches.

300 See McMillan & Woodruff, Private Order, supra note 21, at 2440 (stating that without community cooperation in refusing to trade with those in bad standing, reputation-based sanctioning ceases to function as a deterrent to future cheating).
301 See Quinn & Vu, supra note 2.
302 See McMillan & Woodruff, Private Order, supra note 21, at 2440 (noting that “since checking on the status of each potential trading partner is a costly activity, traders had to be given an incentive not to free ride”). This is not necessarily the case with middlemen who may be able to use interactions with other middlemen at wholesale markets higher in the commodity stream to trade information about farmers. See id. at 2457 (noting that competition gives middlemen strong incentives to monitor clients).
303 See Quinn & Vu, supra note 2. Given the relatively young life of the pomelo market it is not entirely surprising that the survey instrument may have captured a snapshot of a market in development. See id.
304 See id.
305 See id.
306 See id. Eighty percent of farmers report that they would switch from one middleman to another in order to get the small premium. See id.
307 See id.
Our survey indicates that farmers appear to diversify their sales in order to generate information about potential business partners—a first step towards relational contracting. Diversification is a common strategy adopted by farmers around the world to reduce the intensity of bad outcomes. Farmers can employ diversification strategies to manage exogenous risks, like weather or crop disease. One of the most significant risks that Mekong Delta fruit farmers face is contract default in transactions with middlemen. Thus, it is not surprising that Vietnamese farmers would likewise adopt a pattern of diversifying their sales to mitigate the risk of contract default. The pattern of diversification minimizes the costs of contract default across the farmer’s portfolio of sales and permits farmers to provide credit to strangers in the absence of strong legal rights or other private ordering mechanisms.

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308 See Quinn & Vu, supra note 2.
310 See Marcel Fafchamps, Food and Agriculture Organization, Rural Poverty, Risk and Development 8 (1999) (describing the manner in which rural farmers seek to manage their exposure to risk through “portfolio diversification,” including “plant[ing] different crops, or several varieties of the same crop to obtain a more stable output”); BBC World Serv. & Natural Res. Inst., In the Field, Sustainable Livelihoods: Vulnerability, Complexity and Diversification, http://www.nri.org/projects/InTheField/vulnerability.htm (last visited Apr. 20, 2010) (explaining that farmers reduce risk by diversifying their crop production, sale markets, and income sources).
311 See Quinn & Vu, supra note 2.
312 See S. Timothy Kochis, Wealth Management: A Concise Guide to Financial Planning and Investment Management for Wealthy Clients 97 (2007) (summarizing the economic principles behind the concept of portfolio diversification). A Vietnamese farmer’s approach to its portfolio of contracts with middlemen is rooted in the same economic principles governing, for example, an individual investor’s approach to purchasing stock. Cf. id. (“[W]ithin any general investment category, such as common stocks or bonds, effective diversification will eliminate unsystematic risk.”) The farmer’s portfolio of contracts represents a set of risky assets just as an investor’s portfolio of securities does; in both instances diversification decreases the amount of downside risk because underperformance by one contract or one type of stock is hedged against by the performance of the rest of the portfolio of assets, taken as a whole. See id. Consequently, when either a Vietnamese farmer or a securities investor evaluates whether to include a particular asset in the portfolio, the risk of that investment is assessed “in relation to the overall portfolio, not just the individual risk in isolation.” See id. In the specific case of Vietnamese farmers conducting business without relying heavily on relational contracting or other risk-mitigating approaches, the management of risk through portfolio diversification allows the farmer to make ostensibly “riskier” economic decisions (that is, providing credit in speculative sales to strangers), which they otherwise might not make without the hedge of a diversified portfolio of contracts. See Quinn & Vu, supra note 2; cf. Kochis, supra, at 97 (explaining portfolio diversification in terms of stocks and bonds).
A large majority of farmers, sixty-eight percent, adopt this portfolio approach to their sales. In doing so, farmers consciously split their garden into smaller lots and sell each of these lots to multiple buyers—strangers as well as those with whom they have extensive relationships. Selling in smaller lots, raises costs at the margin for buyers. Accordingly, this pattern of sales appears to be driven by farmers, not middlemen. Farmers can maximize the expected value of their sales while minimizing the costs of the downside risks of contract default by allocating sales among different classes of buyers, including providing credit in speculative sales to strangers. In that way, the portfolio strategy provides farmers with cheap insurance against default.

Diversification of sales, however, is not an efficient private ordering strategy. Even though it may mitigate ex ante the expected costs of default, diversification does nothing to alter the ex post incentives in a way that might promote self-enforcement by buyers. Unlike relational contracting or reliance on reputation, buyer default does not result in the buyer incurring any direct or indirect costs that might otherwise act as a deterrent. Diversification may result in a stable portfolio of farmer sales over time but it does not lead to durable individual con-
tracts. Consequently, farmers engaging in this type of contracting are not likely in an equilibrium position.

While diversification does not lead directly to sustainable contracting, it does create opportunities for farmers to seek out good middlemen. Farmers engaging in diversification of their sales are able to test multiple buyers in order to determine which buyers might be good long-term business partners. By relying on diversification, farmers are able to provide credit to a stranger with whom they have previously not done business and thereby test the trustworthiness of multiple trading partners without bearing the excessive costs associated with default. Dealing with strangers in this way creates opportunities for parties to gradually develop long-term relationships with the best trading partners while revealing the unreliable and ceasing to send business their way.

Consistent with that tacit strategy, middlemen report that initial purchases from farmers tend to be small and increase over time. Particularly, they report placing smaller average orders with farmers with whom they have not done previous business. In fact, the average size of purchases from initial sellers is only thirty-five percent of the average size of purchases from repeat sellers. Furthermore, more than ninety percent of farmers report that they would not continue to do business with a middleman who they felt cheated them.

Taken together with the high turnover of trading partners, this data suggests farmers are using diversification strategies to search for reliable business partners. As a middleman proves his reliability, farmers may move more of their business to him. Those who default on their promises have the prospect of future business taken away.

See McMillan & Woodruff, *Dispute Prevention, supra* note 21, at 648–49 (noting that where a business partner sells customized products to another, there is a willingness to sanction the customer who cheats; notably, however, the effect of such sanctions is not significant).

See Quinn & Vu, *supra* note 2.

See id.

See id.

See id.


See Quinn & Vu, *supra* note 2.

See id.

See infra tbl.8, *Average Quantities Purchased Over Past Three Years (Tons).*

See Quinn & Vu, *supra* note 2.

Cf. Axelrod, *supra* note 55, at 20–21 (describing such a strategy in the context of computer simulations). Axelrod found that a “tit-for-tat” strategy beginning with “small clusters of individuals” can spread and establish the basis for cooperation across the board. *Id.* Following a tit-for-tat strategy, parties should be quick to extend trust to strangers but
IV. FARMERS, MIDDLEMEN AND THE RULE OF LAW MOVEMENT

The experience of farmers and middlemen in Vietnam’s Mekong Delta helps provide answers to some of the questions raised by the new rule of law movement. First, after twenty-five years of pursuing an aggressive legal reform agenda with a focus on the development of legal institutions appropriate to a market economy, formal legal rights and supporting institutions in Vietnam are still weak. In the decade following the work of McMillan and Woodruff, although there has been a substantial amount of activity in the legal development area, there has not been demonstrable improvement in the perceived quality of formal legal institutions and formal legal rights. Notwithstanding efforts to develop and reform the formal dispute resolution system through the courts system or the delineation of formal legal rights through the drafting of legislation, market participants in the Mekong Delta have little or no expectation that written contracts have sufficient force to compel performance and, as a result, do not rely on them. Clearly after a quarter-century of effort, legal reform and the development of formal institutions in Vietnam is still a work in progress. Moreover, the work of developing these formal legal institutions is appropriately defined as a long-term effort. Trubek and others correctly suggest that given the long-term potential payout, investments in the formal legal system have to be long-term and made for their own sake, not with the misperception that such investments will result in improved economic results in the short or medium term.

Additionally, notwithstanding the lack of effective formal institutions farmers, middlemen, and other economic actors are willing to make long-term investments of the type one might not expect were it then punish quickly by withholding future business. See id. Counter-parties who prove themselves trustworthy are rewarded by additional cooperation in subsequent rounds. See id.

330 See Quinn & Vu, supra note 2; see also Seth Mydans, Rural Ventures in Vietnam Suffer in the Global Crisis, N.Y. Times, Sept. 29, 2009, at A8 (stating that Vietnam’s entrance into the World Trade Organization in 2007 was “a step that required revisions of [Vietnam’s] legal infrastructure, banking system and regulations that are still causing pain as they reapplied”).

331 See Quinn & Vu, supra note 21, at 637–38.

332 See Quinn & Vu, supra note 2. In a high-trust society like the United States, market participants may also forego written contracts when doing business. See Macaulay, supra note 10, at 58. Though, in such situations parties are able to adopt this informal stance because they are, in effect, contracting in the shadow of the law. See id. at 62.

333 See Trubek, supra note 4, at 74–76, 93–94; see also Tamanaha, supra note 51, at 484–85.
true that formal legal systems are a prerequisite to such activity.\textsuperscript{334} Farmers, for example, are willing to make long-term investments in fruit trees with no assurance that in the out years, middlemen will make good on their commitments to purchase fruit.\textsuperscript{335} For their part, fifty-five percent of middlemen appear willing to make long-term investments in capital assets namely, their boats. Therefore, if law and formal legal structures were a prerequisite for economic activity and economic growth in a post-transition economy, neither the farmer nor the middlemen would be expected to make such long-term investments.\textsuperscript{336}

Further, in the absence of formal legal rights, market participants find ways to structure their interactions in order to raise the probabilities of performance.\textsuperscript{337} Farmers appear willing to do business with strangers.\textsuperscript{338} This differs from other contexts where outsiders have difficulty establishing the relationships required to enter into commercial relationships with insiders.\textsuperscript{339} Vietnamese fruit farmers demonstrate an openness to doing business with strangers that is shared with their urban cousins in private manufacturing enterprises.\textsuperscript{340} This farmer risk-taking is likely part of an implicit strategy to develop relational contracts with middlemen. Farmers, for example, appear to take chances on unknown middlemen and provide them with a small amount of credit.\textsuperscript{341} In the event middlemen make good on their promises, farmers continue to do business and increase the size of their subsequent contracts.\textsuperscript{342} Again, this strategy is not dissimilar to contracting strategies undertaken by manufacturing enterprises in urban areas sampled by McMillan and Woodruff.\textsuperscript{343}

Finally, farmers and middlemen tend not to rely on formal institutions for the resolution of disputes. Instead, parties rely more on direct negotiation to resolve disputes or simply write off losses and move

\textsuperscript{334} See Quinn & Vu, supra note 2.
\textsuperscript{335} See id.
\textsuperscript{336} See id.
\textsuperscript{337} See McMillan & Woodruff, Private Order, supra note 21, at 2421–23.
\textsuperscript{338} See Quinn & Vu, supra note 2.
\textsuperscript{339} See Landa, supra note 53, at 354–55, 356.
\textsuperscript{340} See McMillan & Woodruff, Dispute Prevention, supra note 21, at 651.
\textsuperscript{341} See Quinn & Vu, supra note 2.
\textsuperscript{342} See id.
\textsuperscript{343} See McMillan & Woodruff, Dispute Prevention, supra note 21, at 652 (describing, through anecdotal accounts, the process by which new trading partners become accustomed to one another and expand their trading relationships and noting that “[e]xperience in dealing with a trading partner substitutes for preexisting . . . connections.”).
on. Of course, rural market participants are typically more remote from formal legal structures than perhaps urban market participants, so the fact that they eschew reliance on formal legal structures should not be altogether surprising. Farmers and middlemen who were the focus of the survey here are not, however, dissimilar to other economic actors who show a willingness to make long-term investments despite the weakness of formal legal institutions.

If one examines Vietnam’s external relationships, for instance, one finds a similar pattern of risk taking in the presence of weak legal systems—precisely the type that should theoretically be foreseen by inadequate legal structures. In the area of foreign trade, Vietnam has enjoyed rapid growth in trade relations over the past decade notwithstanding predictions that weak formal legal structures would inhibit such growth. Though Vietnam and the United States have only recently adopted their bilateral investment agreement, the benefits for Vietnam of this market-opening treaty are obvious. Trade with the

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344 See infra tbl.5, Dispute Resolution Methods (Farmers); infra tbl.6, Dispute Resolution Methods (Middlemen).

345 See McMillan & Woodruff, Dispute Prevention, supra note 21, at 644; see also United Nations Dev. Programme, supra note 135, at 7, 9, 11, 15 (noting the discrepancy between urban and rural areas in Vietnam with respect to awareness of judicial institutions, awareness of legal reforms, access to judicial institutions, and, most tellingly, confidence in judicial institutions).

346 See Quinn & Vu, supra note 2.

347 See Int’l Bus. Publ’ns, USA, Vietnam: Financial and Trade Policy Handbook 149 (4th ed. 2008) (describing the legal difficulties associated with the development of a more market-oriented economy in Vietnam, which include confusion among officials implementing the laws, varying interpretations, shortages of lawyers, law-graduate judges, and law professors, and inadequate dissemination of information about the laws); Lisa Toohey, Stepping Stones and Stumbling Blocks: Vietnam’s Regional Trade Arrangements and WTO Accession, in Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements 65, 73–74 (Ross Buckley et al. eds., 2008) (detailing Vietnam’s intense desire to integrate into the global trading system, as evidenced by its pursuit of bilateral and multilateral trade agreements as well as its accession to the WTO in 2006, and revealing that Vietnam is still understood to be transitioning toward the rule of law); see also Dixit, supra note 64, at 3 (“Of course economic activity does not grind to a halt because the government cannot or does not provide an adequate underpinning of law. Too much potential value would go unrealized . . . .”).

348 Compare McMillan & Woodruff, Dispute Prevention, supra note 21, at 639–40 (contending that despite the obstacles Vietnam faces as a transition economy, a thriving private sector has emerged), with Dixit, supra note 64, at 65–67, 80–84 (suggesting that in the absence of strong legal rights there should be a negative relationship between geographic distance and the amount of trade).

349 See Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations, supra note 96.
United States has grown rapidly since 2000. This growth, however, is likely a consequence of the market opening features of the treaty rather than the treaty’s indirect effect on the development of Vietnam’s formal legal system.

Foreign direct investment in Vietnam is an area where one finds a similar willingness to make long-term commitments, regardless of the lack of adequate formal legal protections. Foreign direct investment is highly illiquid, and unlike trade, investors need to be willing to stay in place for the long-term. Were formal legal structures and formal legal rights a precondition for foreign direct investment, then one would expect Vietnam to exhibit low levels of investment. Yet, in fact, during the period following doi moi, Vietnam has enjoyed very high levels of foreign direct investment. This suggests that foreign investors—who are likely to be more “legally oriented” than Mekong Delta farmers—are not dissuaded from making long-term investments in the absence of strong legal rights and durable formal legal institutions.

All of this demonstrates that formal legal institutions and formal legal rights are a trailing edge rather than a leading edge issue. In transition, economic actors will find ways to structure transactions to assure performance rather than wait for governmental authorities to establish

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350 See Trade, Price and Tourism, 2008 STAT. Y.B. VIETNAM, supra note 76, at 452 (statistics on exports from Vietnam to the United States demonstrate a steady upward trend since 2000).


352 See WORLD BANK, supra note 3, at 63–65; see also Trubek, supra note 4, at 82–84.


perfect conditions in which to contract. That is not to say that rule of law activities are not useful, but rather, that they are not an imperative prerequisite for growth in a transition economy and market actors will not idly await them.\footnote{See McMillan & Woodruff, \textit{Dispute Prevention}, supra note 21, at 639–40 (describing how despite legal and economic obstacles, Vietnam’s private sector is “thriving”).} Thus, such activities are trailing edge. In their absence, parties appear to find ways to rely on private ordering strategies or second-best institutions.\footnote{See McMillan & Woodruff, \textit{Private Order}, supra note 21, at 2421–24.} David Trubek and Alvaro Santos similarly note that rule of law activities are of ambiguous value in the near term.\footnote{See Trubek, \textit{supra} note 4, at 74, 93–94; Santos, \textit{supra} note 4, at 253, 255–57.} They suggest that proponents of such activities should pursue them for their own sake and not because they necessarily result in more economic development or the medium-term development of democratic institutions.\footnote{See Trubek, \textit{supra} note 4, at 93–94; Trubek & Santos, \textit{supra} note 4, at 3–5, 17–18.}

Nonetheless, it may well be true that the lack of formal legal rights places an upward bound on economic development activity. Such a conclusion is truly an attractive justification for reliance on formal legal institutions. Such a statement is, however, likely as true as the efficient markets hypothesis has turned out to be in economics and finance.\footnote{See Nicholas Barberis & Richard Thaler, \textit{A Survey of Behavioral Finance}, in \textit{2 Advances in Behavioral Finance} 63–64 (Richard H. Thaler, ed., 2005) (concluding that the efficient markets hypothesis was a naive view); Burton G. Malkiel, \textit{The Efficient Market Hypothesis and Its Critics}, 17 J. Econ. Persp. 59 (2003) (explaining that investors strive to uncover information about individual stocks and the market as a whole as this information is reflected into the market because the markets are never as efficient or predictable as proponents of the Efficient Capital Market Hypothesis maintain). At the height of its importance, economist Eugene Fama declared that “the evidence in support of the efficient capital market hypothesis is extensive, and . . . contradictory evidence is sparse.” Eugene F. Fama, \textit{Efficient Capital Markets: A Review of Theory and Empirical Work}, 25 J. Finance 383, 416 (1970). Of course, behavioral economists and behavioral finance academics spent the next twenty years poking holes in the theory and pointing out its shortcomings. See Barberis & Thaler, \textit{supra}, at 63–64. The same may ultimately be true of the necessity of law for economic development: while attractive in theory, there are too many examples of growth in the absence of strong legal rights to maintain that the link between formal legal rights and growth is beyond reproach. See Landa, \textit{supra} note 53, at 349–50; McMillan & Woodruff, \textit{Dispute Prevention}, supra note 21, at 639–40; Rodrik, \textit{supra} note 4, at 975.}

\textbf{Conclusion}

The new law and development movement’s suggests that in the absence of strong formal legal rights, participants should find it difficult to engage in complex transactions. We, however, find that participants in the pomelos market in Vietnam’s Mekong Delta carry out rela-
tively complex transactions by granting buyers credit with little explicit reliance on formal legal structures.360 Farmers appear to rely on novel private ordering structures—a portfolio approach—to generate information about potentially reliable partners.361 As new buyers prove themselves reliable partners, farmers may shift more business to them, migrating gradually towards more relational contracting to support complex transactions as parties search for and find reliable partners.362 This snapshot of the fruit markets in the Mekong Delta suggests that first, in spite of the lack strong legal rights, parties are able to engage in complex transactions, and second, that developing formal legal structures is a complicated and long-term process with uncertain results.

These conclusions are important given the continuing debate over the importance of the formal legal system in creating conditions conducive to economic development. Throughout the 1990s and until now, general components of the World Bank’s Washington Consensus include market liberalization and strengthening of the rule of law to support the development of markets.363 Critics of the Washington Consensus approach to rule of law reforms criticize its narrow focus on formal legal institutions in the form of legal transplantation and legal education as ineffective and a throw-back to the failed law and development movement of the 1960s and 1970s.364 While this Article does not intend to resolve the debate over the efficacy of this new rule of law movement, it does question whether strong legal rights engendered in the formal legal institutions favored by this approach are a prerequisite for parties to engage in welfare-enhancing economic activity.365 Indeed, rather than being a prerequisite, the experience of farmers and middlemen in Vietnam’s Mekong Delta suggests that the creation of strong legal rights of the type endorsed by the new rule of law movement are a

360 See Quinn & Vu, supra note 2.
361 See id.
362 See McMillan & Woodruff, Private Order, supra note 21, at 2426 (explaining that there is an increase in relationship progress as people learn to trust each other and noting that “[a]fter two years of dealings, the amount of trade credit offered is on average fourteen percentage points higher than at the start of the relationship”).
364 See Carothers, supra note 12, at 53–58 (noting the existence of criticism that current U.S. political development aid “strongly resemble[s] programs of decades past.”); Haggard, supra note 26, at 221 (“Rather than a movable technical apparatus, law is a set of institutions deeply embedded in particular political, legal, economic, and social settings.”); McCubbins et al., supra note 26, at 40–47.
365 See supra Part IV.
trailing edge reform rather than a leading edge one. In the absence of strong legal rights, market participants are able to adapt and find second-best solutions.

The new rule of law movement stands to make the same mistakes of the law and development movement of the 1960s and 1970s to the extent that it focuses on developing formal legal structures, legislative transplantation, and legal training. In the Mekong Delta, farmers might be better off if time and energy was spent investing in improving the efficiency of information flows about potential counterparties than in building up formal legal rights. Indeed, bottom-up approaches can reinforce the work of private actors and possibly help develop appropriate indigenous institutions over time. By treating the development of legal institutions to support markets as a mere top-down technical problem that can generate generalized trust in a market economy, the new rule of law movement may ultimately fail to be of consequence.

Those who eschew an instrumentalist view on the role of law in the development process and argue the rule of law project is a long term, even decades long, effort with unlikely outcomes are more likely to be correct. The rule of law rather than a precursor to economic growth and development in transition economies is likely to be a result over time. Such a process is almost entirely endogenous—developed from the ground up by farmers, middlemen, and other economic actors over time. Moreover, the process is one in which the role of outsiders may be of little consequence, diminishing their status from that of prime mover to that of attentive observer.
Tables

**Table 1: Middlemen Delayed Payment Terms**

<table>
<thead>
<tr>
<th>Payment Terms</th>
<th>%</th>
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<tbody>
<tr>
<td>Immediate settlement</td>
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<tr>
<td>Pay 3-4 days after receipt</td>
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<tr>
<td>Pay 5-15 days after receipt</td>
<td>8.3%</td>
</tr>
<tr>
<td>Pay 1-2 months after receipt</td>
<td>3.3%</td>
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<tr>
<td>Pay in installments over three month period</td>
<td>5.5%</td>
</tr>
<tr>
<td>Other</td>
<td>4.2%</td>
</tr>
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</table>

**Table 2: Middlemen Approaches to Farmers**

<table>
<thead>
<tr>
<th>No. of Approaches</th>
<th>% of Farmers</th>
<th>% Farmers willing to grant credit</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>3.4%</td>
<td>0.0%</td>
</tr>
<tr>
<td>1</td>
<td>3.4%</td>
<td>1.2%</td>
</tr>
<tr>
<td>2</td>
<td>5.1%</td>
<td>1.8%</td>
</tr>
<tr>
<td>3</td>
<td>11.4%</td>
<td>4.8%</td>
</tr>
<tr>
<td>4</td>
<td>12.5%</td>
<td>4.2%</td>
</tr>
<tr>
<td>5</td>
<td>13.1%</td>
<td>5.4%</td>
</tr>
<tr>
<td>6-10</td>
<td>32.4%</td>
<td>8.9%</td>
</tr>
<tr>
<td>11-20</td>
<td>13.6%</td>
<td>4.8%</td>
</tr>
<tr>
<td>&gt;20</td>
<td>5.1%</td>
<td>1.8%</td>
</tr>
</tbody>
</table>

**Table 3: Middlemen Problems with Farmers**

<table>
<thead>
<tr>
<th>Problem</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Farmer sells to other buyer</td>
<td>50.0%</td>
</tr>
<tr>
<td>Price problems (renegotiation)</td>
<td>18.8%</td>
</tr>
<tr>
<td>Poor quality fruit</td>
<td>18.8%</td>
</tr>
<tr>
<td>Other</td>
<td>12.5%</td>
</tr>
</tbody>
</table>

**Table 4: Farmer Problems with Middlemen**

<table>
<thead>
<tr>
<th>Problem</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Middleman failed to pay</td>
<td>43.4%</td>
</tr>
<tr>
<td>Disagreements over quality</td>
<td>16.6%</td>
</tr>
<tr>
<td>Pricing Problems</td>
<td>11.1%</td>
</tr>
<tr>
<td>Other</td>
<td>16.6%</td>
</tr>
</tbody>
</table>

**Table 5: Dispute Resolution Methods (Farmers)**

<table>
<thead>
<tr>
<th>Method</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Forget it and move on</td>
<td>44.4%</td>
</tr>
<tr>
<td>Negotiate with middleman</td>
<td>27.8%</td>
</tr>
<tr>
<td>Go to court, local government, police</td>
<td>22.2%</td>
</tr>
<tr>
<td>Other</td>
<td>5.6%</td>
</tr>
</tbody>
</table>

**Table 6: Dispute Resolution Methods (Middlemen)**

<table>
<thead>
<tr>
<th>Method</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Forget it and move on</td>
<td>16.3%</td>
</tr>
<tr>
<td>Negotiate with farmer</td>
<td>41.9%</td>
</tr>
<tr>
<td>Go to police, court, local gov't.</td>
<td>41.9%</td>
</tr>
</tbody>
</table>
### Table 7: What Information Do You Get from Local Organizations?

<table>
<thead>
<tr>
<th>Information</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extension services</td>
<td>66.7%</td>
</tr>
<tr>
<td>Credit</td>
<td>9.5%</td>
</tr>
<tr>
<td>Market information</td>
<td>11.9%</td>
</tr>
<tr>
<td>Dispute resolution</td>
<td>11.9%</td>
</tr>
</tbody>
</table>

### Table 8: Average Quantities Purchased Over Past Three Years (tons)

<table>
<thead>
<tr>
<th>Seller</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>Repeat seller</td>
<td>104.93</td>
<td>113.53</td>
<td>79.05</td>
</tr>
<tr>
<td>First time seller</td>
<td>45.21</td>
<td>41/67</td>
<td>16.00</td>
</tr>
<tr>
<td>Other</td>
<td>15.00</td>
<td>10.00</td>
<td>5.00</td>
</tr>
</tbody>
</table>

* Through June of 2006.
PRESIDENTIAL PROMISES AND THE UNITING AMERICAN FAMILIES ACT:
BRINGING SAME-SEX IMMIGRATION RIGHTS TO THE UNITED STATES

SARA E. FARBER*

Abstract: Binational same-sex couples in the United States all too often face a difficult reality. Due to discriminatory immigration laws, which prevent United States citizens from sponsoring their same-sex partners for permanent residence, same-sex couples must choose between deportation and separating their families. The Uniting American Families Act, however, offers a remedy to this unacceptable inequality. Yet the Act currently does not have the congressional support it needs to pass. This Note argues that President Obama, as the country’s Executive, should use his “bully pulpit” to inspire the Act’s passage. Specifically, this Note examines the manifestation and extent of Executive power in relation to immigration, the timeliness of the issue, and the recent broadening of Executive power to support a conclusion that Mr. Obama should take such action.

Introduction

While we have come a long way since the Stonewall riots in 1969, we still have a lot of work to do. Too often, the issue of LGBT rights is exploited by those seeking to divide us. But at its core, this issue is about who we are as Americans. It’s about whether this nation is going to live up to its founding promise of equality by treating all its citizens with dignity and respect.

—President Barack Obama1

A difficult reality faces thousands of same-sex binational couples in the United States: the Federal Government refuses to “grant benefits to same sex partners” and thus “immigration law interferes with the fundamental freedom of personal choice in matters of marriage and family

life that have long been recognized by the Supreme Court.”

2 To illustrate this reality consider the following hypothetical. First, consider couple A and B. A and B are a heterosexual couple who met during college, fell in love and decided that they wanted to marry, reside, and find employment in Massachusetts. Person A is a United States citizen and B is in the United States on a nonimmigrant student visa. As a citizen and under current immigration law, A can sponsor B for immigration benefits in the United States, allowing B to live and work in the United States with A. 3 Couple C and D face a different reality because they are a same-sex couple. 4 Like A and B, they met in college. C is a United States citizen, but D is not. D is like B: in the United States on a nonimmigrant student visa. Even though C and D would like to marry, reside and work in Massachusetts, under current immigration law, they will be unable to do so. 5

Like C and D, many same-sex binational couples are unable to reside in the United States, despite one party being a United States citizen. 6 There is a basic denial of immigration rights for same-sex binational couples. 7 With few exceptions, and very little paperwork, heterosexual binational couples can claim a right for a foreign individual to enter the United States. 8 Same-sex binational couples, unlike opposite-sex couples, are not eligible under U.S. laws for such sponsorship. 9 The hardships they face demonstrate the “discriminatory consequences of denying a class of people the recognition their relationships need and deserve.” 10

According to the 2000 U.S. Census, of 594,391 self-identified same-sex couples living together in the United States, there are approxi-
mately 35,820 same-sex binational couples.\textsuperscript{11} Thus, approximately six percent of United States same-sex couples have “no recognition in federal law, and [similarly] no rights.”\textsuperscript{12} This statistic likely underestimates the number of same-sex couples living in the United States for several reasons.\textsuperscript{13} Specifically, “[t]he census does not allow same-sex couples who do not live together to report their relationship status.”\textsuperscript{14} Additionally, many couples choose not to define their relationships as between “unmarried partners.”\textsuperscript{15} Some same-sex couples may prefer the government not know the true nature of their relationship.\textsuperscript{16} Lastly, given concerns regarding immigration status, many foreign-born individuals may choose not to identify themselves as in a same-sex relationship.\textsuperscript{17} The current discriminatory immigration scheme for same-sex binational couples could and should be changed.\textsuperscript{18}

As Representative Jerrold Nadler (D-NY) did in 2007, Senator Patrick Leahy introduced the Uniting American Families Act (UAFA) in 2009 to his colleagues.\textsuperscript{19} The UAFA would recognize the rights of foreign same-sex partners of United States citizens to immigrate to the United States on a similar or equal basis as foreign opposite-sex spouses of United States citizens.\textsuperscript{20} The UAFA, however, does not have the congressional support it needs to pass in either house of Congress.\textsuperscript{21} Further information is provided in the text.

\textsuperscript{11} Id. at 173 app. C. The Human Rights Watch notes that there is no documented information by the Department of Homeland Security with respect to how many homosexuals reside in the United States. \textit{See id.}

\textsuperscript{12} Id. at 7, 173 app. C.

\textsuperscript{13} \textit{See Long, supra} note 2, at 174 app. C. The 2010 census does, however, allow same-sex couples to report themselves as married. Tom McGhee, \textit{GLBT Community Pressing for Census Question to Declare Sexual Orientation}, \textit{DENVER POST}, Mar. 16, 2010, at A01.

\textsuperscript{14} \textit{Long, supra} note 2, at 173 app. C (alteration in original).

\textsuperscript{15} \textit{See id.}

\textsuperscript{16} \textit{See id.}

\textsuperscript{17} \textit{See id.} at 174 app. C. Included in this group are individuals who avoid the census because they do not have legal status to stay in the United States. \textit{See id.} at 7.

\textsuperscript{18} \textit{See id.} at 13; \textit{James D. Wilets, A Comparative Perspective on Immigration Law for Same-Sex Couples: How the United States Compares to Other Industrialized Democracies}, 32 \textit{NOVA L. REV.} 327, 328 (2007).

\textsuperscript{19} \textit{See Uniteding American Families Act, H.R. 1024, 111th Cong. (2009); Uniting American Families Act, S. 424, 111th Cong. (2009); Uniting American Families Act, H.R. 2221, 110th Cong. (2007); Uniting American Families Act, S. 1328, 110th Cong. (2007). In fact, the bill, although not always referred to as the UAFA, has been introduced in Congress every year since 2000. \textit{See Wilets, supra} note 18, at 328.

\textsuperscript{20} \textit{See H.R. 1024; S. 424.}

\textsuperscript{21} \textit{See Victor C. Romero, Crossing Borders: Loving v. Virginia as a Story of Migration}, 51 \textit{HOW. L.J.} 53, 73 (2007); \textit{Billcast, H.R. 1024, 111th Cong. (Westlaw). Billcast provides statistical information on the likelihood of bills passing in their respective houses. See Billcast, supra. Billcast predicts a twenty-five percent chance of UAFA passing the house floor and a
thermore, because the Supreme Court has held that Congress has the power to regulate immigration with wide discretion, equality in the area of same-sex immigration will almost certainly require some action from Congress.\textsuperscript{22}

In 2000, the issue of same-sex federal benefits caught the country’s attention in the presidential debates between candidates Al Gore and George W. Bush.\textsuperscript{23} Despite his stance against gay marriage, Gore commented on the failure of the United States to offer equal rights to same-sex couples and suggested a civil union for such couples.\textsuperscript{24} In 2008, the issue of same-sex binational immigration rights was once again brought to the election platform by then presidential candidate Barack Obama.\textsuperscript{25} In a statement regarding gays and lesbians, Mr. Obama made a call for equality.\textsuperscript{26} In addition to discussing his historical legislative support for eliminating discrimination against gays and lesbians, he also promised that as President he would “use the bully pulpit to urge states to treat same-sex couples with full equality in their family and adoption laws.”\textsuperscript{27} Specifically, Mr. Obama discussed his work to pass the UAFA in order to grant same-sex binational couples the same “rights and obligations as married couples in our immigration system.”\textsuperscript{28}

On January 20, 2009, Barack Obama became America’s 44th President and began to confront the many challenges facing the entire
country. With gay and lesbian issues surfacing, it remains unclear whether President Obama will be able to live up to his campaign promises while simultaneously appeasing conservatives. This Note discusses same-sex binational immigration in light of President Obama’s election and his power to influence Congressional actions. Part I discusses the historical context of immigration for gay individuals in the United States, followed by the legal context for same-sex binational couples in the United States and a brief overview of same-sex immigration benefits in other western democracies. Part II details and analyzes the provisions of the Uniting American Families Act. Part III revisits the Obama campaign and Mr. Obama’s specific promises regarding gay rights, as well as his personal political record on these issues. Part IV then examines the expansion of presidential powers under the George W. Bush administration and the relationship between the Executive Branch and Congress with regard to immigration rights and benefits. Lastly, this Note concludes that given the President’s influential abilities with respect to immigration, President Obama should use his “bully pulpit” to influence Congress to bring equality to same-sex binational immigration. He must show his support of the UAFA to remedy an egregious inequality and protect families and their children.

I. The Legal Immigration History for Homosexuals and Same-Sex Binational Couples

Although opposite-sex binational engaged and married couples in the United States are able to secure immigration status for the foreign partner, same-sex couples do not share that privilege. In fact, the Immigration and Nationality Act (INA) explicitly declares that only foreign nationals that are federally recognized spouses qualify for legal

31 See Amy K.R. Zaske, Note, Love Knows No Borders—The Same-Sex Marriage Debate and Immigration Laws, 32 WM. MITCHELL L. REV. 625, 626 (2006). The United States government will, however, allow same-sex couples from other countries to live in the United States as long as one of them is working in the United States. See Bonnie Miluso, Note, Family “De-Unification” in the United States: International Law Encourages Immigration Reform for Same-Gender Binational Partners, 36 GEO. WASH. INT’L L. REV. 915, 923 (2004). The limitation to this is that they both must be foreigners. See id. For example, if C is from England and is working in the United States on a worker’s visa, her/his partner D can obtain a B-2 category visa enabling her/him to live in the United States. See id.
permanent resident status in the United States.\textsuperscript{32} When determining the meaning of an act by Congress, the word spouse “refers only to a person of the opposite sex who is a husband or a wife.”\textsuperscript{33}

The denial of same-sex immigration benefits is not new to U.S. immigration policy and has been judicially upheld in the United States since 1982 when the Ninth Circuit held that same-sex couples do not qualify for federal immigration benefits.\textsuperscript{34} Further, the denial of immigration rights to homosexuals was congressionally supported in 1917 and then again in 1952.\textsuperscript{35} It was ultimately not until 1990 that homosexuality was removed as a basis for denying immigration benefits to individuals.\textsuperscript{36} The current immigration law, which discriminates against same-sex couples, reflects U.S. laws and policies concerning same-sex marriage.\textsuperscript{37}

\begin{itemize}
  \item \textsuperscript{33} See 1 U.S.C. § 7.
  \item \textsuperscript{34} See Adams v. Howerton, 673 F.2d 1036, 1042 (9th Cir. 1982). Adams was a male U.S. citizen, while his partner Sullivan was a male foreigner living in the United States on a visitor visa. See id. at 1038. Upon the visa’s expiration the two were married in Boulder, Colorado. See id. Adams petitioned the Immigration and Naturalization Service (INS) to grant Sullivan, as his spouse, U.S. status, but it was denied. See id. The denial was upheld by the Board of Immigration Appeals (BIA) and the district court. See id. On appeal, the Ninth Circuit found that it was constitutional to define “spouse” as a member of the opposite sex and that Congress intended immigration benefits only for heterosexual marriages. See id. at 1042.
  \item \textsuperscript{35} See Lena Ayoub & Shin-Ming Wong, Separated and Unequal, 32 WM. MITCHELL L. REV. 559, 563 (2006). In 1952, homosexuals were barred from immigrating to the United States on the basis of mental defect. See id. Additionally, the same year the American Psychiatric Association classified homosexuality as a mental illness. See Joyce Murdoch & Deb Price, Courting Justice: Gay Men and Lesbians v. the Supreme Court 38 (2001). The latter classification supported homosexual immigrants being deported as psychopaths. See id. at 98. Similarly, in 1965 Congress again modified the INA expressly excluding homosexuals from entering the United States on the basis of their “sexual deviation.” See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236 § 272, 79 Stat. 911, 920 (1965) (repealed 1990). Sexual deviation was expressly added to apply to homosexuals. See Bernadette Maguire, Immigration: Public Legislation and Private Bills 147 (1997).
  \item \textsuperscript{36} See Murdoch & Price, supra note 35, at 236. Ironically, the American Psychiatric Association removed homosexuality from the category of mentally defected in 1973. See id. at 62. Although this lag time might seem surprising, it was not until 2003 that the Supreme Court found state sodomy laws unconstitutional. See Lawrence v. Texas, 539 U.S. 558, 578 (2003).
  \item \textsuperscript{37} See Zaske, supra note 31, at 627. The Human Rights Watch reports that there is discrimination and gross “inequity in the immigration system that tears same-sex binational couples apart.” See Long, supra note 2, at 14–15.
\end{itemize}
A. The Defense of Marriage Act

Following the Ninth Circuit case, which held that marriage discrimination was unjustifiable, Congress passed the Defense of Marriage Act (DOMA), which then President Bill Clinton signed into law. DOMA is composed of two parts. The first provision permits states to ignore their obligations under the Full Faith and Credit Clause of the Constitution. As a result states may choose not to recognize same-sex marriages from other states. The second provision of DOMA declares that when interpreting federal laws, “marriage means only a legal union between one man and one woman as husband and wife.” Therefore, in states where same-sex unions are legal, DOMA “stands as a broad wall between same-gender unions” and federal immigration benefits.

Because U.S. immigration is a federal matter, DOMA has eliminated the ability of binational same-sex couples to be recognized as “spouses” under current immigration laws. Additionally, individual states are prohibited from regulating immigration as it is strictly a fed-

39 See Yuval Merin, Equality for Same-Sex Couples 228 (2002).
40 See id. at 228.
41 See 28 U.S.C. § 1738C. The Act specifically states,

No state, territory, or possession, of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id.

43 Miluso, supra note 31, at 920.
44 See Long, supra note 2, at 30. In fact, even in states where marriage or domestic partnerships are available to same-sex couples, from an immigration perspective it might be better not to register as married or domestically partnered. See Denis Clifford ET AL., Legal Guide for Lesbian and Gay Couples 28 (14th ed. 2007). Individuals staying in the United States on nonimmigrant visas are expected to show that they do not intend to stay in the United States permanently. See id. Registering as domestic partners or as a married couple can be used as evidence of an intent to stay in the United States, compromising that individual’s nonimmigrant visa. See id. The immigration situation can be different for binational couples where one individual is transgender and is now considered to be of the opposite sex. See id. at 61. If a state recognizes the marriage, the federal immigration authority should as well, and thus the non-U.S. citizen should be able to acquire marriage-based legal permanent residence. See id.
eral matter. Therefore, “[b]arring repeal of the statute, the only institutions with the power to alter the status quo at the federal level are the federal courts.”

B. Beyond Immigration Through Marriage: Other Immigration Options

Because marriage between same-sex couples is not recognized by the federal government as a result of DOMA, binational same-sex couples desiring to live together in the United States have very few other means of establishing legal immigration status. There are a few options that enable some of these couples to remain together in the United State; a majority of couples, however, are unable to pursue such options and are forced to separate or move to a country that will recognize their relationships.

One such option involves engaging in unlawful sham marriages to acquire immigration status. Persons who commit fraud via a sham marriage face serious fines (up to $250,000), prison time, and even de-

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45 See DeCanas v. Bica, 424 U.S. 351, 354 (1976). Aliens may be subject to state statutes, without such statutes rising to the level of an immigration regulation. See id. at 355.
46 See id.; Evan Gerstmann, Same-Sex Marriage and the Constitution 7 (2d ed. 2008). DOMA’s constitutionality is also an issue of contention; on March 3, 2009, a lawsuit was brought in the Federal District Court of Massachusetts questioning the constitutionality of the Act. See Jason Szep, Married Gay Couples Sue U.S. Seeking Federal Rights, REUTERS, Mar. 3, 2009, http://www.reuters.com/article/topNews/idUSTRE52261H20090303?feedType=RSS &feedname=topNews. In Massachusetts eight same-sex couples, as well as three gay widowers, filed the first major lawsuit questioning the constitutionality of the Act and seeking access to the federal rights of traditionally married couples. See id. The plaintiffs are being represented by Gay & Lesbian Advocates & Defenders (GLAD). Complaint for Plaintiffs at 91, Gill v. Office of Pers. Mgmt., No. 09 Civ. 10309 (D. Mass. Mar. 3, 2009). Plaintiffs argue that they have been denied a) “spousal protections based on their employment with . . . the United States Government,” b) “their correct spousal status by the Internal Revenue Service,” c) correct spousal “protections afforded by the Social Security program,” and d) correct passport issuance. See id. at 3–5. The suit specifically alleges that the plaintiffs are denied federal benefits that would be available to opposite-sex couples. See id. at 2, 5. Thus, GLAD is challenging this provision based on its violation of the Equal Protection Clause of the United States Constitution as found in the Fifth Amendment. See id. at 66–96. This suit will put President Obama’s agenda to the test. See Ruth Marcus, Obama’s Words Put to the Test, SEATTLE-POST INTELLIGENCER, Mar. 4, 2009, at A15. As a candidate, he continuously supported the full repeal of DOMA. See id. As President, however, his Justice Department is likely “obligated to defend the constitutionality of a statute.” See id. The question remains whether President Obama will stand by his election promises or avoid stirring controversy with conservatives. See id.
47 Ayoub & Wong, supra note 35, at 560.
48 See id.
49 See Clifford, supra note 44, at 61.
portation for the immigrant. Other individuals successfully stay in the country through the Diversity Immigrant Visa Lottery (Diversity Lottery). In 1988 Congress created the Diversity Lottery Program, which offers 50,000 diversity visas per year. The lottery is available to those who meet the program’s eligibility requirements and are from countries “with low rates of immigration to the United States.” Anyone can enter the Diversity Lottery if they are a native of a country with a low immigration rate, have a high school diploma, or, in the alternative, a minimum of two years job experience. If successful, the immigrant will obtain legal permanent residence in the United States. The unfortunate news for same-sex couples with respect to the diversity lottery is that millions apply every year and only 50,000 individuals win a visa. Furthermore, many individuals will be barred from the lottery based on their country of nationality, because there are many countries not eligible for the lottery. In other words, the lottery could be a “last-ditch chance” for acquiring immigration status for a non-U.S. national, but it would require the same-sex couple to stake their future together on a chance less than that of “the throw of the dice.”

Other individuals are able to remain in the United States through employment. In some cases, individuals who possess job skills that are in short supply in the United States can be sponsored for a green card. Nevertheless, employment-based immigration visas are incredibly difficult to earn. An employment-based visa in almost every instance will require an employer to show that there are no qualified U.S. individuals to fill the immigrant’s position. Furthermore, there are very few companies who put the time or effort into hiring immigrants. And the reality is that work visas expire; they do not offer permanent stability for

50 See id. Deportation will likely result in the immigrant being barred from ever returning to the United States. See id.
51 See id. at 62; Dep’t of State, Diversity Visa Program, http://travel.state.gov/visa/immiгранts/types/types_1322.html (last visited Apr. 5, 2010).
52 See Dep’t of State, supra note 51.
53 See id.
54 See id. Many individuals who “win” a diversity visa are unable to obtain their green cards due to no fault of their own. See Clifford, supra note 44, at 62.
55 See Clifford, supra note 44, at 62.
56 See id.; see also Long, supra note 2, at 36.
57 See Long, supra note 2, at 36.
58 See id. at 36–37.
59 See id. at 36.
60 See Clifford, supra note 44, at 62.
61 See id.
62 See Long, supra note 2, at 36.
63 See id.
same-sex binational couples.\textsuperscript{64} Also, employment visas are not only challenging to acquire but can also result in couples’ intertwining their lives together and can damage their ability to stay together.\textsuperscript{65} Employment visas are conditioned on an individual’s intention to return to her/his country of origin.\textsuperscript{66} If the government finds out an individual is in a same-sex relationship, it might assume that person’s intent to remain in the United States and therefore deport her/him.\textsuperscript{67}

There are a number of work-related visas for which individuals may qualify for: the H-1B visa, the O-1 visa, and the P visa.\textsuperscript{68} An H-1B visa is a work-based visa.\textsuperscript{69} An O-1 visa is available to persons who have extraordinary work ability.\textsuperscript{70} Persons who are internationally recognized athletes or entertainers might be able to qualify for a P visa.\textsuperscript{71} Students can also stay in the United States on student visas so long as they are registered as full-time students.\textsuperscript{72}

Another option for gay and lesbian foreigners is to apply for asylum in the United States if they successfully demonstrate a “well-founded fear of persecution in their country of origin based on their

\textsuperscript{64} See \textit{id.} at 42.  
\textsuperscript{65} See \textit{id}.  
\textsuperscript{66} See \textit{id}.  
\textsuperscript{67} See \textit{Long, supra} note 2, at 42.  
\textsuperscript{68} See \textit{Clifford, supra} note 44, at 63.  
\textsuperscript{69} See \textit{id}.  An H-1B visa is for temporary workers in specialty occupations. See \textit{id}. The employee seeking an H1-B must be sponsored by a U.S. Citizenship and Immigration Services (USCIS) approved employer for a particular position for a specific period of time, initially up to three years. See \textit{Div. of Int’l Servs., Nat’l Insts. of Health, Summary of Nonimmigrant Visa Classifications} (2006), http://dis.ors.od.nih.gov (follow “Visa Information” hyperlink; then follow “Visa Classifications Chart” hyperlink).  
\textsuperscript{70} See \textit{Clifford, supra} note 44, at 63. In order to obtain an O-1 visa foreigners must “demonstrate the sustained national or international acclaim and recognition for achievements in science, education, business or athletics.” Yale Univ., O-1 Visa, http://www.yale.edu/oiss/immigration/other/ (follow “Exceptional Ability” hyperlink) (last visited Mar. 25, 2010). The immigrant can only be employed through an employer who petitions for the worker’s visa. See \textit{id}.  
\textsuperscript{71} See \textit{Clifford, supra} note 44, at 63.  
\textsuperscript{72} See Yale Univ., F-1 Visa, http://www.yale.edu/oiss/immigration/common (follow “F-1 students” hyperlink; then follow “Reinstatement” hyperlink) (last visited Apr. 5, 2010). An F-1 student visa places an additional burden on the immigrant to show that she/he can fund their entire education. See \textit{Clifford, supra} note 44, at 63. Similarly, a J-1 visa allows an individual to stay in the United States while in school and further grants students eighteen months of “academic” job training during their program. See Yale Univ., J-1 Student Visa, http://www.yale.edu/oiss/immigration/other/ (follow “Student Intern” hyperlink) (last visited Apr. 5, 2010). Unlike the F-1 visas, persons using a J-1 visa must return to their home country for two years after completing their program before they can qualify for other visas in the United States. See Yale Univ., F-1 Versus J-1, http://www.yale.edu/oiss/immigration/common (follow “F-1 versus J-1” hyperlink) (last visited Apr. 5, 2010).
proclaimed sexual orientation.” Specifically, gays and lesbians are granted asylum based on their past persecution or fear of future persecution due to their sexuality. The immigrant applying for asylum must be in the United States when she/he applies; individuals living abroad cannot apply for asylum, but only for refugee status, which is harder to obtain. A gay individual seeking asylum would have to demonstrate that her/his need for asylum is based on the need “to stay alive and free.” Nevertheless, because of anti-immigrant sentiments, a grant of asylum is quite difficult to obtain.

The ability of gay immigrants to apply for asylum was affirmed by Attorney General Janet Reno in 1994, when she stated that In re Toboso-Alfonso would be “precedent in all proceedings involving the same issue or issues.” In the case, Fidel Armando Toboso applied for asylum status after being paroled into the United States in June of 1980 as part of a Mariel Boat Lift. In 1985 his parole was terminated, and he was placed before an immigration judge where he admitted he was deportable but applied for asylum rather than return to Cuba. An immigration judge withheld his deportation based on his membership in a so-

73 See Wygonik, supra note 22, at 502. The first time asylum was granted on the basis of sexuality was in 1990. See id. In that year the BIA granted asylum to a Cuban man who was persecuted for being gay. See In re Toboso-Alfonso, 20 I. & N. Dec. 819, 821–23 (B.I.A. 1990). Currently, a person may be granted asylum if it is determined an individual is “unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” See Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(42), 1158(b)(1) (2006).

74 See Wygonik, supra note 22, at 503.

75 See Clifford, supra note 44, at 61. Individuals intending to apply for asylum must apply within one year of arrival in the United States. See id. at 62.

76 See Long, supra note 2, at 44.

77 See id. Claims based on sexual orientation carry their own unique risks. See id. Because homosexual applicants are often unaware of the one year filing deadline, they may fail to apply in time. See id. Additionally, homosexuals might not apply for asylum due to danger in their own foreign communities. See id.

78 Attorney General Order No. 1895–94 (June 19, 1994) (“I hereby designate the decision of the Board of Immigration Appeals in In re Fidel Toboso-Alfonso (A-23220644) (March 12, 1990) as precedent in all proceedings involving the same issue or issues.”).


80 See id. The immigration judge ultimately concluded that the applicant was statutorily eligible for asylum as he was a member of a particular social group who fears persecution by the Cuban government. See id. He was not granted asylum per the judge’s discretion, though he was withheld from deportation. See id.
cial group. The Immigration and Naturalization Service (INS) appealed this finding; the BIA held that the INS did not provide sufficient information to determine gays were not part of a particular social group. The BIA also determined that there was no error in the immigration judge’s finding that Alfonso’s life or freedom would be threatened if he remained in Cuba.

The benefit of applying for asylum if successful is that the asylee can remain in the United States for as long as it is unsafe for her/him to remain in her/his country of origin. The individual can also remain in the United States indefinitely as long as she/he applies for legal permanent residence within one year after getting asylum. Yet, as indicated, achieving asylum in the United States has become increasingly difficult. Also, asylum officers and immigration judges are sometimes insensitive to same-sex couples; due to a lack of knowledge regarding gender and sexuality, they could treat an individual with sarcasm and insensitivity resulting in applicants keeping their sexuality secret. Overall, while gay rights were arguably expanded by the In re Toboso-Alfonso decision, they were also limited through the passage of DOMA.

C. An International Perspective

The immigration dilemma facing same-sex binational couples in the United States is further illuminated through a brief comparison of same-sex binational immigration rights in other western democracies. In fact, most industrialized democracies recognize same-sex immigration rights.

81 See id. Alfonso asserted that he was a homosexual who would be persecuted if he returned to Cuba. See id. He claimed that if he returned he would be regularly detained by the Cuban authorities. See id. at 820–21.
82 See id. at 822.
83 See id. at 823.
84 See Clifford, supra note 44, at 62.
85 See id.
86 See Long, supra note 2, at 44.
87 See id. at 45.
88 See Wygonik, supra note 22, at 503–04.
89 See Wilets, supra note 18, at 328.
90 See id. at 329.
land, Norway, Sweden, Iceland, the United Kingdom, Australia, Brazil, France, Germany, Israel, Portugal, and Switzerland.91

The European Union (EU) has also established that same-sex couples in the EU are entitled to the freedom “to move and reside” among its member states in an equal manner as that of opposite-sex couples.92 This establishing directive only affects same-sex couples where one individual is an EU citizen.93 Ultimately, the directive allows freedom to move and live within the EU to registered partners.94 Therefore, member states that recognize same-sex partnerships must grant the right to enter and reside to recognized partners, where one individual is an EU citizen.95 For couples who are not married, the directive also provides some protection, in that Member States must provide the means for “unmarried partners [to] request admission.”96

In the EU, member states must ensure that their legislation: a) does “NOT exclude same-sex married couples;” b) “include[s] registered partners, where national law permits registered partnership;” c) provides a means for unmarried partners and their families to move and reside in the member state; d) “include[s] children who have a legally-recognized relationship with an EU citizen;” e) implements the Directive without discriminating based on sexual orientation; and f) provides that the admission of children into the EU is not discriminatory and is in the best interest of children.97 The EU is an important point of comparison on the issue of same-sex immigration benefits in the United

91 See id. In addition to same-sex immigration rights, several western countries offer marriage rights to same-sex couples. See GERTSMANN, supra note 46, at 6. On April 1, 2001, the Netherlands became the first country to legalize same-sex marriage. See id. Then in 2003 Belgium also granted marriage rights to homosexuals. See id. Canada legalized same-sex marriage in 2005, as did Spain. See id. Several European countries also recognize same-sex civil partnerships or quasi-marital same-sex unions including the United Kingdom, Norway, Sweden, and Iceland. See id. Lastly, the highest court in South Africa found the definition of marriage as solely between a man and a woman unconstitutional. See id.


93 See id.

94 See Mark Bell, Int’l Lesbian & Gay Assoc., EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process 6 (2005). Bell explains that the Directive does this by defining a “family member” as the partner of a EU citizen, who has a legal partnership based on “the legislation of a Member State.” See id. The Member State must, however, treat partnerships as equal to marriage. See id.

95 See id.

96 See id. at 9.

97 See id. at 15.
States, because like the United States, the EU provides law for several of its member states, which affects individual EU citizens.98

Perhaps most interesting is Brazil, a country that has experienced recent progressive legislation, while also having a history of “significantly more anti-gay violence than the United States.”99 In April 2000, a Brazilian federal court decided that Brazilian gay and lesbian couples in permanent relationships have the same status as heterosexual couples for the purposes of social security benefits and public pensions.100 In 2003, the Brazilian National Immigration Council decided that same-sex couples could enjoy immigration benefits in Brazil.101 As of 2004, the country had established procedures to enable same-sex binational couples to immigrate to Brazil.102 If a same-sex couple wants to pursue a family in Brazil, it can enjoy immigration rights that are comparable to those of opposite-sex married couples.103

II. EQUALITY FOR SAME-SEX IMMIGRATION: THE UNITING AMERICAN FAMILIES ACT

On February 14, 2000, New York Democratic Representative Jerrold Nadler introduced the Permanent Partners Immigration Act, (PPIA).104 The bill sought to “amend the Immigration and Nationality Act to provide a mechanism for United States citizens and lawful permanent residents to sponsor their permanent partners for residence in the United States, and for other purposes.”105 In 2005, Vermont Democratic Senator Patrick Leahy introduced the bill in the Senate under the name Uniting American Families Act.106

98 See Wilets, supra note 18, at 351 (analogizing the EU federal system to that of the United States).
100 See MERIN, supra note 39, at 357–58.
102 See id.
103 See id.
104 See Miluso, supra note 31, at 916. Effectively the PPIA would not have recognized marriage rights between same-sex partners but would rather simply treat the partners as spouses. See Zaske, supra note 31, at 634.
On May 8th, 2007, the Uniting American Families Act was introduced to the House of Representatives and the Senate.\(^{107}\) Due to UAFA’s failure to pass in either the House or the Senate in 2007, it was most recently introduced to the House and the Senate on February 12, 2009.\(^{108}\) The UAFA proposes to end discrimination in current immigration laws against same-sex binational couples.\(^{109}\) Specifically, it allows same-sex permanent partners of U.S. citizens to gain immigration status in the United States in the same manner as opposite-sex couples but without a marriage requirement.\(^{110}\)

A couple under the UAFA will have to meet several requirements to qualify for immigration benefits.\(^{111}\) First, the UAFA defines a permanent partner as an individual who is over eighteen years old, and “in a committed, intimate relationship with another individual eighteen years of age or older in which both individuals intend a lifelong commitment.”\(^{112}\) Additionally, the partners must be financially dependent on one another, not be married to anyone else or in a permanent partnership with anyone else, not be able to legally marry one another under federal law, and not be first, second, or third degree blood relatives.\(^{113}\)

As indicated, the UAFA does not grant or extend marriage benefits to same-sex couples; the lack of marriage benefits is important, as it avoids the larger issues of recognizing same-sex unions, but still grants same-sex couples an essential right to live in the United States.\(^{114}\) In fact, the UAFA specifies that immigration benefits are contingent on the couple not qualifying for marriage under Federal law.\(^{115}\) As a result, the Act has the propensity to “eliminate the physical barrier” that di-


To amend the Immigration and Nationality Act to eliminate discrimination in the immigration laws by permitting permanent partners of United States citizens and lawful permanent residents to obtain lawful permanent resident status in the same manner as spouses of citizens and lawful permanent residents and to penalize immigration fraud in connection with permanent partnerships.

H.R. 2221; S. 1328.


\(^{109}\) See H.R. 1024; S. 424.

\(^{110}\) See H.R. 1024; S. 424.

\(^{111}\) See H.R. 1024; S. 424.

\(^{112}\) See H.R. 1024; S. 424.

\(^{113}\) See H.R. 1024; S. 424.

\(^{114}\) See Wilets, supra note 18, at 328.

\(^{115}\) See H.R. 1024; S. 424.
vides same-sex binational couples. Important to some, the UAFA does not even change the federal definition of spouse. This “conceptual decoupling” of same-sex relationships and same-sex immigration therefore avoids the controversial debate surrounding same-sex marriage. This scenario is similar to the immigration scenarios for same-sex couples in both Australia and Israel.

Similarly, the UAFA addresses another common concern in immigration benefits: fraud. Specifically, section 14 provides that aliens can be deported for fraud if they enter into a same-sex relationship within two years of admission to the United States and then separate within two years following that admission, they will have the burden of showing that the partnership “was not contracted for the purpose of evading any provision of the immigration laws.” Fraud can also be shown if “it appears to the satisfaction of the Secretary of Homeland Security that the alien has failed or refused to fulfill the alien’s permanent partnership, which the Secretary of Homeland Security determines was made for the purpose of procuring the alien’s admission as an immigrant.” Therefore, not only would same-sex binational couples be subject to the same requirements of heterosexual couples and fraudulent marriages, but the UAFA also provides strict and severe punishment if partners are found to have committed fraud.

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116 See Romero, supra note 21, at 73. Romero uses the phraseology “physical barriers” in a most literal sense, that the UAFA allows same-sex binational couples to live in the United States together, rather than be separated by national borders. See id.

117 See Ayoub & Wong, supra note 35, at 571–72.

118 See Wilets, supra note 18, at 328.

119 See Ayoub & Wong, supra note 35, at 573. In April of 1991 the Australian government created a new visa category for common law relationship and same-sex couples. See Wilets, supra note 18, at 331. In 2000 the Israeli Ministry of the Interior created a same-sex immigration right for non-Jewish partners of Jewish citizens. See id. at 338. From a same-sex marriage perspective in Israel and Australia both countries recognize some sort of same-sex rights. See id. In Israel same-sex benefits date as far back as 1994 when the Israeli Supreme Court declared that not providing employee benefits to a same-sex partner was unconstitutional per the Israeli Equal Employment Opportunity Act, which protects homosexuals from workplace discrimination. See Merin, supra note 39, at 356. In Australia the eight states that comprise the country enact their own laws with respect to family law, criminal law, and antidiscrimination law. See id. at 170. Currently the Capital Territory, New South Wales, and Victoria have legislation acknowledging the relationships of same-sex couples. See id. Victoria is the only state in Australia with laws that provide the same rights to same-sex couples as opposite-sex couples. See id. at 170–71.

120 See H.R. 1024; S. 424.

121 See H.R. 1024; S. 424.

122 See H.R. 1024; S. 424.

123 See Ayoub & Wong, supra note 35, at 573.
Currently the UAFA has support from twenty-three Senate members and 119 Representatives. If passed, it would allow same-sex binational couples to strengthen their families. Couples would be able to maintain family unity, rather than be forced to separate, face deportation, or leave the United States. Similarly, through passing an act that would grant same-sex couples immigration benefits, the United States would no longer lag behind the many countries that offer same-sex immigration benefits. The United States would have the opportunity to maintain its image as a country at the forefront of human rights.

III. Barack Obama: 2008 Election Promises and his Political Record on Gay and Lesbian Issues

Barack Obama, as America’s 44th President, has assumed the leadership of the United States, a country that is still arguably “the most powerful in the world.” Richard Holbrooke notes that of President Obama’s tasks he needs to a) control the sprawling federal bureaucracy, b) change the relationship between the executive and legislative


125 See Ayoub & Wong, supra note 35, at 596.

126 See id.

127 See Zaske, supra note 31, at 627.

128 See id.

129 See Richard Holbrooke, The Next President: Mastering a Daunting Agenda, FOREIGN AFF., Sept.-Oct. 2008, at 22; President Barack Obama, supra note 29. Barack Obama was born on August 4, 1961 in Hawaii. See Organizing for America, Meet the Candidate: Meet Barack, http://www.barackobama.com/about/ (last visited Mar. 28, 2010). President Obama comes from a binational family: his father was born in Kenya and his mother was from Kansas. See id. He graduated from Columbia University in 1983 and Harvard Law School in 1991, where he was the first African-American president of the Harvard Law Review. See id. The President considers himself a politician who is cognizant of the globalized world we live in, preaching “fresh thinking and a politics that no longer settles for the lowest common denominator.” See id.
branches, and c) recruit support for other non-governmental sectors. President Obama also faces a crumbling immigration system that is in need of reform.

During his 2008 campaign, Mr. Obama maintained that he was opposed to same-sex marriage, but also opposed an amendment to the United States Constitution defining marriage as solely between one man and one woman. Mr. Obama also claimed to oppose bans on same-sex adoption rights and support civil unions for gay people. Importantly, during his election he advocated for and remained committed to the message that “equality is a moral imperative” for Americans. He specifically promised to fight for the repeal of DOMA. Moreover, the President claimed to support the passing of the Employment Non-Discrimination Act (EDNA), which would prohibit job discrimination based on sexual orientation and gender.

During his campaign, he also supported several other Gay, Lesbian, Bisexual, and Transgender (GLBT) issues such as 1) access to survivor benefits for same-sex partners; 2) equal tax treatment for same-sex couples; 3) domestic partner benefits for federal employees including health insurance; and 4) repealing the so-called “Don’t Ask, Don’t Tell” policy within the military. Most importantly during his campaign Mr. Obama also stated that he supported equal immigration rights for same-sex couples via the UAFA. During his tenure as a Junior Senator, however, he never signed the UAFA.

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130 See Holbrooke, supra note 129, at 21. Between 1999 and 2001, Mr. Holbrooke was a U.S. Ambassador to the United Nations. Id. He is the architect of the 1995 Dayton Peace Agreement. Id.


134 See Open Letter from Barack Obama, supra note 23.

135 See id.

136 See id.


138 See id.

139 See Kathy Drasky, Obama Says He Has “Worked to Improve” the Uniting American Families Act (UAFA), INDYBAY (S.F., Cal.), Feb. 29, 2008, http://www.indybay.org/newsitems/2008/02/29/18482630.php. In the first weeks of his presidency, President Obama angered members of the gay community. See Ed Stoddard, Obama Must Work for Compromise in U.S. Culture War, REUTERS, Jan. 19, 2009, http://www.reuters.com/article/idUSTRE504BR20090119. Namely, he came under criticism when he invited conservative pastor Rick Warren to his inauguration as a speaker. See id. Warren had previously made several controversial com-
IV. IMMIGRATION LAW: THE FEDERAL BALANCE

The Bush administration sought to strengthen the power of the executive branch, requesting minimal oversight from Congress and the Supreme Court. President Bush used the September 11, 2001 attacks to expand the power of the executive branch. Immigration law, particularly the executive’s power to exclude, became one way Bush experimented regarding homosexuality, including that it is “not the natural way” and that “[c]ertain body parts are meant to fit together.” See John Cloud, The Problem for Gays with Rick Warren—and Obama, TIME, Dec. 18, 2008, http://www.time.com/time/politics/article/0,8599,1867664,00.html. Yet Mr. Obama also invited openly gay bishop Gene Robinson to his inauguration. See Stoddard, supra. In its previous version, the White House webpage boasted an impressive commitment to expanding the rights of homosexuals in the United States. See The White House, Civil Rights, http://www.whitehouse.gov/agenda/civil_rights/ (last visited Apr. 5, 2009). The administration explicitly advocated expanding hate crime statutes, fighting workplace discrimination, supporting full civil unions and federal rights for LGBT couples, opposing a constitutional ban on same-sex marriage, repealing Don’t Ask-Don’t Tell, expanding adoption rights for same-sex couples, promoting AIDS prevention, and empowering women to prevent HIV/AIDS. See id. While the current website continues to indicate support for the GLBT community, its explicit language is substantially reduced. See The White House, Civil Rights, http://www.whitehouse.gov/issues/civil-rights (last visited Apr. 5, 2010) [hereinafter White House, Civil Rights].

Despite recent progress, President Obama has disappointed some by moving slowly with respect to repealing the military’s “Don’t Ask-Don’t Tell” policy. See Doug Sovenn, Obama Disappoints Gay Rights Advocates (KCSC radio broadcast Feb. 2, 2009). “Don’t Ask-Don’t Tell” is a public policy in the United States codified by the National Defense Authorization Act for Fiscal Year 1994. See 10 U.S.C. § 654 (2006). It prohibits any person who (1) engages in homosexual activity; or (2) expresses that they are a homosexual; or (3) is in a homosexual marriage from serving in the U.S. military. See id. § 654(b). The law excludes openly gay individuals from military services because homosexuals “create an unacceptable risk to the armed forces high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.” See id. § 654(a)(14). The U.S. military is currently investigating the possibility of eliminating the “Don’t Ask, Don’t Tell” policy. Gordon Lebold, Pentagon Treads Carefully in Examining “Don’t Ask, Don’t Tell,” CHRISTIAN SCI. MONITOR, Mar. 31, 2010, http://www.csmonitor.com/USA/Military (follow “View All Military” hyperlink; then follow “Pentagon Treads Carefully in Examining “Don’t Ask, Don’t Tell” hyperlink). On March 25, 2010, Defense Secretary Robert M. Gates revealed interim military provisions that will make it more difficult to discharge openly gay men and lesbians. Thom Shanker, A Military Downgrading of “Don’t Ask, Don’t Tell,” N.Y. TIMES, Mar. 26, 2010, at A17. The new measures limit those military members who can initiate “Don’t Ask, Don’t Tell” related proceedings. Id. The measures also attempt to eliminate the ability of third parties to “out” members of the military. Id.

141 See id. at 224.
panded this authority.\textsuperscript{142} Immigration law in the United States, however, is not solely in the hands of the Executive branch.\textsuperscript{143} Rather, it rests within the hands of the entire federal government.\textsuperscript{144} Nevertheless, immigration law has not always rested within the federal government’s jurisdiction.\textsuperscript{145} In fact, prior to the 1870s it was the individual states that patrolled interstate and international immigration.\textsuperscript{146} Although the Constitution of the United States contains a Naturalization Clause, it does not explicitly give Congress the right to regulate the process of gaining admission to the United States.\textsuperscript{147} It was not until 1889 that the Supreme Court found an inherent federal power granting Congress the right to regulate the United States’ borders and exclude certain foreigners from entering the country.\textsuperscript{148} Despite Congress’s inherent power, in practice the President is an influential player in U.S. immigration policy.\textsuperscript{149}

A. Congress’s Immigration Power

The Supreme Court has declared that “over no conceivable subject is the legislative power of Congress more complete than it is over the

\textsuperscript{142} See id.


\textsuperscript{144} See id.

\textsuperscript{145} See Lee, supra note 140, at 228–29.

\textsuperscript{146} See id.

\textsuperscript{147} See U.S. Const. art. 1, § 8. The Constitution grants Congress the power to “establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.” See id.

\textsuperscript{148} See Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 585 (1889). In this case, the Court looked to the validity of the 1888 Chinese Exclusion Act, which prevented the re-entry of Chinese laborers who left the United States prior to the enactment of the Act. See id. at 605. The Court found that inherent in the power of the legislature and the national government was its ability to exclude aliens from its territory. See id. at 603. Echoing Chief Justice Marshall, Justice Field stated:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

See id. at 604 (quoting Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812)).

\textsuperscript{149} See Rosenblum, supra note 143, at 1.
admission of aliens.”150 Congress’s plenary power in the realm of immigration extends so far that it may be unconstitutional if applied to domestic policy.151 Congress itself established its power in the realm of immigration with the Immigration Act of 1882.152 The Act’s primary purpose was to act as a ban, prohibiting “undesirable migrants” from entering the United States.153 In 1889 the Supreme Court, in the Chinese Exclusion Case, again declared that Congress had the power to regulate immigration, “even when doing so involved overriding international treaties.”154

Furthermore, the Supreme Court has repeatedly refused to interfere in Congressional alien admission requirements, even when those requirements would not pass constitutional scrutiny domestically.155 An important example of such deference is evidenced in Boutilier v. INS.156 Boutilier was a gay Canadian alien, ordered by INS to be deported to Canada.157 His deportation was based on his status as a homosexual.158 The INA specifically allowed the removal of individuals “afflicted with psychopathic personality,” and at the time, homosexuality counted as such an affliction.159 The Court found that the language “psychopathic personality” was intended specifically to exclude homosexuals from the United States.160 In its decision, the Court accepted and stood by the Congressional decision to exclude homosexuals.161

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151 See 3A Am. Jur. 2d Aliens and Citizens § 282 (2005). Congress, however, does share immigration power beyond its admission power with the executive branch through the Senate’s execution of treaties, the legislative powers of Congress, and sometimes, the executive’s own authority. See id.
152 See Rosenblum, supra note 143, at 5.
153 See id.
154 See id. See generally Chinese Exclusion Case, 130 U.S. at 609 (upholding and explaining Congress’s plenary power to exclude foreigners even if contrary to a treaty).
155 See Lee, supra note 140, at 228.
156 See 387 U.S. 118, 122–25 (1967). While homosexuality is no longer a basis for excluding individuals from the United States, the case nonetheless shows the Court’s unwillingness to interfere with the Congressional right to determine admission criteria. See id. at 123.
157 See id. at 118.
158 See id.
159 See id. at 118–19.
160 See id. at 124.
161 See Boutilier, 387 U.S. at 124. The Court stated that “[h]ere Congress commanded that homosexuals not be allowed to enter.” See id. Moreover, “[i]t can hardly be disputed that the legislative history of § 212(a) (4) clearly shows that Congress so intended.” Id. (discussing the possible ambiguity surrounding the words “psychopathic personality”).
The underpinnings of the INA’s gay immigration ban, however, were essentially undone by *Hill v. INS* in 1983.\(^\text{162}\) In 1980, Carl Hill arrived in San Francisco and verbally admitted to U.S. Customs that he was gay.\(^\text{163}\) Based on his admission of homosexuality he was excluded from the United States.\(^\text{164}\) Nevertheless, the Ninth Circuit found that his exclusion was improper and that one could not be excluded from the United States based solely on her/his admission of homosexuality.\(^\text{165}\) Importantly though, the Court did not comment on the INA’s homosexual ban but rather ruled that further exclusions of individuals based on their homosexuality would face “serious legal scrutiny.”\(^\text{166}\)

Therefore, even with the *Hill* ruling, it was not until Congress acted in 1990, finding that individuals could not be barred from immigrating to the United States based solely on their sexuality, that the homosexual immigration ban was repealed.\(^\text{167}\) Additionally, the continued Congressional deference with respect to the admission criteria of aliens in the United States has allowed the exclusion of aliens for their male gender (father in an illegitimate-child relationship) as well as political beliefs.\(^\text{168}\) But Congress’s power in the realm of immigration is

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\(^\text{162}\) *See Long, supra* note 2, at 26; *see also* *Hill* v. *INS*, 714 F.2d 1470, 1480 (9th Cir. 1983) (“The only evidence upon which a finding of insanity can be made for the purpose of an exclusion proceeding is a certification . . . by a medical officer . . . specially designated civil surgeons, or a board of Public Health Service Officers.”).

\(^\text{163}\) *See Hill*, 714 F.2d at 1473.

\(^\text{164}\) *See id.*

\(^\text{165}\) *See id.* at 1480.

\(^\text{166}\) *See id.*; *Long, supra* note 2, at 26–27 (analyzing *Hill*).

\(^\text{167}\) *See Long, supra* note 2, at 28. This decision marked the United States as the last industrialized country to remove a ban on homosexual immigration. *See id.* The 1990 Immigration Act also allowed the Department of Health and Human Services to lift the 1987 HIV ban. *See id.* In 1993, however, Congress reintroduced the ban specifying that the HIV/AIDs infections were grounds for excluding individuals from immigrating to the United States. *See id.* This is pertinent to homosexual immigration because of the many stereotypes homosexual individuals face associate them with the HIV virus. *See id.* at 29.

\(^\text{168}\) *See Fiallo v. Bell*, 430 U.S. 787, 789 (1977); *Kleindienst*, 408 U.S. at 770; *Boutilier*, 387 U.S. at 124. In *Fiallo v. Bell*, three fathers and their children (either the child was an alien, or the father was an alien) born out of wedlock desired to attain immigrant status for the alien on the basis of their “relationship to a citizen or resident alien child or parent.” *See* 430 U.S. at 790. They challenged INS law because, under the law, “the natural father of an illegitimate child who is either a United States citizen or permanent resident alien is not entitled to preferential treatment as a ‘parent.’” *Id.* at 789. In *Kleindienst v. Mandel*, Mandel was a Belgian citizen who described himself as a “revolutionary marxist,” despite his lack of membership in the communist party. *See* 408 U.S. at 789. The Court found that Mandel, and other excludable aliens, did not have a First Amendment Right to appeal their exclusion. *See id.* at 767–68.
not without limits, especially when balanced with the executive’s power to exclude aliens.\footnote{See United States ex rel. Knauff v. Shaughtnessy, 338 U.S. 537, 542 (1950) (discussing the inherent ability of the Executive to exclude aliens).}

\section*{B. The President’s Immigration Powers}

President George W. Bush’s administration adopted an expansive view of presidential authority, accrediting the need for national security to the September 11, 2001 attacks.\footnote{See Lee, supra note 140, at 223–24.} The attacks spurred anxiety over terrorism that has since altered and impacted immigration debates.\footnote{See Long, supra note 2, at 32.} Even sexual rights discussions encompass anti-terrorist sentiment.\footnote{See id.} For example, a same-sex married couple was stopped at the Canadian border because they tried to use the same paperwork as used by heterosexual married couples.\footnote{See id.} A conservative women’s group reported that many people fear unregulated borders and that in this instance the border police were able to stop “domestic terrorists.”\footnote{See id.}

Furthermore, President Bush expanded executive power through immigration law.\footnote{See John P. Mackenzie, Absolute Power: How the Unitary Executive Theory Is Undermining the Constitution 1 (2008); Lee, supra note 140, at 224.} Specifically, the Bush administration used its authority over the nation’s security and welfare as a means of creating a powerful executive branch that did not want oversight or to bargain with Congress.\footnote{See Mackenzie, supra note 175, at 1.} Bush used the executive’s power in immigration for an increase in “interrogation, incapacitation and deportation.”\footnote{See Lee, supra note 140, at 224 (stating that the Justice Department detained and deported more than 1000 persons on various immigration-related grounds following September 11, 2001).}

Thus, as indicated, the President has substantial power with respect to immigration in the United States, especially regarding the exclusion of immigrants.\footnote{See Immigration and Nationality Act, 8 U.S.C § 1182(f) (2006).} The Immigration and Nationality Act provides that when the President finds that the admission of a group of aliens is detrimental to the United States, he may suspend the entry of those aliens, or impose restrictions on their entry as he finds necessary.\footnote{See id. The INA specifically states:

Whenever the President finds that the entry of any aliens or any class of aliens into the United States would be detrimental to the interests of the United
The President also has a role in influencing the enforcement of these immigration policies. Ultimately, the Executive has become successful in immigration enforcement because unlike congressional subcommittees, the executive branch has many resources. Specifically, the Executive branch has the ability to write regulations, while Congress is often unaware of the enforcement policies and procedures already in place.

The Supreme Court has also noted that the President’s power in immigration is intrinsically linked to the executive power to control foreign affairs. The Court in United States ex rel. Knauff v. Shaugnessy founded the doctrine of national sovereignty power and held that the President’s right to exclude aliens was a fundamental act of such sovereignty. Knauff involved a female German national, who left her country during Hitler’s time in power. She subsequently married a U.S. citizen while working for the U.S. government in Germany. Upon seeking entrance to the United States, she was temporarily excluded and then per an order of the Attorney General, permanently excluded. The Court held that it was in the inherent power of the executive as a result of the President’s need “to control the foreign affairs of the nation.”

After the Knauff Court declared the President’s inherent power to exclude aliens, Congress legitimized the decision in the 1952 Immigration and Nationality Act. The Supreme Court, since the Knauff decision, has not clarified whether the Executive right to exclude is inherent or Congressionally delegated. But since the 1950s the lower

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Id.

180 See Rosenblum, supra note 143, at 6.
181 See id. at 10–11.
182 See id. at 6–7.
183 See Knauff, 338 U.S. at 542.
184 See id.; Lee, supra note 139, at 238.
185 See 398 U.S. at 539.
186 See id.
187 See id. at 539–40.
188 Id. at 542. The Court also noted that an executive officer such as the Attorney General could be delegated to carry out the functions of exclusion. See id. at 543.
190 See Lee, supra note 140, at 241.
courts have used § 212 of the INA as the basis of the President’s ability to exclude aliens.\textsuperscript{191} Yet, nowhere is the President authorized to establish the criteria of admission into the United States.\textsuperscript{192} The President, however, is able to use immigration as a tool of foreign policy, even with Congress’ domestically-oriented concerns.\textsuperscript{193}

Even from a minimalist’s perspective the President has some role in commenting on legislative proposals and also has the power to veto legislative agendas.\textsuperscript{194} Examples include: executive commentary, which can be influential in the legislative process, and also Presidents’ influence of legislative immigration via the veto.\textsuperscript{195} Thus, Presidents comment on Congressional immigration proposals as well as have the ability to approve or veto a final immigration act.\textsuperscript{196} Immigration is, in fact, one of the most divisive issues between the President and Congress.\textsuperscript{197} Rosenblum notes that from 1882 to 1952 the President vetoed ten proposed immigration laws.\textsuperscript{198} This number of vetoes by the President is significant as since the 1882 Chinese Exclusion Act, Congress “has passed only eight separate major immigration laws, amended the basic INA another half-dozen times, and held regular oversight and investigative hearings on a range of immigration issues.”\textsuperscript{199}

C. The Intersection of Presidential, Congressional, and Judicial Power Regarding Immigration Policies

Generally, there is a very limited amount of interference from the judiciary in the areas of immigration and naturalization.\textsuperscript{200} Government action with respect to aliens is not however completely immune from judicial interference.\textsuperscript{201} Courts examine immigration policies when there is a concern that the Plaintiff’s constitutional rights are being violated.\textsuperscript{202} They are also may examine policies that involve separation of powers.\textsuperscript{203}

\textsuperscript{191} See id. at 241.
\textsuperscript{193} Rosenblum, \textit{supra} note 143, at 7, 9.
\textsuperscript{194} See id. at 6.
\textsuperscript{195} See id.
\textsuperscript{196} See id.
\textsuperscript{197} See id. at 1.
\textsuperscript{198} Rosenblum, \textit{supra} note 143, at 6.
\textsuperscript{199} See id.
\textsuperscript{201} See id.
\textsuperscript{202} See id.
\textsuperscript{203} See id.
Nevertheless, due to several Cold War-era cases there is some confusion regarding the source of the Executive’s power to regulate immigration.\textsuperscript{204} Even recently the Justices disagreed on where the power to regulate immigration, particularly in exclusion cases, arises.\textsuperscript{205} Yet, what is evident is that each elected branch of the government affects and influences the immigration policies in the United States.\textsuperscript{206} Congress’ immigration policies tend to be dominated by “domestic political concerns.”\textsuperscript{207} The President on the other hand, has a much broader perspective on immigration policy, as he tends to consider immigration from a perspective of foreign policy and the international implications of U.S. immigration policies.\textsuperscript{208}

D. The President’s Power to Influence Congressional Outcomes

Although the President can influence immigration legislation “in pursuit of his diplomatic goals” it is Congress that will ultimately have to pass legislation regarding the admission of aliens to the United States.\textsuperscript{209} Although there are individuals who argue that Congress should unquestionably act and pass the UAFA, it has yet to do so.\textsuperscript{210} An important part of passing the UAFA could be President Obama’s addition of the UAFA to the Washington policy agenda.\textsuperscript{211} Scholars have consistently commented that it is the President who has the most significant role in “setting the policymaking agenda in Washington.”\textsuperscript{212} Moreover, some argue that there is no other individual than the President who has the ability to motivate and focus the attention of many actors.\textsuperscript{213} For example, both Presidents Clinton and Bush Sr. were able to increase Congressional attention to domestic issues such as education and healthcare.\textsuperscript{214} Even those who do not support an executively-centered government concede a President’s ability to influence Congress is an important

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\textsuperscript{204} See Lee, supra note 140, at 224–25. The confusion lies in whether Congress delegates power to the executive regarding the exclusion of aliens or whether an inherent executive power to exclude aliens exists. See id.

\textsuperscript{205} See id. at 225.

\textsuperscript{206} See Rosenblum, supra note 143, at 8.

\textsuperscript{207} See id. at 9.

\textsuperscript{208} See id. at 9–10.

\textsuperscript{209} See Lee, supra note 140, at 228.

\textsuperscript{210} See LONG, supra note 2, at 15 (urging the United States to pass the UAFA to address “egregious inequality”).


\textsuperscript{212} See id.

\textsuperscript{213} See id.

\textsuperscript{214} See id. at 342.
strategic power. Additionally, even though Congress has a substantial ability to continue its own agenda, the President has a significant influence over Congress’s agenda setting. Regarding specific immigration laws, the President successfully influenced immigration laws in 1942, 1965, 1986, and 1996. Since World War II, Presidents have been the drafters of immigration laws or substantially bargained with Congress over their contents. In the same light, President Obama might be able to act as an “issue entrepreneur” and highlight the UAFA to the legislature. Depending on how support for the UAFA in Congress is structured, President Obama could either 1) try to convince congressmen to adopt the UAFA even if they disagree with the goal of the act or 2) attempt to reframe the debate surrounding the UAFA such that Congress believes the UAFA and their political interests are the same. For example, instead of making the UAFA an issue of immigration, President Obama could reframe it as an issue of civil liberties.

Another important component of President Obama’s ability to obtain the passage of the UAFA, depends on the extent and details of his other legislative requests. It is likely that a President’s legislative proposal will spark debate between the President and Congress. Thus, if President Obama is going to persuade Congress to pass the UAFA, he must do so by “bargaining and persuasion.” Just because Mr. Obama won the 2008 election does not mean that he has been in-

215 See id. at 327. An important piece of a president’s power to influence congress is a president’s public prestige. See Douglas Rivers & Nancy L. Rose, Passing the President’s Program: Public Opinion and Presidential Influence in Congress, 29 Am. J. Pol. Sci. 183, 184 (1985). “presidential influence in Congress” is defined in the Rivers and Rose article as the President’s ability to pass his legislative program by Congress. See id. at 185.

216 See Edwards & Wood, supra note 211, at 328, 342. However, some argue that presidents are only influential under certain circumstances. See Kimberly Maslin-Wicks, Two Types of Presidential Influence in Congress, 28 Presidential Stud. Q. 108, 109 (1998). Edwards and Wood believe that presidents are influential only at the margins of issues, rather than being the inspirers or leaders of change. See id. at 109. Those who advocate this position purport that members of congress vote on issues according to their own beliefs, which a president can largely do little to change. See id.

217 See Rosenblum, supra note 143, at 17–22, 31.

218 See id. at 31–32 (excluding the 1952 INA).

219 See Edwards & Wood, supra note 211, at 342.

220 See Maslin-Wicks, supra note 216, at 116.

221 See id.

222 Rivers & Rose, supra note 215, at 185.

223 See id. at 185–86. Presidential influence is also interesting because presidents can achieve policies and legislation opposed by a substantial amount of congress, thus potentially and effectually putting a presidential agenda before a congressional agenda. See id.

224 See id. at 186. The authors discuss various tactics presidents can use to achieve legislative persuasion including patronage, perquisites and other incentives. See id.
stantaneously successful in achieving his legislative platform.\textsuperscript{225} If he is sincere in his care for bringing equal federal benefits to same-sex couples, he should use this limited political capital to bring the UAFA to Congress’ attention, so that it does not “become lost in the complex and overloaded legislative process.”\textsuperscript{226}

\section*{Conclusion}

The election of President Barack Obama was prefaced by claims of hope and change for the United States. Included in Mr. Obama’s election promises was his commitment to the repealing of the Defense of Marriage Act, which effectually denies same-sex couples the same federal benefits afforded to opposite-sex married couples. Of those federal benefits denied to same-sex couples are federal immigration benefits. As a result, over 35,000 couples in this country face a constant battle: how to keep their families together.

The denial of same-sex immigration benefits leaves U.S. citizens who are in same-sex relationships unable to sponsor their foreign partners. Couples are denied the ability to remain together solely on the basis of their sexuality. This situation can be changed. The Uniting American Families Act would provide same-sex binational couples, in which one individual is a U.S. citizen, equal immigration benefits to opposite-sex couples of similar circumstance. The Act not only achieves this goal, but also avoids the controversial and fiery debate surrounding same-sex marriage.

As of March 22, 2010 the Act does not have the support it needs to become law in the United States. Nevertheless, the more support the Act gets, the closer the egregious inequality facing same-sex binational couples in the United States is to being eliminated. President Obama should remain committed to his 2008 Election promises. He should use his influence as President and work with the Congress to achieve equal immigration benefits for same-sex couples. Or as he routinely stated in

\begin{itemize}
\item \textsuperscript{225} See \textit{id.} at 186; see also \textit{Assessing Barack Obama}, N.Y. TIMES, Nov. 4, 2009, http://topics.nytimes.com/topics/reference/timestopics/people/o (follow “Obama, Barack” hyperlink; then follow “Assessing Barack Obama” hyperlink) (assessing the success of issues in his governing agenda and noting daunting tasks after his first year in office). Rivers and Rose note that an election inevitably leaves the minority party frustrated and perhaps able to prevent a president’s legislative agenda. See Rivers & Rose, \textit{supra} note 215, at 186. Therefore, while in the early moments of a new president’s term one might experience a honeymoon-like atmosphere with congress, it will likely return to its established pattern of bargaining and persuasion. \textit{See id.}
\item \textsuperscript{226} See Edwards & Wood, \textit{supra} note 211, at 328.
\end{itemize}
his presidential campaign, he should use his “bully pulpit” to influence Congress to bring equal immigration benefits to same-sex couples.

This Note has discussed three particularly compelling reasons that President Obama should work toward the passage of the UAFA. First, the expansion of presidential authority under the Bush administration has broadened the President’s ability to regulate immigration policy. Second, the historical evidence that the Executive does have the ability to influence and shape immigration reform supports the notion that presidential influence in this arena is appropriate and effective. Third, Mr. Obama’s election commitment to the LGBT community should be prioritized. As a country that prides itself on its status as a global leader in human rights and equality, the United States should no longer lag behind the rest of the modernized world. Instead, as the President himself has stated, same-sex couples deserve “full equality under the law.”
TOWARD AN UNCONDITIONAL RIGHT TO VOTE FOR PERSONS WITH MENTAL DISABILITIES: RECONCILING STATE LAW WITH CONSTITUTIONAL GUARANTEES

Ryan Kelley*

Abstract: Casting a ballot is a primary form of community participation in the United States. This exercise provides citizens with a means to safeguard their legal rights and effectuate change. Nevertheless, some citizens, such as people with mental disabilities, are often denied this fundamental right solely based upon their status. These citizens have faced a long history of pernicious discrimination at the hands of their communities, legislators, and even the courts. Yet, social policy has begun to evolve in light of more nuanced understandings of mental disabilities. This knowledge has also spurred the reform of state and federal law. While the prospect of change looms high, in the context of voting, some states lag behind and recent jurisprudence demands that they reform voter eligibility requirements. This Note calls for all states to ensure that the right to vote is a presumptive right of the mentally disabled, to facilitate its exercise, and to deny it by a clear and fair standard that only excludes the mentally incapacitated when there is a clear lack of understanding of the nature and effect of voting.

Introduction

Liz Glenn is a forty-four year old woman living in Quincy, Massachusetts.¹ She commutes to work daily at a catering and gift establishment, and she attends church and socializes with friends on the weekends.² She is an active member of her community, and like all members, she faces the challenges life throws her.³ Liz is mentally retarded, a quadriplegic, has use of only one arm, and uses an electric wheelchair.⁴

* Senior Articles Editor, Boston College Third World Law Journal (2009–2010).
² See id.
³ See id.
⁴ See id.
She has been found unable to protect herself from harm without assistance by reason of physical disability.\(^5\)

L.C. is a thirty-one year old woman living in a state institution in Georgia.\(^6\) She loves to draw and write.\(^7\) She suffers from schizophrenia and lives with mild mental retardation.\(^8\) L.C. has lived for more than half her life in state-run institutions despite the fact that, at least once, professional staff has determined she could be appropriately served in a community residential setting and that her presence in an acute psychiatric unit was harmful to her habilitation.\(^9\)

Liz and L.C. share much in common.\(^10\) Each has unique interests and talents; each is dealing with the challenges life sends them one by one.\(^11\) Each also has a disability—mental retardation.\(^12\) However, these women’s stories diverge in one key way.\(^13\) Although Liz Glen’s community has resolved to ensure that her disability does not preclude her from participating fully, L.C.’s community has used her disability as a reason to exclude her from such participation.\(^14\)

Across the United States, communities today are guilty of discriminatorily excluding people like L.C. from voting, a fundamental area of civic participation.\(^15\) Although voting can best be understood as a right “preservative of all rights,” many states have formally barred persons with mental disabilities from exercising the right of suffrage through their constitution or statutes.\(^16\) Communities often amplify this exclusion through informal barriers, such as refusing assistance to those in need.\(^17\) The ability “to exercise legal rights and to have a voice in gov-

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\(^5\) See id.


\(^7\) See id.

\(^8\) Id.

\(^9\) See id.

\(^10\) See Brief of Respondent, supra note 6, at 5–6; The Arc of Mass., supra note 1.

\(^11\) See Brief of Respondent, supra note 6, at 5–6; The Arc of Mass., supra note 1.

\(^12\) See Brief of Respondent, supra note 6, at 5–6; The Arc of Mass., supra note 1.

\(^13\) See Brief of Respondent, supra note 6, at 5–6; The Arc of Mass., supra note 1.

\(^14\) See Brief of Respondent, supra note 6, at 5–6; The Arc of Mass., supra note 1.


ernment” are core elements of democracy. Without access to their own political or governmental system, the mentally disabled are surreptitiously denied these rights and branded as outsiders.

“When a single person, who has not broken any laws, is excluded from the mainstream . . . of community life, all of society becomes vulnerable.” Throughout history, persons with mental disabilities have been systematically denied fundamental personal rights and thereby precluded from full and functional participation in society. Beginning in 1898, states sought to enact legislation providing for the compulsory sterilization of persons with mental disabilities. Fear and societal disdain led to the exclusion of most individuals with disabilities from edu-

It is . . . surprising to discover that the Supreme Court has evidenced in its right-to-vote jurisprudence what may be characterized as a limited view of the value of voting. The Court tends to rely implicitly on an “instrumental” view of the franchise in which voting is seen solely as a societal tool for exerting political power. Winkler, supra note 15, at 330–31. This “instrumental” view narrowly places the core value of suffrage on the act of casting a vote and having it counted. See Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL’Y REV. 353, 364–65 (2003). Even under a strict “instrumentalist” view, the right to vote is critical. See id. Aside from this legal hurdle, Karlan noted that informal barriers could be established based upon public officials making on-the-spot judgments about voter eligibility, the absence of affirmative accommodations for those in need (for example, assistance for the illiterate), and individual private caregivers who often serve as “gatekeepers to the outside world” for the disabled community. See Karlan, supra note 16, at 922–23.


19 See id.; Bruce Dennis Sales et al., Disabled Persons and the Law: State Legislative Issues 5 (Joel Feinberg et al. eds., 1982).


21 Sales et al., supra note 19, at 5.

22 Robert L. Hayman, Jr., The Smart Culture: Society, Intelligence, and Law 243 (1998). The Supreme Court had upheld the practice ostensibly reasoning that sacrifice was a civic duty. See Buck v. Bell, 274 U.S. 200, 207 (1927). Justice Oliver Wendell Holmes for the Court stated:

We have seen more than once that public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Id. (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905))
cation until the nineteenth century.\textsuperscript{23} Some philanthropic efforts later established “asylums” for children with disabilities through which they gained some education at the expense of being alienated from community life.\textsuperscript{24} This history of discrimination does not limit itself to education, in fact, prejudice persists in the areas of employment, health care, insurance and family law.\textsuperscript{25} Even today, many individuals with mental disabilities remain wards of state, locked in segregated institutions and prevented from participating in community life.\textsuperscript{26}

Along with this grim history of pervasive and systematic isolation, segregation, and discrimination, persons with mental disabilities have faced unique challenges in their battle for civil rights.\textsuperscript{27} First, the very definition of disability is a source of controversy.\textsuperscript{28} While many believe that the problems persons with disabilities face arise from internal characteristics, a growing portion of the disabled community finds that those problems actually come from their external environment.\textsuperscript{29} By focusing solely on the organic impairment, the non-disabled tend to be unaware of the extent that social perception and environment can contribute to the disability.\textsuperscript{30} In addition, disabled people lack a sense of shared history that has helped some minority groups “disseminat[e] . . . information about prejudice and oppression.”\textsuperscript{31} Until the disability rights movement, many could not overcome feelings of humiliation and

\textsuperscript{24} See id. Even when compulsory education laws forced public schools to accept children with disabilities, they were segregated by classroom or school. See id. at 1425–26. Large public schools arose in urban areas of the United States at the start of the nineteenth century and later adopted grade placement through which ungraded classes were soon created for the “uncooperative, or unsuccessful” See id. Consequently, by 1932, seventy-five thousand children with mental retardation were segregated in public schools. Id.
\textsuperscript{26} Olmstead v. L.C., 527 U.S. 581 (1999) (holding unjustified institutionalization is discrimination based on disability).
\textsuperscript{27} See 42 U.S.C. § 12101(a)(2), (3), (5) (2006); Olmstead, 527 U.S. at 608 (Kennedy, J., concurring); Harlan Hahn, Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?, in Backlash Against the ADA Reinterpreting Disability Rights 26, 28–31 (Linda Hamilton Kreiger ed., 2003) (distinguishing challenges faced by the disability rights movement from those experienced by African Americans and women).
\textsuperscript{28} See Hahn, supra note 27, at 28, 32–35.
\textsuperscript{29} See id. at 28.
\textsuperscript{30} See id.
\textsuperscript{31} Id. at 36.
shame, thus preventing them from drawing upon their own experiences to investigate broader patterns of oppression.\footnote{Id. Hahn’s notion can be gleaned from personal testimonies given in reflection on living with a disability prior to the movement. See Nat’l Council on Disability, Voices of Freedom: America Speaks Out on the ADA 23–24 (1995). Disabled persons testified that they felt like prisoners in their own homes, burdened, and suffered anxiety with regard to asking for assistance. See id. Mental disability advocate Susan Stefan considered the complex nature of discrimination against persons with mental disabilities, noting: Discrimination is not only occasioned by psychiatric disability, it can cause disability. It is like an infection striking and already vulnerable and struggling soul. . . . Discrimination saps people’s strength and their ability to struggle through each day—hence causing the very depression, hopelessness, anxieties, and suspicions that become the basis for further discrimination. Stefan, supra note 25, at xiii–xiv.}

Inspired by the examples of the African-American civil rights and women’s rights movements, which experienced great victories in the late 1960s, the disability rights movements began to take root in the 1970s.\footnote{David Frum, How We Got Here: The 70s, the Decade that Brought You Modern Life (for Better or Worse) 250–51 (2000).} Advocacy arose in response to historical practices of segregation.\footnote{See Colker, supra note 23, at 1419.} Thus a key focal point was institutionalization, a tool used to both “hide and degrade individuals with disabilities” under the guise of providing them with treatment.\footnote{See id. Deinstitutionalization is “the release of institutionalized individuals (as mental patients) from institutional care to care in the community.” Webster’s New Collegiate Dictionary 335 (9th ed. 1991).} The practice of institutionalization further estranged the disabled from their community by impeding their right to vote and, in some cases, disenfranchising them because of their residence in facilities.\footnote{See id. Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (holding a Georgia apportionment statute to be unconstitutional and reasoning that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live”).} Accordingly, advocates have focused their efforts on de-institutionalization and integration.\footnote{See id.}

While the disability rights movement has progressed on several fronts—including ensuring persons with disabilities opportunities for employment, education and defining further their rights—the fundamental right to vote remains egregiously undervalued and abused.\footnote{See 42 U.S.C. § 12101 (2006); Colker, supra note 23, at 1430–34; Developments in the Law—the Law of Mental Illness, VII. Voting Rights and the Mentally Incapacitated, 121 Harv. L. Rev. 1179, 1181–85 (2008) [hereinafter Developments in the Law]; see also Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (holding a Georgia apportionment statute to be unconstitutional and reasoning that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live”).} Although federal and state constitutions protect voting, “a hallmark of
our democracy”, there are limits on this right. Notably, states are allowed to define who is eligible to vote and manage the election process. A 2000 study found that forty-four states disenfranchised the mentally incompetent, some by constitution and some by statute. Though denial of the right of suffrage may be constitutionally and statutorily sound, when an individual is mentally incapacitated, indiscriminate denial due to some mental incapacity should not be tolerated. Modern policies, enlightened by a contemporary understanding of disability and more developed structured capacity assessments, accept that a basic understanding of the nature and effect of voting is a sufficient standard to establish the capacity to vote.

In response to zealous advocacy on the part of disability advocates, several states have begun to consider efforts that would ensure the right to vote for persons with mental disabilities. State constitutions have been amended and election laws have been adopted to limit the effect of constitutional provisions which categorically deny this group suffrage. While successes are being achieved incrementally, discriminatory language persists in state constitutions, and several states still maintain elections laws that violate the federal constitutional guarantee of equal protection under the law.

39 Sally Bach Hurme & Paul S. Appelbaum, Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters, 28 McGEORGE L. REV. 931, 931 (2007); see Wesberry, 376 U.S. at 17 (concluding that Article I, Section 2 of the Constitution “gives persons qualified to vote a constitutional right to vote and to have their vote counted”); Developments in the Law, supra note 38, at 1181–85.
40 See U.S. CONST. art. I, § 2, cl. 1; art. II, § 1; Hurme & Appelbaum, supra note 39, at 931.
41 Developments in the Law, supra note 38, at 1181.
44 Developments in the Law, supra note 38, at 1182.
45 See id. at 1183–84.
46 U.S. Const. amend. XIV; see Doe, 156 F. Supp. 2d at 56; Developments in the Law, supra note 38, at 1181–85.
Federal laws have also attempted to address the challenges faced by persons with mental disabilities. The Americans with Disabilities Act of 1990 (ADA) is perhaps the most recent major civil rights statute. Despite achieving this legislative success, disabled persons have not experienced forceful judicial successes similar to those seen by African Americans and women during the Civil Rights Era of the 1960s. Moreover, an unsettled definition of disability, pervasive discrimination, and a general skepticism of the ADA itself plague ADA plaintiffs.

The shortcomings of the ADA led Congress to enact the ADA Amendments Act of 2008 (ADAAA), which went into effect January 1, 2009. The ADAAA aims to broaden the class of persons protected by the ADA and to strengthen the effect of such protection by giving courts express instructions on statutory interpretation. The effects of this legislation remain to be seen, but court precedent under the original ADA may pose a continued challenge to achieving the purposes intended by the new ADAAA. If these enhancements of the act are given full effect, Title II, which protects the right to vote from discrimination as a service, program or activity provided by a public entity, could serve as a powerful tool for restoring the franchise to persons with mental disabilities.

This Note will argue that persons with mental disabilities have a presumptive right to vote—the use of which should be facilitated rather than impaired. States that exclude those who lack capacity to vote should only rely upon a judicial finding of such incapacity to ensure equal protection and due process. Part I will introduce the law of elections and survey the current status of state law concerning voter eligibility for mentally disabled persons. Part II will discuss the national trend

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49 See id. Id.


51 See id. §§ 2, 4.

52 See Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 370, 374 (2001) (holding Title I of the ADA unconstitutional to the extent which it allowed private citizens to sue states for money damages).

53 See 42 U.S.C. § 12132; Developments in the Law, supra note 38, at 1185–89.
in the contemporary understanding of mental disability. It will examine the federal and state legislation that is moving in the direction of broadening the exercise of the right of suffrage and guarding against discrimination of those with mental disabilities by states in their administration of elections. Part III will use recent cases to demonstrate that despite this hopeful reform, some states cling to policies that violate the constitutional rights of citizens with mental disabilities and must be held accountable for this wrong. This Note will conclude that states should facilitate the right to vote of those with mental disabilities and that if states declare the mentally incapacitated ineligible, they should do so only after a court has determined the incapacity by a clear and fair standard for the sake of our national guarantee of equal protection under the law.

I. THE LAW OF ELECTIONS: STATE LAW AND ITS EFFECT ON THE VOTING RIGHTS OF PERSONS WITH MENTAL DISABILITIES

The Supreme Court has generally expressed an “instrumentalist” view of the significance of the right to vote under which the right is characterized by an “ability to cast a ballot and to have that ballot counted.” Although the Court’s interpretation establishes the fundamental nature of the right to vote, this limited definition grants states broad authority to administer elections in the manner they see fit. This administrative license has led some states to adopt eligibility criteria that plainly discriminate against mentally disabled individuals who would otherwise be qualified to vote. Furthermore, from state to state and even within each state’s various sources of law, inconsistent and often archaic terminology leads to ambiguity and amplifies the potential for discrimination—a problem that increased clarity of definition and understanding could dispel.

55 See Waterstone, supra note 17, at 364–65.
58 See Hayman, supra note 22, at 121; Hurme & Appelbaum, supra note 39, at 934–36, 939. One advocate for persons with mental disabilities recognizes that the very fact that the law requires definitions of disability amplifies the discrimination of those with mental impairments by affording and abridging rights based upon these categorizations. See Stefan, supra note 25, at xiii. Stefan laments that the law’s reliance on definitions has been unkind to those with mental disabilities because such terms construct mutually exclusive categories and the law demands that individuals fit into one category or the other: disabled-not disabled, competent-incompetent, mentally ill-not mentally ill. See id. Such rigidity is dia-
A. Mental Disability Defined

Despite the many significant legal developments in the area of disability rights over the past century, the lack of stable definitions in the area of mental disability law is a significant impediment to the progress of the rights of person with disabilities.\(^59\) Although disagreement exists over the definition, the American Bar Association has suggested a few possibilities.\(^60\) First, mental disability is a catchall term which encompasses impairments of both mental and cognitive functioning.\(^61\) These disabilities are often reduced to several different categories including mental illness, developmental disabilities, communication disorders and substance abuse.\(^62\) These categorizations, however, cannot be heavily relied upon because a particular impairment may not fit well within one or the other and, oftentimes, problems occur in tandem.\(^63\) Despite these differences, each type of mental disability is generally treated similarly in the context of law.\(^64\)

Dementias are defined as organic mental disorders evidenced by a failure “to understand events and people, make plans, and take care of oneself.”\(^65\) Distinct from dementias, developmental disabilities are mental, cognitive and physical impairments that begin in early adulthood and are likely to continue to impose functional impairments on the individual.\(^66\) The definition of one developmental disability, mental retardation, is hotly contested.\(^67\) For the purpose of this Note, mental retardation is defined as substantially subaverage intelligence coupled with limitations in two adaptive skill areas.\(^68\)


\(^{60}\) See John Parry, MENTAL DISABILITY LAW: A Primer 2 (5th ed. 1995); Hurme & Appelbaum, supra note 39, at 934–36, 939.

\(^{61}\) Parry, supra note 60, at 2.

\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) Id.

\(^{65}\) Id. at 4. Dementias caused by Alzheimer’s disease are believed to afflict one out of every twenty-five adults between the ages of sixty-five and seventy-four. Id. Alzheimer’s disease progressively erodes cognitive and functional abilities over time. Id.

\(^{66}\) Parry, supra note 60, at 5.

\(^{67}\) See Hayman, supra note 22, at 121.

\(^{68}\) See Parry, supra note 60, at 5. Adaptive skill areas include communication, self care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Id. Anywhere from one to three percent of the population is
Although these definitions can facilitate our discussion, they derive from the medical model of disability that focuses narrowly on assessments of the degree of a person’s functional limitations. A more contemporary definition understands disability not merely as a physical or mental impairment but a result of discrimination in the social order based upon environmental factors and “narrow assumptions about what constitutes the normal range of human functioning.”

The problem of mental disability has been scrutinized in the legal context when making determinations of competency and capacity either in criminal or testamentary proceedings. Competency considerations within the context of civil law can be traced to the origins of the laws of guardianship and wills in ancient Roman and English common law. At one point, the presence of a mental disability itself was sufficient to deny an individual decision-making rights and privileges, but today lawmakers have begun to realize that competency is a nuanced concept, and thus some jurisdictions are increasingly requiring more thorough adjudication of competency before rights are revoked.

classified as mentally retarded. Id. This definition accords with that accepted by the psychiatric community. See AM. PSYCHIATRIC ASS’N, DESK REFERENCE TO THE DIAGNOSTIC CRITERIA FROM DSM-IV-TR, at 52 (4th ed. 2000).


71 See MICHAEL L. PERLIN ET AL., COMPETENCE IN THE LAW FROM LEGAL THEORY TO CLINICAL APPLICATION 5 (2008).

72 See id. Guardianship is an involuntary procedure in which an individual is deemed incapable of making day-to-day decisions and is either put under the authority of another person or into a state run facility. See BLACK’S LAW DICTIONARY 726 (8th ed. 2004). This guardian “assumes the power to make decisions about the ward’s person or property.” See id.

73 See PARRY, supra note 60, at 98; see, e.g., WASH. REV. CODE § 11.88.010(5) (Supp. 2009) (“Imposition of a guardianship for an incapacitated person shall not result in the loss of the right to vote unless the court determines that the person is incompetent for purposes of rationally exercising the franchise . . . .”); WIS. STAT. § 54.25(2)(c)1.g (2008) (“if the court finds that the individual is incapable of understanding the objective of the elective process”).
B. The Law of Elections: An Overview

The guarantee of a voice in government and the free exercise of legal rights are central features of democratic society. Accordingly, the design of electoral systems in modern democratic nations features two key objectives: “increasing enfranchisement and voting [as well as] assuring the integrity of the vote.” Some scholars have argued that “universal suffrage is essential if citizens are to recognize a government as legitimate.” They further reason that minority groups need the vote in order to protect themselves from powerful insiders who use government power to subordinate them. Regardless, the various franchising amendments in the United States did not establish the broad principle of universal suffrage. Thus, in the United States, the right to vote is not per se constitutionally protected. Yet, implicit in our constitutional system is a protected right to participate in state elections on an equal basis with other qualified voters. States have exercised broad discretion in the administration of elections but this discretion was bound by a constitutional prohibition of discrimination. Though the Supreme Court has found certain restrictions on the right to suffrage

74 See Rothstein & Rothstein, supra note 18, at 652.
76 Jane Rutherford, One Child, One Vote: Proxies for Parents, 82 Minn. L. Rev. 1463, 1486 (1998).
77 See id. at 1488.
78 See id. While some may still argue for universal suffrage, the last of the voting rights amendments, the Twenty-Sixth Amendment did not incorporate this principle. U.S. Const. amend. XXVI, § 1.
79 See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973) (recognizing a constitutional guarantee of equal participation for qualified voters in state elections but also holding absolute equality of education funding is not mandated).
80 See id.
81 See Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959). The Supreme Court has recognized that states have a legitimate interest in assuring “intelligent exercise of the franchise.” See Katzenbach v. Morgan, 384 U.S. 641, 654 (1966) (ruling English language voter literacy tests unconstitutional and discriminatory). The Court has also held that states may consider residence, age, and prior criminal record in determining voter eligibility. See Lassiter, 360 U.S. at 51. Lassiter upheld literacy tests on the basis that such tests were neutral on race, creed, color, and sex. See id. Where it was reasoned that literacy tests were designed to ensure “independent and intelligent” exercise of the right of suffrage, the Court found the requirement constitutionally permissible. See id. at 52–53. Under the Equal Protection Clause, however, more recent Supreme Court jurisprudence has given varying degrees of “close constitutional scrutiny” to voter eligibility requirements and eradicated many eligibility requirements that states once imposed. See Mo. Prot. & Advocacy Servs., Inc. v. Carnahan, 499 F.3d 803, 808 (8th Cir. 2007); see, e.g., Carrington v. Rash, 380 U.S. 89, 94–95 (1965) (holding unconstitutional a restriction prohibiting active members of Armed Forces from voting in state).
withstand even heightened scrutiny, it has consistently required that
any such restriction be justified by a compelling state interest.\textsuperscript{82}

The Court has recognized “preserving the political community and preventing voter fraud” as compelling government goals warranting restrictions on the right to vote in some circumstances.\textsuperscript{83} Thus, as states have excluded persons with mental disabilities, they have sought to preserve the political community by distinguishing voters who intend to express some preference and affect the election results from those who do not understand the nature of voting, and whose votes could become subject to fraud.\textsuperscript{84} Nonetheless, in considering restrictions, the Supreme Court has been wary that “to the extent that a citizen’s right to vote is debased, he is that much less a citizen.”\textsuperscript{85}

C. State Law Restrictions on the Voting Rights of Persons with Mental Disabilities

Kristopher Willis, a twenty-six year old developmentally disabled man from Iowa and Adam Folsom, a twenty-eight year old suffering from velocardiofacial syndrome and some mental retardation both cast a ballot in the most recent presidential election.\textsuperscript{86} Parents of the men

\textsuperscript{82} See Richardson v. Ramirez, 418 U.S. 24, 54–55, 56 (1974) (rejecting a challenge to California laws denying ex-felons the right to vote); Dunn v. Blumstein, 405 U.S. 330, 344–46 (1972). In rejecting a durational residency requirement as unconstitutional, the Court, in \textit{Dunn}, suggested compelling state interests might include preventing electoral fraud and guaranteeing the existence of “knowledgeable voters” within the state. \textit{Dunn}, 405 U.S. at 345–60. The Court criticized a branch of the “knowledgeable voter” standard, which made “intelligent” voting a criterion, reasoning that this prong was “an elusive one and susceptible of abuse.” See \textit{id.} at 356. The Court refused to decide “the extent to which a State [could] bar less knowledgeable or intelligent citizens from the franchise.” See \textit{id.}

\textsuperscript{83} See Karlan, \textit{supra} note 16, at 925.

\textsuperscript{84} See \textit{id.}

\textsuperscript{85} Reynolds v. Sims, 377 U.S. 533, 567 (1964) (striking down inequality in state senate representation on the principle of “one person, one vote”). History itself is evidence that a lack of political power can both reflect and magnify societal subordination. See Rutherford, \textit{supra} note 76, at 1478–85 (summarizing the struggles of African Americans and women in achieving equal rights). Nevertheless, under our current system “the outsiders must demonstrate that they are sufficiently like the insiders who can vote” to obtain this right. See \textit{id.} at 1488. To the extent that “outsiders,” such as persons with mental disabilities, are actually different from current voters, “they are caught in a bind” because current voters are unlikely to represent the interests of the mentally disabled. See \textit{id.}

\textsuperscript{86} Steve Gravelle, \textit{Mother Wants to Limit Voting for Disabled: Disabled People Entitled to Cast Ballots}, \textit{Gazette} (Cedar Rapids, Iowa), Nov. 18, 2008, at A1; Beth Velliquette, \textit{Mother to Challenge Vote Cast by Her Disabled Son}, \textit{Herald-Sun} (Durham, NC), Nov. 4, 2008, at C1. Velocardiofacial syndrome (VCFS) is a disorder characterized by a cleft palate (opening in the roof of the mouth), heart defects, characteristic facial appearance, minor learning problems and speech and feeding problems. See Nat’l Inst. on Deafness and Other Com-
claimed that they were taken advantage of by their caregivers who facilitated their voting; therefore, they have sought redress under state law.\textsuperscript{87} By contrast, in 2004, Floridian Kamal Samar was fighting for an opportunity for his twenty-three year old son, David, to cast a vote.\textsuperscript{88} Kamal argued, “He is a citizen of this country. He should be able to vote.”\textsuperscript{89} Yet, based on state law, David’s legal guardianship likely posed a bar to his father’s efforts.\textsuperscript{90}

Despite their different situations, Kristopher, Adam, and David each fell victim to state election laws that did not adequately protect their right to vote.\textsuperscript{91} David’s right was impeded by a legal system that failed to emphasize the importance of that right and follow a clear process to exclude only the truly mentally incapacitated from participating.\textsuperscript{92} Kristopher and Adam actually did vote but their ballot may have been fraudulently interfered with, and, like David, their right may be compromised in the future by a general lack of clarity in state election laws.\textsuperscript{93}

A key challenge and the probable reason for the failure of universal suffrage efforts for the mentally disabled is the inability to agree upon a single definition of the capacity to vote.\textsuperscript{94} The hodgepodge of voting standards we see today was all but guaranteed when the Constitutional Convention compromised by adopting state standards for voting.\textsuperscript{95} Currently, forty-eight state constitutions exclude certain categories of people

\textsuperscript{87} See Gravelle, supra note 86; Velliquette, supra note 86.
\textsuperscript{89} See id.
\textsuperscript{90} See id. Although no follow-up article was published, Samar’s father had admitted that David would not likely understand the elections even if he were shown photos of the candidates, thus he argued for the opportunity to vote on his son’s behalf. See id. The outreach director from the Volusia County Supervisor of Elections spoke firmly against such proxy voting explaining that voter assistance is appropriate but that the disabled individual must understand and make the choice. See id. Further, the judge responsible for guardianship determinations in the county indicated at the time the article was published that, if the disabled person lacked any understanding, he would consider denying the person the right to vote. See id.
\textsuperscript{91} See Circelli, supra note 88; Gravelle, supra note 86; Velliquette, supra note 86.
\textsuperscript{92} See Circelli, supra note 88; Gravelle, supra note 86; Velliquette, supra note 86.
\textsuperscript{93} See Circelli, supra note 88; Gravelle, supra note 86; Velliquette, supra note 86.
\textsuperscript{95} See Rutherford, supra note 76, at 1486.
from eligibility to register and vote.  

Criminal convictions and mental status are persistent exclusions.

A simplified way of grasping the far from consistent state exclusions of the mentally disabled is to picture the voting right spread along a continuum measuring the extent of disenfranchisement. “At one end are the states that specifically encourage voting,” states that categorically bar voting at the other, and a mid-range that allow for a reservation of the right in some manner.

Unclear exclusionary language led seven state constitutions deny the right to vote to “idiots or insane” persons. A number of states prohibit voting by those of unsound mind, non compos mentis, or those who are not of “quiet and peaceable behavior.” The constitutions of sixteen states bar those adjudged mentally incompetent or incapacitated from voting. In addition, four states prohibit persons

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96 Hurme & Appelbaum, supra note 39, at 934.
97 See id. at 934–35.
98 Kyle Sammin & Sally Balch Hurme, Guardianship and Voting Rights, Bifocal, Fall 2004, at 1, 11.
99 See id.
100 See, e.g., Ark. Const. art. III, § 5; Iowa Const. art. II, § 5; Ky. Const. § 145, cl. 3; Minn. Const. art. VII, § 1; Miss. Const. art. XII, § 241; N.M. Const. art. VII, § 1; Ohio Const. art. V, § 6; Hurme & Appelbaum, supra note 39, at 935. Idiocy has been understood to refer to “mental feebleness due to disease or defect of brain, congenital or acquired during development” resulting in lack of understanding. See In re S. Charleston Election Contest, 3 Ohio N.P. (n.s.) 373, 386 (Prob. Ct. 1905). The term insanity generally included idiocy and referred to “a person who has suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life.” See Baker v. Keller, 237 N.E.2d 629, 638 (Ohio Ct. Com. Pl. 1968).
101 See Hurme & Appelbaum, supra note 39, at 935. Two constitutions refuse suffrage to those of unsound mind. Ala. Const. art. V, § 2; Mont. Const. art. IV, § 2; see Hurme & Appelbaum, supra note 39, at 935. Those who are not of “quiet and peaceable behavior” are barred from the franchise in Vermont. Vt. Const. art. II, § 42; see Hurme & Appelbaum, supra note 39, at 936. Yet, the Vermont Secretary of State has indicated informally that this is not used as a competence standard but rather “to facilitate peaceful conduct at town meetings.” See Hurme & Appelbaum, supra note 39, at 936 n. 27. Three states exclude persons of non compos mentis. See id. at 935. Non-compos mentis has been defined loosely as a complete lack of “mental capacity to understand the nature, consequences, and effect of a situation or transaction.” See Town of Lafayette v. City of Chippewa Falls, 235 N.W.2d 435, 441 (Wis. 1975). The constitution of Kansas allows the legislature to deny those with “mental illness” the franchise. Kan. Const. art. V, § 2; see Hurme & Appelbaum, supra note 39, at 935.
102 See Hurme & Appelbaum, supra note 39, at 935. Likewise, Wisconsin allows for the disenfranchisement of those adjudged mentally incompetent. See Wis. Const. art. III, § 2; Hurme & Appelbaum, supra note 29, at 935. Missouri and New Jersey exclude those adjudged incapacitated. Mo. Const. art. VIII, § 2; N.J. Const. art. II, § 1, ¶ 6; Hurme & Ap-
“under guardianship” from the electorate. These provisions reveal not only that a wide array of individuals across the nation are denied suffrage by state constitutional provisions, but also that this denial is based on imprecise categorizations. Moreover, these constitutional provisions often fail to clearly define the categorizations used, thereby making them difficult to interpret and enforce.

In addition to state constitutions, state election laws also address issues of cognitive impediments. To frustrate matters further, when elections laws coincide with a state constitutional provision, criteria for exclusion do not always coincide. Election laws of some states seem to overlook the fact that they even have a state constitutional provision barring persons by reason of a mental disability. Other states present a narrower basis for exclusion, while others still use entirely different language causing difficulty in determining who is subject to exclusion and on what basis. Twenty-eight states’ election laws do not comment...
on exclusion due to mental disability at all; yet, twenty of those have some state constitutional bar.\textsuperscript{110}

Significantly, the creation of a majority of these bars to voting coincided with the creation of asylums and institutions which removed whole classes of persons who were deemed disabled from communities across the country in the nineteenth century.\textsuperscript{111} Vermont and Maine led the way in disenfranchising voters because of intellectual and developmental disabilities.\textsuperscript{112} Vermont excluded those “not of peaceable behavior,” while Maine denied “persons under guardianship.”\textsuperscript{113} Only in 1831 did states adopt explicit methods of such disenfranchisement using the terms “idiot[s]” and “insane.”\textsuperscript{114} This shift in language demonstrates an important development in public opinion.\textsuperscript{115} While emphasis was initially placed upon the fact that persons with disabilities were financially dependent or under guardianship, a growing focus on cognitive aptitude reflected a developing trend to exclude those with “intellectual and moral incompetency.”\textsuperscript{116}

II. Trend Toward Heightened Respect for the Individual Capacities of Persons with Mental Disabilities

Beginning as early as 1966, disability advocates began to argue for individuals with disabilities to have a right to live in an integrated

\textsuperscript{110} See id. at 940. Even more confusing is the law in Massachusetts. See id. at 956. Massachusetts has both constitutional provisions and election law indicating that persons “under guardianship” cannot vote; however, the Secretary of State of Massachusetts issued an opinion that persons under guardianship should be able and encouraged to vote unless found incompetent to do so. See Opinion of the Elections Division, Persons Subject to Guardianships That Do Not Specifically Forbid Voting Are Eligible Voters, reprinted in 8 John Cross et al., Guardianship and Conservatorship in Massachusetts 149 (2d ed. 2000); Hurme & Appelbaum, supra note 29, at 956.

\textsuperscript{111} See Colker, supra note 23, at 1449.

\textsuperscript{112} See id.

\textsuperscript{113} ME. CONST. art. II, § 1; VT. CONST. of 1793, ch. II, § 21; Colker, supra note 23, at 1449.

\textsuperscript{114} See Colker, supra note 23, at 1449.

\textsuperscript{115} See id. at 1450.

\textsuperscript{116} See id. Interestingly, women in the nineteenth century were similarly characterized. Rutherford, supra note 76, at 1481–82. They were labeled “morally inferior, emotional, irrational, delicate, passive, simple-minded, weak, timid, and child-like, and these stereotypes reinforced the opposition to suffrage.” See id. “Even those who placed women on a pedestal did so to create a separate private sphere outside of politics: women were simply too sweet, naive, and sentimental to vote.” Id. at 1482. Later, “positive stereotypes enabled women to prevail.” See id. at 1483.
Since then, the law of disability discrimination developed under this integrationist approach and enhanced the access of disabled individuals to education, housing, and even voting.

This revolution in social policy has as its goal “making available to . . . people patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of society.”

In line with this trend, some states have begun to revise their laws to respect the autonomy of persons with mental disabilities. The federal government has also enacted legislation aimed at reducing discrimination and enforcing equal treatment, and new legal standards, informed by a contemporary understanding of mental disability have arisen. These changes are facilitating a movement toward not just extending the right to vote to mentally disabled persons who are able but actually promoting its exercise.

A. State Law Changes Toward Recognition of the Individual Capacities of Mentally Disabled Persons

States have a compelling interest in ensuring that voters comprehend the voting process and make an independent choice when casting a vote but this interest does not change the fact that not all persons with

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119 Martha A. Field & Valerie A. Sanchez, Equal Treatment for People with Mental Retardation 13 (1999).
120 See Developments in the Law, supra note 38, at 1182–83.
122 See, e.g., N.J. Const. art. II, § 1(6); 42 U.S.C. §§ 12102–12103; Wash. Rev. Code § 11.88.010(5) (Supp. 2009); Wis. Stat. § 54.25(2)(c)1.g (2008); ADA Restorative Act Hearing, supra note 69, at 12 (citing the George W. Bush administration’s commitment to promoting the rights of people with disabilities and their participation “in all aspects of American life”); Nat’l Council on Disability, Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act 1 (2000) (noting an “increased recognition and understanding of the manner in which the physical and social environment can pose discriminatory barriers to people with disabilities” and describing the ADA as “a vehicle through with people with disabilities have made their political influence felt”).
a mental disability are incompetent to vote. States have already begun to narrow disenfranchisement based on an individual’s capacity.

Most states achieved this end by creating forms of limited guardianship and narrowly interpreting constitutional and election law provisions to exclude only those under full guardianship. Traditionally, almost all guardianships were “broad and all inclusive”; this began to change in the 1960’s. In contrast, the modern emphasis “has been to establish more precise limits on the guardian’s powers and to make procedures stricter” for both creation and monitoring of the arrangement. In 1980, the American Bar Association endorsed a resolution which urged states to help persons with mental disabilities live self-sufficiently to the maximum extent practicable by developing limited or partial guardianships. Although at the time of this endorsement few states recognized limited guardianships, today at least forty-two states do.

State probate laws have essentially attempted to grapple with the reality that “when people start sliding downhill they often slide slowly, almost imperceptibly. They have good days and bad days. They can manage some things and not others.” Accordingly, in excluding the mentally incapacitated, several states have come to reflect upon

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123 Developments in the Law, supra note 38, at 1181–82.
124 See id.
125 See id. at 1182–83.
126 See John W. Parry & Sally Balch Hurme, Guardianship Monitoring and Enforcement Nationwide, 15 MENTAL & PHYSICAL DISABILITY L. REP. 304, 304 (1991). Gradually, states have come to appreciate the far-reaching consequences of guardianship which restricts the liberty and forecloses certain legal and civil rights of a ward. See id.; Phillip B. Tor & Bruce D. Sales, Research on the Law and Practice of Guardianship, in MENTAL HEALTH AND LAW: RESEARCH POLICY AND SERVICES 75, 75–79 (Bruce D. Sales & Salim A. Shah eds., 1996). Guardianship is rooted in the feudal English doctrine of *parens patriae* by which the English crown would assume the role of parent for those who lacked discretion to manage their own affairs. See Tor & Sales, supra, at 75–79. In the United States, guardianship is similarly a means by which the state assumes custody of a child or mentally or physically disabled person who is unable to protect his or her self. Id.
127 See Tor & Sales, supra note 126, at 75–79. Initially, a guardianship hearing could consist of little more than a doctor’s letter of medical diagnosis; today, however, demands of substantive due process, the availability of less restrictive alternatives and a general tendency to grant power no greater than necessary to protect the ward result in a more rigorous process. See id.
128 See id.
129 See id.
whether the probate judge found the person incompetent for the specific purpose of voting.\textsuperscript{131}

Another route to change has been to remove over-inclusive terms from state laws.\textsuperscript{132} New Jersey’s 2007 elimination by referendum of the phrase “idiot or insane person” is an example of this trend.\textsuperscript{133} Similarly, some states have eliminated old terminology which promoted imprecise categorization and was plainly offensive but did not replace these terms with a clear standard.\textsuperscript{134} Such uncertainty as to who a standard excludes provides fertile ground for violations of constitutional guarantees of equal protection due to categorical rather than necessary and proper exclusion.\textsuperscript{135}

\textsuperscript{131} \textit{Developments in the Law}, supra note 38, at 1183.

\textsuperscript{132} See \textit{id}.


\begin{quote}
[T]he right to vote is a fundamental liberty and that this liberty should not be confiscated without due process. When the state chooses to use guardianship proceedings as the basis for the denial of a fundamental liberty, an individual is entitled to basic procedural protections that will ensure fundamental fairness. These basic procedural protections should include clear notice and a meaningful opportunity to be heard. The legislature further finds that the state has a compelling interest in ensuring that those who cast a ballot understand the nature and effect of voting is an individual decision, and that any restriction of voting rights imposed through guardianship proceedings should be narrowly tailored to meet this compelling interest.
\end{quote}


\textsuperscript{135} See Mo. Prot. & Advocacy Servs., Inc. v. Carnahan, 499 F.3d at 808–09 (8th Cir. 2007) (reasoning categorical prohibition of a ward from voting would not withstand close equal protection scrutiny); see also Doe v. Rowe, 156 F. Supp. 2d. at 56 (D. Me. 2001) (finding inconsistent and unclear terminology in a state constitution and election law resulted in unconstitutional exclusion from the electorate of otherwise capable persons with mental disabilities).
B. The Americans with Disabilities Act of 1990, the ADA Amendments Act of 2008, and Court Precedent

Only with the passage of the ADA, did the disabled minority gain the kind of legislative ground for civil rights that women and blacks achieved during the civil rights era of the 1960s. In enacting the ADA, Congress intended to provide a comprehensive national mandate for the “elimination of discrimination against individuals with disabilities.” Congress found that “mental disabilities in no way diminish a person’s right to fully participate in all aspects of society,” though such participation is often inhibited as a result of “prejudice, antiquated attitudes, or failure to remove societal and institutional barriers” that exist against the mentally disabled. Yet, the ADA’s ambitious objective was thwarted when the Supreme Court narrowly construed its definition of disability, thereby denying protection to individuals Congress intended to protect. The Court’s precedent has led lower courts to follow suit

136 See Silvers & Francis, supra note 48, at 33.
138 See id. § 2(a)(2).
139 See id.; Sutton v. United Air Lines, Inc., 527 U.S. 471, 486–87 (1999). In Sutton v. United Air Lines, Inc., the Court rejected the claims of two women who were denied employment as pilots for an airline because their uncorrected vision did not meet the acuity requirement. See 527 U.S. at 475–76. The Court reasoned that Congress could not have intended “disabled” to apply to cover individuals when their limitations could be reduced by mitigating measures. See id. at 486–87. In this way, a court could deny a person with severe disabling depression protection under the Act if it can be shown that a treatment regimen would reduce the limitations on his functioning. See Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999) (focusing narrowly on whether the petitioner was disabled and reasoning “whether petitioner is ‘disabled’ due to limitations that persist despite his medication or the negative side effects of his medication”). The scope of protection intended by the bill has been even further curtailed by the Court in subsequent decisions; for example, in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, the Court reversed the circuit court’s finding that the plaintiff was disabled and required on remand that the court determine whether the plaintiff’s disability “prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.” See 534 U.S. 184, 198 (2002). Yet, the ADA itself does not contain this “severely restricts” requirement, but rather a lesser “substantial limitation” standard. See 42 U.S.C. § 12101(2)(a); Ruth Colker, The Mythic 43 Million Americans with Disabilities, 49 WM & MARY L. REV. 1, 61 (2007). Moreover, the Court refused to apply Title I against the states for money damages because Congress had not relied on evidence sufficient to provide a rational basis for concluding that states were engaged in patterns of employment discrimination against disabled persons that required such prophylactic legislation. See Bd. of Trs. v. Garrett, 551 U.S. 356, 374 (2001). Although in recently finding that Congress’s prophylactic legislation was supported by sufficient evidence, the Court upheld Title II against the states; it did so narrowly, however, with regard to the right of access to courts. See Tennessee v. Lane, 541 U.S. 509, 524–25, 527–28 (2004).
and ignore the more comprehensive congressional intent and understanding of disability discrimination that was codified in the ADA.\textsuperscript{140}

In light of this history, Congress recently passed the ADA Amendments Act of 2008, to provide “clear, enforceable standards addressing discrimination.”\textsuperscript{141} The ADAAA specifically rejects a narrow definition of disability and therefore affords protection to a broad scope of persons.\textsuperscript{142} The definition adopted consists of three prongs: “a physical or mental impairment that substantially limits one or more of the major life activities of such individuals; a record of having such an impairment; or being regarded as having such an impairment.”\textsuperscript{143} Congress carefully elucidated major life activities listing among them, “caring for oneself, performing normal tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” but also qualified this list as non-exclusive.\textsuperscript{144} Additionally, the third prong of the definition provides protection where an individual has been subjected to a prohibited action “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a substantial life activity.”\textsuperscript{145} Notably, this definition encourages courts to broadly construe the scope of its protections.\textsuperscript{146}

Congress also provided courts with specific rules of construction.\textsuperscript{147} The first of these rules colors the rest, mandating that the Act’s definition of disability be construed in favor of broad coverage of individuals to the maximum extent permitted by its terms.\textsuperscript{148} The other rules clarify the terms of the Act to broaden the disabled class, with the last providing that determination of whether a person is disabled should “be made without regard to the ameliorative effects of mitigating measures.”\textsuperscript{149} Consequently, the ADAAA has reaffirmed the congressional intent behind the ADA and re-established the scope of its protection to ensure that persons with disabilities are treated equally.\textsuperscript{150}

\begin{footnotes}
\footnotetext[141]{See ADAAA § 2(b)(1).}
\footnotetext[142]{See id.}
\footnotetext[143]{42 U.S.C. § 12102 (1).}
\footnotetext[144]{See ADAAA § 4(a)(2)(A).}
\footnotetext[145]{See id. § 4 (a) (3)(A).}
\footnotetext[146]{See id. § 4(a) (4)(A).}
\footnotetext[147]{See id. § 4.}
\footnotetext[148]{See id. § 4(a) (4)(A).}
\footnotetext[149]{See ADAAA § 4(a)(4). This last rule specifically reverses the result in Sutton. See id. § 4(a)(4)(E); Sutton, 527 U.S. at 486–87.}
\footnotetext[150]{See ADAAA §§ 2–4.}
\end{footnotes}
If successful, the focus will shift away from an individual’s inherent differences and onto the practices of society “examined in light of latent flexibility in structuring and modifying tasks, programs, facilities, and opportunities.”151

Title II of the ADA, provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.”152 Although the Eleventh Amendment has posed a bar to private suits seeking money damages due to state violations under Title I of the ADA, the Supreme Court held that in at least one circumstance, Title II permits private suits for money damages.153 Title II states that voting falls within the rights protected from discrimination by the ADA as a service, program or activity provided by a public entity such as any state or local government.154 Further, discriminatory denial of voting rights should likewise give rise to a right to sue privately for money damages under Title II.155

C. Contemporary Understanding of Mental Disability with Regard to Voting Capacity: An Incentive to Develop Less Restrictive Voter Eligibility Requirements

Even in the face of a strong presumption that persons are competent to vote, contemporary disability advocates recognize that, at times, it may be necessary to directly assess that capacity.156 As discussed earlier, such a standard was not necessary in the past because incapacity was often defined solely by status, that is, for example, persons under guardianship, institutionalized or insane.157

Fortunately some jurisdictions, influenced by contemporary understandings of mental disability, are adopting more individualized functional assessments rather than categorical definitions of capacity.158

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151 ADA Restorative Act Hearing, supra note 69, at 26.
153 See Lane, 541 U.S. at 531; Garrett, 531 U.S. at 374. Lane held “that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services.” Lane, 541 U.S. at 531.
155 See id. § 12132; Lane, 541 U.S. at 530–31.
156 See Hurme & Appelbaum, supra note 39, at 960.
157 See id.
158 See id. at 936–45, 961.
Four states have attempted to define a standard. Washington, for example, excludes from voting only those persons who “lack[] capacity to understand the nature and effect of voting such that he or she cannot make an individual choice.” Wisconsin provides that incapacity for purposes of voting is established when a person is found “incapable of understanding the objective of the elective process.” Both the Washington and Wisconsin standards share a basic requirement that the person have some understanding of the electoral process. Even as early as 1907, courts searching for a standard of voting capacity recognized knowledge of the nature and effect of one’s act in casting a vote as the generally accepted rule.

Although scientific knowledge can assist in the formulation of a standard for voting capacity, the end result will always be a policy measure, not scientific itself. The capacities of persons with mental disabilities range from greater to lesser proficiency with no scientifically determinant point at which a mark of sufficient capacity can be established. Accordingly, where the mark is placed must be derived from balancing the importance of allowing the person to exercise the right with the potential adverse outcomes of such an allowance.

At law, capacities generally fall within two categories, decisional (capacity to decide something) and performance-oriented (capacity to do something). Voting is essentially a decisional capacity, it rests on the cognitive function of grasping data and choosing between op-

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161 Wis. Stat. § 54.25(2)(c).1.g.

162 See Wash. Rev. Code § 11.88.010(5); Wis. Stat. § 54.25(2)(c)1.g.


164 See Hurme & Appelbaum, supra note 39, at 962.

165 See id.

166 See id. Adverse outcomes would include the harms suffered by a state and the disabled person when a person who does not understand the nature and effect of voting casts a vote or someone else takes advantage of a person’s disability to cast a fraudulent vote. See Jason H. Karlawish et al., Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia, 292 J. Am. Med. Ass’n 1345, 1345 (2004).

167 See Hurme & Appelbaum, supra note 39, at 962.
Decisional capacity analysis is not new to the law, so states can rely upon its well-developed foundations in creating a standard. Over time consideration of decisional capacity has come to rely upon four main elements: a person’s ability to (1) understand relevant information, (2) appreciate the effects of one’s own decisions, (3) compare options and (4) make choices. Thus, legislatures can craft capacity standards out of all or some of these elements and the degree to which any one element is emphasized will tailor the rigor of the test.

The states that have offered guidance to elections administrators have adopted a low standard for voting capacity in order to maximize the number of people eligible to vote. Their decision likely relies upon the strong weighing of policy in favor of extending the right to vote, “a defining characteristic of democratic polity,” against the small and uncertain risk for abuse, fraud, or otherwise improper ballot casting by the marginally incapacitated.

Furthermore, the creation of a standard is aided by the substantial development of standardized assessments of decisional capacity over the last few years. These new tools produce quantitative measures that can be considered when assessing capacity but are not given determinate weight. Knowing the typical range associated with capacity and incapacity based upon statistical data can aid a professional in tough cases, but any score that falls below an established cut-off would

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168 See id. at 962–63. Even though voting requires some physical act like flipping a lever or filling in a bubble on the ballot, that action is not intrinsic to the act of voting itself and no longer needs to be completed by the person himself. See id.

169 See id. Examples of recognized decisional capacities include the ability to contract, marry, create a will and make decisions regarding one’s medical treatment. See id.

170 See Grisso & Appelbaum, supra note 43, at 1033. When more elements are included in the standard, the more rigorous the test of capacity becomes. See id. at 1034–35, 1036–37.

171 See id. A difficult test would require the person to understand the act of voting, be able to reason between candidates and ballot measures and appreciate his own choice and the effect of his casting a ballot, thereby incorporating all four legal standards of decisional capacity. See id. at 1034–35, 1036–37.


173 See Hurme & Appelbaum, supra note 39, at 963–64. This inference and the modern trend toward extending the right to vote are reinforced by the fact that only the understanding element of the decisional capacity test has been adopted even though medical evidence has shown that each additional element added to such a test will narrow the class considered capable. Grisso & Appelbaum, supra note 43, at 1035–36. Further, in retaining this element, legislatures and courts require only a “modicum of knowledge” of voting and forbid any more particularized inquiry. See Hurme & Appelbaum, supra note 39, at 965.


175 See Hurme & Appelbaum, supra note 39, at 963–64, 966.
simply indicate the need for more careful evaluation, not a categorical exclusion.\textsuperscript{176}

The Competence Assessment Tool for Voting (CAT-V) is one such test that poses certain tasks to the subject in order to probe his or her understanding of the nature and effect of voting and ability to choose between options.\textsuperscript{177} The CAT-V was tested on a small group of Alzheimer’s patients at the Memory Disorders Clinic at the University of Pennsylvania and revealed tight correlation between scores and the degree of dementia.\textsuperscript{178} Nevertheless, these results remain to be demonstrated on a wide scale.\textsuperscript{179} Regardless, the advantage of such a tool is that it “focuses the interviewer’s attention on the specific abilities requisite to voting and may even provide a basis for educating the person being evaluated so that they might[sic] acquire sufficient understanding to achieve capacity.”\textsuperscript{180}

Contemporary understanding of mental disability has evolved substantially and now encourages and assists the expansion of the right to vote.\textsuperscript{181} Some states have already begun to establish standards to assess a person’s capacity to vote.\textsuperscript{182} Additionally, structured assessment instruments have substantially developed to such an extent that they can assist in providing a spectrum upon which states can mark at what point

\textsuperscript{176} See Appelbaum et al., supra note 43, at 2094–95, 2097.

\textsuperscript{177} See id. at 2095. The exam itself features an assessor asking various questions, such as “Imagine that two candidates are running for Governor of [subject’s state], and today is Election Day in [subject’s state],” “What will the people of [subject’s state] do today to pick the next Governor?” (testing the subject’ understanding of the nature of voting), and “When the election for governor is over, how will it be decided who the winner is?” (testing the subject’s understanding of the effect of voting). Id. at 2099. The second part of the test concerns the subject’s ability to choose between candidates posing a choice between two hypothetical candidates with different platforms. See id.

\textsuperscript{178} See id. at 2095, 2096 tbl.1. This element of the test makes the test arguably more rigorous than what would be required by the standard states and courts have been inclined to adopt as mentioned above. See Wash. Rev. Code § 11.88.010(5) (Supp. 2009); Wis. Stat. § 54.25(2)(c)1.g (2008); Doe, 156 F. Supp. 2d at 56; Welch, 83 N.E at 558; Appelbaum et al., supra note 43, at 2095, 2096 tbl.1. Regardless, the actual test data seemed to indicated that this “choice” element of the decisional test was more frequently met than the “understanding” element by the group tested. See Appelbaum et al., supra note 45, at 2095, 2096 tbl.1.

\textsuperscript{179} See Hurme & Appelbaum, supra note 39, at 970.

\textsuperscript{180} See id.

\textsuperscript{181} See Karlawish et al., supra note 166, at 1346; Charles P. Sabatino & Edward D. Spurgeon, Facilitating Voting as People Age: The Implications of Cognitive Impairments, 38 McGeorge L. Rev. 843, 850–52 (2007).

\textsuperscript{182} See Wash. Rev. Code § 11.88.010(5); Wis. Stat. § 54.25(2)(c)1.g.
mental incapacity is sufficient to deny persons the right. Thus, in accordance with this trend, all states should create measurable standards for voting capacity based upon the low threshold of a person’s ability to understand the nature and effect of voting.

III. REFORM AMONG STATES LAGS BEHIND DESPITE RECENT COURT DECISIONS

Despite advances in understanding mental disability and the creation of tests that provide reliable measurements of mental capacity, some states have not changed their constitutions or election laws to remedy this unjustified disenfranchisement. Without modification, these laws allow for summary denial of the right of suffrage to persons with mental disabilities, who nevertheless understand the nature and effect of voting and have the ability to make choices, in violation of the Equal Protection Clause of the Fourteenth Amendment. Even worse, informal barriers that prevent access to the polls or absentee voting may persist despite the most inclusive state constitutions and election laws.

A. Tennessee v. Lane: Affirming Title II Protection for Certain Fundamental Rights

Tennessee v. Lane, a recent case under Title II, was brought by plaintiffs who were paraplegics who used wheelchairs for mobility claiming “they were denied access to, and the services of, the state court system by reason of their disabilities.” Although the plaintiffs did not contest their voting eligibility, the Supreme Court referred to voting at least five times in its opinion. Particularly, the Court recognized the harm Congress sought to redress by enacting Title II—the “pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.” Moreover, the Court noted that “[a]s of 1979, most States still categorically disqualified
‘idiots’ from voting, without regard to individual capacity.”\textsuperscript{191} The opinion seemed to lament that many of these laws “remain on the books” and recognized that one such law was recently challenged in 2001.\textsuperscript{192}

Notably, \textit{Lane} found that Title II sought to enforce not only a prohibition on disability discrimination but also “a variety of other basic constitutional guarantees.”\textsuperscript{193} The Court emphasized that such rights were “subject to more searching judicial review” and some were “protected by the Due Process Clause of the Fourteenth Amendment.”\textsuperscript{194} Under this review, the Court found Title II to be congruent and proportional to its object of enforcing the right of access to the courts, a fundamental right.\textsuperscript{195} The \textit{Lane} opinion recognized that the ADA demanded states remove such barriers because failure to do so would have the same practical effect of outright exclusion.\textsuperscript{196}

Therefore, Title II could prove to be a tool to enforce other fundamental rights that have been subject to a similar history of discrimination, like the right to vote.\textsuperscript{197} At the very least, \textit{Lane} is strong precedent that allegations of discriminatory denial of the right to vote will be evaluated at a closer level of scrutiny than rational basis.\textsuperscript{198} At best, \textit{Lane} supports the proposition that “ordinary considerations of cost and convenience alone” will not justify a state’s denial of a fundamental liberty interest such as the right to vote and, on the other hand, may oblige the state to provide for that right’s meaningful exercise.\textsuperscript{199}

\textbf{B. Doe v. Rowe: Holding States Accountable for Discriminatory Voting Laws}

\textit{Lane} referred to a 2001 voting rights case that was a significant victory for persons with mental disabilities in the state of Maine.\textsuperscript{200} In \textit{Doe v. Rowe}, the U.S. District Court of Maine considered whether Maine’s
constitution and its state election law violated the Due Process and Equal Protection Clauses, the ADA and the Rehabilitation in prohibiting “persons under guardianship for reasons of mental illness” from registering to vote and voting in any election.201 The case included three individual plaintiffs and the Disability Rights Center of Maine, Inc., which represented each plaintiff as well as the rights of all Maine residents who had been denied the right to vote as a result of being placed under guardianship for mental illness.202

The first plaintiff was Jane Doe, a thirty year old placed under full guardianship as a result of bipolar disorder.203 At her guardianship proceedings, the probate court did not consider her capacity to vote or notify her that she would lose the right to vote as a result of the placement.204 Just before the November 2000 election, Jane desired to vote, but the constitution of Maine prohibited her from engaging in that activity.205 She sought a preliminary injunction to allow her to vote and, in so doing, learned that the State of Maine’s position was “that a person under full guardianship by reason of mental illness could vote if the Probate Court specifically reserved this individual’s right to vote.”206 Accordingly, Jane Doe filed a petition with the Aroostook County Probate Court to modify her guardianship order and was granted the motion.207

The next plaintiff, Jill Doe, was a seventy-five year old woman also diagnosed with bipolar disorder and placed under guardianship upon being classified as incapacitated by reason of her mental illness.208 Jill averred that no one raised the issue of her capacity to vote at her guardianship proceeding.209 Like Jane, Jill filed a motion with the Pe-

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201 See id. The court found that “pursuant to Maine’s Constitution and the relevant implementing statute, persons who are ‘under guardianship for reasons of mental illness’ are prohibited from registering to vote or voting in any election.” Id. at 38. Further, the state criminalized the act of voting if the person had knowledge he or she was prohibited. See Me. Rev. Stat. Ann. tit. 21–A, § 674(3)(B) (2009).

202 See Doe, 156 F. Supp. 2d at 39.

203 See id. The court adopted the Department of Health and Human Services understanding of bipolar disorder as “a recurrent mood disorder featuring one or more episodes of mania or mixed episodes of mania and depression.” Id. at 39 n.4; U.S. Dep’t of Health & Human Servs., Mental Health: A Report of the Surgeon General 246 (1999).

204 See Doe, 156 F. Supp. 2d at 39.

205 See id.

206 See id.

207 See id.

208 See id.

209 Doe, 156 F. Supp. 2d at 40. Jill contested that she was incapacitated at the guardianship proceeding and in the alternative argued that she should be placed under limited
nobscot County Probate Court asking her order be revised so she could vote in the November 2000 election.\footnote{210} In support of her motion, Jill offered an affidavit from her psychiatrist, indicating that the doctor believed Jill “understood the nature and effect of voting such that she could make an individual choice about the candidates and questions on the ballot.”\footnote{211} Although her motion was unopposed, the probate judge denied it summarily based on his reading of the law, specifically “under the provisions of Article II, Section I of the Constitution of the State of Maine.”\footnote{212}

The third plaintiff, June Doe, was under guardianship as a result of being diagnosed with mild organic brain syndrome, intermittent explosive disorder, and antisocial personality.\footnote{213} Just like Jane and Jill, June’s capacity to vote was not considered at her guardianship proceeding.\footnote{214} June wanted to vote but could not file a motion because she was hospitalized; her motion, however, would have been heard by the same probate judge who summarily dismissed Jill’s motion and would likely have faced a comparable fate.\footnote{215} Her doctor testified that “based on his . . . 32 years of experience [he] generally believe[d] that a person under guardianship for severe mental illness ‘is more likely to be monitored and receive treatment which will help restore him or her to capacity in areas such as voting’ compared to [other mentally ill persons] not under guardianship.”\footnote{216} The Doe court related this doctor’s observation to what the U.S. Supreme Court had described as a “common phenomenon” among mental disorders, that the patient functions well with medication but because of the illness, lacks the capacity to follow the treatment regime.\footnote{217} This logic, if accepted, may undercut the reasoning behind any limitation on the voting rights for persons under guardianship only to ensure she take her medication. See \textit{id.} at 39–40. The probate judge nonetheless placed her under a full guardianship arrangement. See \textit{id.}.

\footnote{210} See \textit{id.} at 40. In support of her motion, Jill gave a sworn affidavit attesting that she had voted in the past by absentee ballot being unaware that she was not allowed. See \textit{id.}

\footnote{211} See \textit{id.}

\footnote{212} Doe, 156 F. Supp. 2d at 40; see Me. Const. art. II, § 1.

\footnote{213} Doe, 156 F. Supp. 2d at 40. Antisocial personality disorder is a “pattern of disregard for and violation of the rights of others.” \textit{Am. Psychiatric Ass’n, supra} note 75, at 685. Organic brain syndrome describes “any of various disorders of cognition caused by permanent or temporary brain dysfunction and characterized especially by dementia.” \textit{Am. Heritage Dictionary} 1239 (4th ed. 2000).

\footnote{214} See Doe, 156 F. Supp. 2d at 40.

\footnote{215} See \textit{id.} at 41.

\footnote{216} See \textit{id.} at 41 n.7.

\footnote{217} See \textit{id.} (citing \textit{Olmstead v. L.C.}, 527 U.S. 581, 610 (Kennedy, J., concurring)).
guardianship for reasons of mental illness and likely supports the con-
verse.218

The State of Maine argued that it was a duty of probate court
judges to determine a person’s capacity at the guardianship hearing.219
Yet, the record itself evidenced confusion among the probate judges as
to whether they were bound by such a duty, let alone whether they had
the authority to make such a determination in the first place.220 Moreover,
the court observed that individuals with mental illness subjected
to guardianship proceedings were not specifically advised that “they
could be disenfranchised if they are placed under full guardianship.”221

In addition, neither the Maine Constitution nor the relevant stat-
ute set forth a definition of “mental illness.”222 In 1980, the Deputy Sec-
retary of State advised that the restriction only applied to “a person un-
der guardianship for reasons of mental illness.”223 He also stated that it
did not include those mentally ill but not under guardianship or those
who appeared “senile” or “retarded” or who had another physical or
mental handicap.224 During the Doe litigation, the defendants realized
that this view disenfranchised an “arbitrarily defined group of citi-
zens.”225 Consequently, they argued that the court should read the term
broadly to include all persons under full guardianship.226

The Doe court considered Maine’s drastic re-interpretations of the
definition of mental illness and the proffered due process protections
as a desperate attempt to cover up constitutional infirmities in the
state’s law.227 Accordingly, the court found that the manner by which
Maine disenfranchised persons with mental illness violated guarantees
do process and equal protection, both facially and as applied, as
well as Title II of the ADA.228 Significantly, the opinion derided the
state’s definition of mental illness saying that it “singles out, for no le-

218 See id.
219 See Doe, 156 F. Supp. 2d at 43.
220 See id.
221 See id.
222 See id.
223 See id at 44.
224 See Doe, 156 F. Supp. 2d at 44. The Office of the Maine Secretary of State again
adopted a similar position in 1999. See id.
225 See id.
226 See id. The court was skeptical of this position because there was no evidence of at-
ttempts to advise or educate municipal officials and there was no indication that voters had
been advised of this new broad meaning of “mental illness” when they re-affirmed the
restriction by referendum in November 2000. See id. at 44–45.
227 See id. at 45–46.
228 Id. at 49, 50–51, 52, 56, 59.
gitimate basis, people with psychiatrically based diagnos[e]s as opposed to all those who may be under guardianship for reasons of mental incapacity.”229 Most importantly, the court warned that adding more diagnoses to the category of mental illness increases the risk that people who understand the nature and effect of voting will be wrongfully denied their right.230 In sum, Doe established that a categorical exclusion of persons with mental disabilities that did not distinguish between persons who understood the nature and effect of voting and those who did not was unconstitutional and in violation of federal law.231 Moreover, the court found that the manner by which this exclusion was effectuated particularly offended the procedural due process guarantees.232

C. Missouri Protection & Advocacy Services, Inc. v. Carnahan: A Bump on the Road

In Missouri Protection & Advocacy Services, Inc. v. Carnahan, residents and an advocacy organization challenged a Missouri constitutional provision and its implementing statute, which denied the right to vote to residents under guardianship by reason of mental incapacity.233 The court recognized that Missouri’s prohibition had “a long history.”234 Like other states, Missouri originally barred from voting persons kept at poorhouses or other asylums at public expense and only later added to the prohibition any “idiot” or “insane person.”235 In 1958, the state passed an amendment which provided “no person who has a guardian . . . by reason of mental incapacity, appointed by a court of competent

229 See id. at 52. The court was particularly disturbed by the fact that a person under guardianship because of mental retardation would unconditionally be allowed to vote regardless of whether his mental disability diminished his capacity to understand the nature and effect of voting. See id.

230 See Doe, 156 F. Supp. 2d at 55. The court related that in 1999, the United States Department of Health and Human Services released the first Surgeon General’s Report on Mental Illness, which defined mental illness as “a term that collectively refers to all diagnosable mental disorders.” See id. at 54 (quoting U.S. Dep’t of Health & Human Serv., supra note 203, at 5) The court continued, “Mental disorders are health conditions that are characterized by alteration in thinking, mood or behavior (or some combination thereof) associated with distress and/or impaired functioning.” Id. (quoting U.S. Dep’t of Health & Human Serv., supra note 203, at 5). The court reasoned that should a state adopt such a broad modern definition as its basis for exclusion from voting eligibility it would risk excluding those who have some disorder, such as an eating disorder, but nonetheless possess a genuine understanding of the nature and effect of voting. See id. at 55.

231 Id. at 56.

232 See id. at 50–51.

233 See 499 F.3d 803, 805 (8th Cir. 2007).

234 See id.

235 See id. at 806; Colker, supra note 23, at 1449.
jurisdiction . . . shall be entitled to vote.” The amendment’s aim was to give polling officials a concrete standard for determining who could be disqualified. The state’s implementing statute, however, provided a different standard that prohibited persons, “adjudged incapacitated” from registering to vote.

The named plaintiff, Robert Scaletty, had been diagnosed with schizophrenia and, in 1999, was placed under a full order of protection in accordance with procedures established in Missouri law. Although his guardianship order reserved his right to vote, he was subsequently denied the right by election officials who explained that state law does not allow individuals under such an order to vote. After Scaletty became party to the case in January 2005, however, the Kansas City Board of Election Commissioners sent his guardian a voter identification card and advised that he would be eligible to vote in the future.

The plaintiffs mounted a facial attack against the Missouri constitutional and statutory provisions, arguing that they constituted a categorical ban on voting for persons under guardianship. They argued that the bare term, “adjudged incapacitated,” of the statute could be read to implicate a far broader class of individuals than those excluded by Article VIII § 2 of the Missouri Constitution, including those placed under guardianship by reason of physical disability.

The district court in this case explained that “difficulty arises in determining whether people who have been adjudged incompetent can, with or without accommodation, meet the essential eligibility requirements for voting,” and it concluded that some could, and some could not. The court examined the totality of Missouri law to reach its conclusion. It found that Missouri law requires an “individualized determination of the individual’s mental capacity and entry of an order that is no more limiting than necessary to protect the individual.”

236 See Carnahan, 499 F.3d at 805.
237 See id. at 806.
238 See Mo. Ann. Stat. § 115.133.2 (2008); Carnahan, 499 F.3d at 806.
239 See Carnahan, 499 F.3d at 811.
240 See id.
241 See id.
242 See id. at 808.
243 See id. at 806.
245 See id.
246 See Mo. Rev. Stat. § 475.078.3 (2008) (allowing the probate court to find and enter an order recognizing that a person is incompetent as to some matters and competent as to others); Carnahan, 2006 WL 1888639, at *6. In reaching this conclusion, the court was
The court grounded its logic upon a provision that empowered and obligated a probate judge to tailor an order of protection to the needs of the ward and not impose limits that are greater than necessary. Yet, the opinion noted that its conclusion might have been different “if the entire sum and substance of Missouri law dictated that any person with a legally appointed guardian” could not vote. The court believed that such a situation might violate the ADA.

On appeal to the United States Court of Appeals for the Eighth Circuit, the plaintiffs renewed their argument that Missouri’s constitution and implementing statute had created a categorical ban on voting for persons under guardianship. The court recognized that if the plaintiffs’ contentions were true, the statute would not fare well under close equal protection scrutiny. Yet, the court was confident that the Missouri Supreme Court would read the inconsistent statutory terms the same in light of a firm state policy to construe liberally the right of suffrage. It observed that, taken together, the statutes cited preserve the right to vote for partially incapacitated individuals, unless the court specifies otherwise, and deny the right to vote for totally incapacitated individuals, unless the court specifies otherwise. Further, as written, persuaded that “the net effect is to afford the person the protection needed and allow him or her to operate without the strictures of an order of protection with respect to those aspects of life for which protection is not required—including, if appropriate in a given case, the right to vote.” See id.

See Carnahan, 2006 WL 1888639, at *4. The court relied on the Missouri statute which read:

A person who has been adjudicated incapacitated . . . shall be presumed to be incompetent. A person who has been adjudicated partially incapacitated . . . shall be presumed to be competent. The court . . . may determine that an incapacitated . . . or particularly incapacitated . . . person is incompetent for some purposes and competent for other purposes.

MO. REV. STAT. § 475.078.3.

See Carnahan, 2006 WL 1888639, at *6. In which case the law would not account for the individual’s unique abilities and limitations upon making a decision resulting in the denial of the right to vote. See id.

Id.

See Carnahan, 499 F.3d at 808.

See id.

See id. at 806.

See MO. REV. STAT. §§ 475.010, 475.078 (2008); Carnahan, 499 F.3d at 806. Like the district court, the circuit court considered that the Missouri Probate Code contains different provisions for an “incapacitated person” and a person only “partially incapacitated,” the main distinction being that full incapacity imposes “all legal disabilities provided by law, except to the extent specified in the order of adjudication.” See Carnahan, 499 F.3d at 806. This convinced the court that the partially incapacitated individual would be subject
the law creates a presumption that one has the right to vote until adjudged incapacitated.\textsuperscript{254}

Unfortunately, due to standing, the court refused to address the plaintiffs’ proffered evidence of the very same type of categorical exclusion that was present in \textit{Doe}.\textsuperscript{255} The court held that the Missouri Protection and Advocacy Services, Inc. (MOPAS) had no standing to bring these allegations of discrimination, despite representing four individuals who were denied the right to vote because they were under full guardianship orders.\textsuperscript{256} Nevertheless, the court did not hesitate to condemn categorical denials of the right to vote based solely on one’s status without considering one’s actual understanding of the nature and effect of voting.\textsuperscript{257}

D. \textit{Lane, Doe, and Carnahan Provide a Strong Incentive for States to Develop a Clear and Fair Standard for Voter Eligibility}

Even if the states that categorically exclude persons based upon their mental disabilities choose to ignore the trend toward facilitating the inclusion of the mentally disabled in communities, they must now reconcile their election law with the demands of the Constitution and federal government in light of the foregoing court decisions.\textsuperscript{258} \textit{Lane} equipped advocates with a powerful tool which bolsters the historically denigrated right to vote of persons with mental disabilities.\textsuperscript{259} \textit{Lane} also sent a clarion call to states, informing them that failing to accommodate persons with disabilities by removing barriers to their participation in society and full enjoyment of our Constitution’s guarantees can constitute discrimination.\textsuperscript{260} Further, \textit{Doe} struck down a state’s election law and demanded that a new standard for eligibility be developed based

\textsuperscript{254} See \textit{Carnahan}, 499 F.3d at 806–07.

\textsuperscript{255} See \textit{id.} at 810.

\textsuperscript{256} See \textit{id.} 809–10. Dr. Paul S. Appelbaum, cited \textit{infra} for his work toward the development of a structured assessment of voting capacity, conducted the evaluation of the MOPAS constituents and concluded that they met the criteria suggested by \textit{Doe}. See Brief of Appellants at 8, 11, Mo. Prot. & Advocacy Serv., Inc. v. \textit{Carnahan}, 499 F.3d 803 (8th Cir. 2007) (No. 06-3014). Further, there was evidence that even if the state provided a means by which the wards could seek restoration of their right, guardians often forbade or failed to help them do so. See \textit{id.} at 13.

\textsuperscript{257} See \textit{Carnahan}, 499 F.3d at 808.

\textsuperscript{258} See \textit{Lane}, 541 U.S. at 524, 531–34; \textit{Carnahan}, 499 F.3d at 808; \textit{Doe}, 156 F. Supp. 2d at 38, 51, 56, 59.

\textsuperscript{259} See 42 U.S.C. § 12132; \textit{Lane}, 541 U.S. at 524.

\textsuperscript{260} See \textit{Lane}, 541 U.S. at 531.
upon an individual’s actual understanding of the nature and effect of voting.\textsuperscript{261} Finally, \textit{Carnahan} reaffirmed that states will not be able to rely upon election laws which in effect categorically exclude persons based upon their status.\textsuperscript{262} States cannot remain blind to the change embodied in these recent cases; they must affirmatively work toward facilitating the right to vote for persons with mental disabilities and exclude only individuals a court finds incapacitated because the potential voters genuinely lack an understanding of the nature and effect of voting, as determined by a clear and fair standard.\textsuperscript{263}

**Conclusion**

Today, mentally disabled people who retain a fundamental understanding of the nature and effect of voting such that they are able to make choices are barred from doing so in several states.\textsuperscript{264} Consequently, these people are denied the means by which to effectuate their legal rights and a voice in government—rights guaranteed in the Constitution. These denials violate equal protection as well as Title II of the Americans with Disabilities Act and cannot persist.\textsuperscript{265}

A national trend away from this pernicious discrimination has been given force through opinions like \textit{Lane}, \textit{Doe}, and \textit{Carnahan}.\textsuperscript{266} The law of this country demands a right to vote even for those suffering from mental disabilities. States should facilitate the independent exercise of voting. Though states have some discretion to exclude those who are mentally incapacitated, they must create clear and fair standards based on a low threshold that take into account the ability to understand the nature and effect of voting.\textsuperscript{267} These standards should be applied by courts in order to guarantee due process and equal protection under the law. Accordingly, all states \textit{should} assist those who desire to exercise the right to vote and \textit{must} assure that they are not arbitrarily denied and excluded.

\textsuperscript{261} See \textit{Doe}, 156 F. Supp. 2d at 56.

\textsuperscript{262} See \textit{Carnahan}, 499 F.3d at 808.

\textsuperscript{263} See \textit{Lane}, 541 U.S. at 524, 531–34; \textit{Carnahan}, 499 F.3d at 808; \textit{Doe}, 156 F. Supp. 2d at 33, 51, 56, 59; \textit{ADA Restoration Act Hearing}, supra note 69, at 12, 26.

\textsuperscript{264} See Hurme & Appelbaum, supra note 39, at 956. Hurme and Appelbaum found, as of 2007, that the laws of Arizona, Hawaii, Mississippi, Nevada, Virginia, West Virginia, and Wyoming resulted in categorical exclusions. \textit{See id.} at 61 n.161.

\textsuperscript{265} See \textit{Doe}, 156 F. Supp. 2d at 56.

\textsuperscript{266} See \textit{Lane}, 541 U.S. at 524; \textit{Carnahan}, 499 F.3d at 808; \textit{Doe}, 156 F. Supp. 2d at 33, 51, 56, 59.

\textsuperscript{267} \textit{Doe}, 156 F. Supp. 2d at 33, 51, 56, 59.
COLLECTIVE RIGHTS TO INDIGENOUS LAND IN CARCIERI v. SALAZAR

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Abstract: Since settlers set foot in the Americas, tension has existed between American Indian tribes and European settlers over tribal rights to land. When the Narragansett Tribe of Rhode Island proposed to build low-income housing on a thirty-one acre parcel of land, it became involved in years of litigation with the State of Rhode Island, its governor, and the town of Charlestown, RI. Throughout the litigation, the debate over collective ownership of land, cultural differences in property rights and the intentions behind the United States government’s policy positions regarding American Indians simmered below the surface. This comment focuses on those issues and argues that the Supreme Court’s decision in Carciere v. Salazar, by refusing to grant collective rights to the Narragansett Tribe, violates the Indian Reorganization Act and constitutes an unjust imposition of the western view of individual rights to tribal land ownership.

INTRODUCTION

All over the world, indigenous peoples struggle to maintain or reclaim their ancestral lands from governments, private citizens, or corporations.1 In 2005, a group of scholars and professionals assembled at Oxford University to discuss the cultural, social, political and legal dimensions of land rights among indigenous peoples around the world.2

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2 See Timothy Chesters, Introduction to LAND RIGHTS, supra note 1, at 1, 1. Indigenous peoples are descended from the pre-colonial inhabitants of particular territories, are often marginalized in society, have distinct traditions, identities, customs and beliefs, and define themselves as indigenous. See Lotte Hughes, Response to Richard Leakey, “Whose World Is It Anyway?,” in LAND RIGHTS, supra note 1, at 166, 169–71. The idea of indigeneousness is, in large part, the invention of colonial anthropologists, whose definitions made it easier for colonial governments to classify, control, divide, and rule native peoples. See id. at 171. Despite that fact, the definition helps those who seek rights and protections for indigenous
Five of the presented speeches and six essays in response make up Land Rights: Oxford Amnesty Lectures. Although each presenter and respondent discussed land rights in a different country and evidenced a different perspective, a few core themes run throughout the lectures and throughout the international debate on indigenous rights. One theme in particular, the tension between individual and collective rights to land among indigenous peoples, resurfaced again and again.

In the United States, Congress has used its plenary power over Indian affairs to enact laws that limit or eradicate tribal land rights, making the tribes ever-more dependent on the U.S. government for aid. Meaningful judicial review of Congressional acts has not been forthcoming, and the Supreme Court has set many harmful precedents it-

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3 Chesters, supra note 2, at 1.
4 See id. at 11.
5 See William Beinart, Strategies of the Poor and Some Problems of Land Reform in the Eastern Cape, South Africa: An Argument Against Recommunalization, in LAND RIGHTS, supra note 1, at 177, 200 (suggesting that land reform policies should exclude communal forms of ownership); Brennan, supra note 1, at 77, 78–80 (noting that with collective land rights and self-determination, indigenous people must reconcile their membership in society at large with membership in the collective, and must understand the clash that occurs when an individual asserts rights against the collective); Richard Leakey, Whose World Is It Anyway?, in LAND RIGHTS, supra note 1, at 153, 156–57 (discussing the tension between European and indigenous concepts of land rights); Romeo Saganash, Indigenous Peoples and Human Rights, in LAND RIGHTS, supra note 1, at 47, 56, 60–61 (discussing the tension between individual and collective rights while urging the recognition of collective rights to land); see also James Anaya, Indigenous Law and Its Contribution to Global Pluralism, 6 INDIAN L.J. 3, 6–7 (2007); Lorie M. Graham, Reparations, Self-Determination, and the Seventh Generation, 21 HARV. HUM. RTS. J. 47, 63–64 (2008); Austen L. Parrish, Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights, 31 AM. INDIAN L. REV. 291, 309 (2006–2007).

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self, often withdrawing federal benefits that tribes need most and leaving few resources behind.\(^7\) In *Carcieri v. Salazar*, the Supreme Court denied the Narragansett Tribe of Rhode Island ("the Tribe" or "the Narragansett"), and any tribe not under federal jurisdiction in 1934, the benefits of The Indian Reorganization Act (IRA), which Congress passed during the New Deal era.\(^8\) The IRA, which came after centuries of whittling away tribal rights and preceded many more years of the same, is a rare bright spot in the history of federal Indian law.\(^9\) Nevertheless, the majority in *Carcieri* held that the definition of "tribe" in the IRA was dependent on the definition of "Indian," therefore denying that a tribe had any collective rights that transcended the individual

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\(^7\) See, e.g., *Carcieri v. Salazar* (*Carcieri III*), 129 S. Ct. 1058, 1068 (2009) (holding that the Narragansett Tribe of Rhode Island could not claim benefits under the Indian Reorganization Act of 1934 because they were not under federal jurisdiction in 1934); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 425 (1989) (holding that Indian tribes cannot regulate land held in fee by non-Indians); *Lyny v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451, 453 (1988) (holding that, despite the "devastating" impact on traditional religious practices that a Forest Service logging road through sacred Native American land would have, "[w]hatever rights the Indians may have to the use of the area . . . do not divest the Government of its right to use what is, after all, its land"); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 205–06, 212 (1978) (holding that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians, reducing tribes’ ability to enforce the norms of their community against non-Indians who commit crimes on reservations and, especially, against corporations); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (holding that Congress has the power to abrogate Indian treaties in favor of "considerations of governmental policy"); *Kagama*, 118 U.S. at 384 ("The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (holding that tribes have the right of possession and use of land, which could be extinguished at any time by the federal government through discovery). For a general discussion of Congressional plenary power over Indian affairs and the lack of meaningful judicial review, see Robert J. Miller, *Native America, Discovered and Conquered* 163–64 (2006); Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 Hastings L.J. 579, 580–81 (2007) (arguing the existence of a "reduction in Indian law cases decided on the basis of established precedent, an increase in cases decided without a guiding legal theory, and an increase in cases that appear to be decided on the basis of the gut reaction of the Justices").


\(^9\) See Ward Churchill, *Perversions of Justice: Indigenous Peoples and Angloamerican Law* 16 (2003); Pevar, *supra* note 6, at 10. Although the IRA affords significant benefits to tribes, the Act also further increases tribal dependence on the federal government and, in some ways, decreases sovereignty. See Churchill, *supra*. Despite these caveats, it is still appropriate to characterize the IRA as more positive than other legislation, such as the Dawes Act. See Larry W. Burt, *Tribalism in Crisis: Federal Indian Policy*, 1958–1961, at 3 (1982).
rights of its members.\textsuperscript{10} By limiting the ability of tribes to assert collective rights and to exercise sovereignty over their land under the IRA, the Supreme Court removed some of the most important federal benefits that tribes may claim.\textsuperscript{11}

Part I of this Comment introduces the tension between individual and collective rights and the United Nation’s resolution of this tension. Part II traces the evolution of American legislative and judicial policy as it pertains to American Indians.\textsuperscript{12} Part III addresses \textit{Carcieri v. Salazar} as an example of the Court’s refusal to recognize collective rights to land under the IRA. Finally, Part IV discusses the proposed Congressional action to reverse the holding in \textit{Carcieri} by amending the IRA to extend benefits to any federally recognized tribe. Part IV urges the Court to use the Declaration on the Rights of Indigenous Peoples as a template to recognize collective rights without endangering individual rights.

\section{The Debate over Collective Rights for Indigenous Peoples}

As the debate over collective rights for indigenous peoples has unfolded, multiple perspectives have emerged.\textsuperscript{13} Some scholars believe that collective rights for indigenous peoples are tantamount to human rights and should be protected at the international level.\textsuperscript{14} In this view, indigenous peoples should have the ability to assert collective rights against those who attempt to undermine their beliefs, cultures and traditions.\textsuperscript{15} Although many nations are prepared to recognize the individual rights of indigenous people to own property, to be free from discrimination, and so forth, very few countries recognize the collective rights of groups to the same.\textsuperscript{16} Nevertheless, “To restrict international

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\textsuperscript{10} See \textit{Carcieri III}, 129 S. Ct. at 1067.
\textsuperscript{11} See \textit{id.}; \textit{Pevar}, \textit{supra} note 6, at 89–90 (discussing the positive effects of the IRA on tribal abilities to control land among other benefits such as the ability to collect taxes, borrow money, enter into business contracts and operate federally funded programs).
\textsuperscript{12} American Indian is the current census term used by the federal government. Alex M. Johnson, \textit{The Re-emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race}, 94 \textit{Iowa L. Rev.} 1547, 1558 n.42 (2009).
\textsuperscript{13} See Chesters, \textit{supra} note 2, at 1–11.
\textsuperscript{16} See, e.g., Colchester, \textit{supra} note 14, at 121 (“[The UK does] not accept the concept of collective human rights . . . . [H]uman rights are calls upon states to treat individuals in accordance with international standards. As a result, the UK is unwilling to accept use of
human rights to individual rights would only serve to assimilate or otherwise undermine [indigenous] cultures, traditions, legal systems, and world views.”  

For those who hold this view, recognizing only individual rights leaves indigenous peoples without any effective means of self-preservation and practically ensures extinction.

Others believe that recognizing collective rights will endanger the individual rights of indigenous persons. In this view, the danger in recognizing collective rights is that individual rights (for women and children or for minorities within the collective, for example) will suffer under collective leadership and the State’s ability to protect those individuals’ rights will diminish. Still others believe that indigenous peoples should not seek recognition from the international community, preferring that they organize to change their circumstances inside their own countries. Proponents of this view argue that indigenous claims to collective rights “are often seen as threats to the unity of the . . . nation, instead of opportunities to make all groups feel included and to ensure that their needs are recognized.” Although protection of individual rights is of paramount importance both internationally and domestically, one has to question the unilateral denial of collective rights on this basis.

The debate over the collective rights of indigenous people has been especially fierce where land rights are concerned. For many in-
digenous communities the right to occupy their ancestral lands is a precondition to survival as a people. Though indigenous peoples have, by definition, inhabited their lands for many years, remaining on the land and defending or regaining that land from colonizing forces has proven difficult, especially when colonizing forces assert the belief that land ownership is not about connection to the land, but rather about “owning” or using the land in accordance with colonial beliefs.

The Declaration on the Rights of Indigenous Peoples (“the Declaration”), passed by the United Nations General Assembly on September 13, 2007, champions the collective rights of indigenous peoples. Although the Declaration extends collective rights to indigenous groups, it also includes provisions that protect women, elders, children and minorities within indigenous communities. These provisions encourage States to aid indigenous peoples in educating, protecting, and promoting the development of all members, both as individuals and as members of the collective. Multiple provisions in the Declaration relate specifically to land use and recognize that many of the injustices perpetrated against indigenous peoples worldwide have involved land. The Declaration recognizes the right of indigenous people to exercise or regain control over their ancestral lands, to develop their lands in accordance with their own priorities and according to their own strate-

25 See Brennan, supra note 1, at 90 (discussing the Gurindji people’s reclamation of their traditional lands in the Watti Creek (“Dagaragu”) in Australia); Wiwa, supra note 1, at 137–44 (discussing the Ogoni’s struggle for rights to their ancestral land in the Niger River Delta, which has been exploited by oil companies to the detriment of the Ogoni since 1958).


29 See id.

30 See id. at Annex, arts. 8(2)(b), 10, 25–26, 28–30, 32.
gies, and provides redress if such rights are not recognized. The Declaration also includes the right to restitution of lands confiscated, occupied, or otherwise taken without free and informed consent, with the option of providing just and fair compensation wherever such return is not possible. Despite this broad grant of sovereignty over ancestral lands, indigenous peoples cannot rely on the Declaration to change the way governments view their rights because the Declaration lacks an enforcement device and is therefore a mere statement of principle.

II. The Evolution of Indian Law and Policy in the United States

The utmost good faith shall always be observed towards Indians; their land and property shall never be taken from them without their consent.

—The Northwest Ordinance of 1787

Both globally and domestically, the arrival of colonists fundamentally changed the relationship of indigenous peoples to one another and to their land. The arrival of white settlers in the New World changed life dramatically for American Indians, especially in regards to land rights. The colonists viewed land as a commodity, and ownership of land included permanent rights of usage (or non-usage) and the right to profit from its fruits. On the other hand, American Indians viewed the land as a resource, “which could not in itself be owned any more than could the air or the sea.” In tribal culture, people owned the right to use the land for a particular purpose, and these rights were vested in kin groups or villages rather than in individuals. These conflicting views of land ownership led Europeans to view American Indians as mere occupants of the land, which was ready for acquisition by “productive people.” It was nevertheless in the colonists’ interest to

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31 See id.
32 See id. at art. 28.
33 See Ellen L. Lutz, Response to Romeo Saganash, “Indigenous Peoples and International, Human Rights,” in Land Rights, supra note 1, at 69, 71 (“[D]eclarations are not treaties, and they are not offered to states to ratify and thereby bind themselves as a matter of international law. Nor do they create new enforcement machinery to which victims can turn if their rights are violated.”).
34 Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.
35 See Richter, supra note 26, at 54.
36 See id.
37 Frank Pommersheim, Broken Landscape 14 (2009); Richter, supra note 26, at 54; John H. Vinzant, The Supreme Court’s Role in American Indian Policy 39 (2009).
38 Richter, supra note 26, at 54.
39 Id.
40 Pommersheim, supra note 37, at 17. In 1810, Justice John Marshall stated:
keep the peace with the militarily powerful tribes on the East coast for purposes of trade, land, and protection, and colonists and the early government signed treaties to this effect with tribes. After hostilities between states and the tribes within their borders became problematic, the framers made relations with tribes the exclusive province of the federal government, and Congress passed multiple laws assuring tribes that they had nothing to fear.

Despite this early brokered peace, subsequent federal policy towards American Indian tribes has been marked by various policies of removal, allotment and termination. The tribal practice of holding

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What is the Indian title? It is a mere occupancy for the purposes of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. It is a right not to be transferred but to be extinguished.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 121 (1810) (citations omitted). But see Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier 150–51 (2005) (arguing that the English thought the American Indians owned the land, a view which persisted until the 1820s when colonists viewed the tribes as occupying land owned by the United States).

41 See PEVAR, supra note 6, at 6 (characterizing early federal policy towards tribes as conciliatory, meant to avoid further hostilities after war with England, despite the fact that these laws were rarely enforced against settlers); VINZANT, supra note 37, at 42–45 (highlighting the market forces of the fur trade, government disdain for private land deals between colonists and settlers, and the desire for peace with tribes as the controlling factors in relations between tribes and the government).

42 See, e.g., U.S. Const. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .”); Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790) (prohibiting whites from obtaining Indian land without government consent, restricting trade with Indians except in compliance with federal standards, authorized the prosecution of whites who committed crimes against Indians). According to Vinzant, this implies a consensual, not dominant, relationship with tribes designed to protect tribes from the states. VINZANT, supra note 37, at 46–47.

43 See, e.g., 25 U.S.C. § 71 (2006) (“No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.”); Act of May 29, 1830, ch. 148, 4 Stat. 411. The policy of removal was followed by the policy of allotment under the General Allotment Act, which was motivated to end federal dealings with tribes and to force individuals to assimilate into white society. Nicole C. Salamander, Half a Full Circle: The Reserved Rights Doctrine and Tribal Reacquired Lands, 12 U. DENV. WATER L. REV. 333, 336, 339 (2009); see Dawes Act, 25 U.S.C. §§ 331–381 (2006). Under the termination policy, tribes’ relationship with and benefits from the federal government were ended abruptly, leaving tribes without any resources. See PEVAR, supra note 6, at 11; VINZANT, supra note 37, at 61. In assessing tribal readiness for termination, tribes were divided into groups based on several criteria such as percentage of members with European ancestry, literacy rate, business knowledge, acceptance of white institutions, and acceptance by neighboring white communities. VINZANT, supra note 37, at 60. Congress began termination in 1954, and by the early 1960s, had terminated federal relationships with 109 tribes. Id. at 61. A
land in common stood as an impediment to the federal goal of “civilizing” American Indians once they had been removed to reservations in the west. As Senator Henry Dawes said of collective land ownership:

[T]he defect of the system [is] apparent. They have got as far as they can go, because they own their land in common . . . there is no enterprise to make your home any better than that of your neighbors. There is no selfishness, which is at the bottom of civilization. Till this people consent to give up their lands . . . so that each can own the land he cultivates, they will not make much more progress.

The General Allotment Act, also known as the Dawes Act, was sponsored by Senator Dawes and “forced the division of the tribal domain amongst the individual citizens of the tribe to be held by the United States ‘in trust’ for the individual allottee, and thereby created a fictitious ‘surplus’ of tribal land that the tribe could be forced to sell.” Although some members of Congress saw the Dawes Act as a land-grab that would benefit land speculators and not tribe members, this opposition did not impede the passage of the Act. The consequences of the

“terminated” tribe lost the protection of any trust relationship with the federal government and gave the state in which the tribal lands sat civil and criminal jurisdiction over tribe members. Id. When it became clear that termination caused grave social, economic and health problems on reservations, which would require even more federal money to fix, Congress abandoned termination in the early 1960s in favor of a policy emphasizing self-determination and a return to the idealistic views of the New Deal era. See Pevar, supra note 6, at 12–13; Vinzant, supra note 37, at 61–62 (discussing the Menominee of Wisconsin and noting particularly that the federal government spent $162,000 in 1962 on the tribe and another two million dollars in 1972 to fix the effects of termination).


45 Id.

46 G. William Rice, The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”: Updating the Trust Land Acquisition Process, 45 Idaho L. Rev. 575, 576 (2009); see Pevar, supra note 6, at 8. Several American Indian rights groups, largely composed of non-Indians, supported the enactment of the Dawes Act because they believed that the tribes’ only hope for continued existence was to abandon collective ownership of land and to substitute white “civilization” for their traditional customs. Pommersheim, supra note 37, at 126. In addition to these self-proclaimed friends, land speculators also supported passage of the Dawes Act, which would free up land for purchase, sale and profit. Id. at 127.

47 Pommersheim, supra note 37, at 127–28. Regarding the Dawes Act, Senator Henry M. Teller from Colorado said:

If I stand alone in the Senate, I want to put upon the record my prophecy in this matter, that when 30 or 40 years shall have passed and these Indians shall have parted with their title, they will curse the hand that was raised professedly in their defense to secure this kind of legislation . . . .
Dawes Act on tribes across the country were devastating and persist to the present.48

One of the few pieces of legislation passed that positively impacted tribal land rights was the Wheeler-Howard Indian Reorganization Act; it was passed in 1934 with the goals of increasing tribal landholdings and providing statutory authority for tribal home rule.49 Congress enacted the IRA with the “overriding purpose of . . . establish[ing] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.”50 Under the IRA, tribes “under federal jurisdiction” could claim a multitude of benefits, including the ability to petition the Secretary of the Interior (the Secretary) to take land into trust on their behalf (the trust land provision).51 The trust land provision allows tribes to exercise near-

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48 See Rice, supra note 46, at 577. Before the passage of the Dawes Act, tribes held 138 million acres of land nationwide but by 1934, tribal landholdings had decreased to 48 million acres, nearly half of which were desert or semi-desert. See id. Moreover, the Dawes Act resulted in fractionated ownership among tribal members, increasing the administrative costs associated with land management to the detriment of beneficial programs and services. See Vinzant, supra note 37, at 53–54; Rice, supra note 46, at 578. In fact, the Supreme Court has discussed the impoverished condition of American Indian tribes as giving rise to a Congressional duty to protect and to care for tribes, and that a broad grant of legislative power was necessary in order for Congress to carry out these duties. See Miller, supra note 7, at 165.

49 See 25 U.S.C. §§ 461–479; Rice, supra note 46, at 578–80. Other provisions of the IRA also further this purpose. See 25 U.S.C. § 461 (“[N]o land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.”); id. § 462 (“The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.”); id. § 463 (the Secretary of the Interior may “restore to tribal ownership” any “surplus” land that had not yet passed into private hands); id. § 476 (tribes may “prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe”).


51 25 U.S.C. § 465 (allowing the Secretary to “acquire . . . lands . . . for the purpose of providing land to Indians.”). Section 479 defines the term “Indian” as:

[A]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Id. § 479. Section 479 defines the term “tribe” as “any Indian tribe, organized band, pueblo, of the Indians residing on one reservation.” Id. The IRA also prohibited further allotment of tribal land. Id. § 461. It authorized the Secretary of the Interior to add land to reservations, to create new reservations for tribes that had lost all of their land, and to
sovereignty over their land, free from state and local taxation, regulations, and civil and criminal jurisdiction.\textsuperscript{52}

The Supreme Court has played a central role in shaping the principles of Indian law and exercises an unusual degree of power in changing it at will.\textsuperscript{53} Although the Supreme Court has never viewed tribal governments as equal to our own or as worthy of deference, the its early principles of Indian law at least begrudgingly recognize a duty towards American Indians and tribes.\textsuperscript{54} These include holdings that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit,” that tribes are “distinct, independent political communities,” and that federal law and Indian treaties preempt the laws of the state in which the tribal land sits.\textsuperscript{55} The relationship between the federal governments and the tribes was originally likened to that between a guardian and his ward, and subsequently has been described as a trustee–beneficiary relationship.\textsuperscript{56} Even the language of the IRA itself imposes such a relationship.\textsuperscript{57}

\textsuperscript{52} Pevar, \textit{supra} note 6, at 98.

\textsuperscript{53} See Fletcher, \textit{supra} note 7, at 585 (“Nothing stops the court—no constitutional provision, common law principle, or anything else—from working radical transformations of federal Indian law at any moment.”). For an extensive history of Indian law and the Supreme Court, see generally David E. Wilkins, \textit{American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice} 1–310 (1997). Wilkins argues that “the law’ as developed, articulated, and manipulated by the High Court has actually contributed to the diminution of the sovereign status of tribes and has placed tribes and their citizens/members in a virtually destabilized state.” Id. at viii.


\textsuperscript{56} See Cherokee Nation, 30 U.S. at 2 (“[American Indian] relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.”); Lyng v. Nw. Indian Cemetery Protective Ass’n, 485 U.S. 439, 444 (1988) (citing the existence of governmental “trust responsibilities” to protect water and fishing rights reserved to the Hoopa Valley Indians).

\textsuperscript{57} See 25 U.S.C. § 465 (“Title to any lands acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired.”) (emphasis added).
The application of the protective principles enunciated in early Court decisions has decreased over time. Between 1832 and 1959, the Court hardly announced any federal Indian law, and often cited to the political question doctrine when an Indian law question arose. From 1959 until 1986, tribal interests won victories before the Supreme Court in approximately sixty percent of cases. Prior to becoming Chief, Justice William Rehnquist played a prominent role in the losses sustained by tribal interests during this period. Once Justice Rehnquist became the Chief Justice in 1986, the rate of tribal success dropped below twenty-five percent. The Rehnquist Court reversed presumptions that tribes were not subject to state taxation, limited tribal criminal and civil jurisdiction over nonmembers, and limited both the federal trust responsibility toward Indian tribes and the canons of construing Indian treaties and statutes to the benefit of Indians and tribes. Though Chief Justice Rehnquist no longer sits on the Court, his Court’s legacy is apparent in decisions like Carceri.

III. Carceri v. Salazar as an Example of the Supreme Court’s Refusal to Recognize Collective Rights to Land

In Carceri, the Supreme Court divested the Narragansett tribe of benefits under the IRA, including trust land benefits. The majority’s holding, that the Secretary’s authority under the IRA to “provid[e] land for Indians” extended only to tribes that obtained federal recogni-

58 See Fletcher, supra note 7, at 597.
59 Id. at 598.
60 Id. at 598–99 (citing Alex Tallchief Skibine, Teaching Indian Law in an Anti-Tribal Era, 82 N.D. L. Rev. 777, 779–80 (2006)).
62 David H. Getches, Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice, and Mainstream Values, 86 Minn. L. Rev. 267, 280–81 (2001). In contrast, convicted criminals achieved reversal in thirty-six percent of cases that reached the Supreme Court in the same period. Id.
tion before 1934, spoke more to the individualized notions of land ownership present in the Dawes Act than to the revitalization policy behind the IRA.\footnote{See id. at 1067–68.} Because the IRA was passed, in part, to return some of the collective benefits tribes had lost during centuries of assimilation, allocation and termination, the Court’s decision was at odds with the spirit of the IRA.\footnote{See id. at 1067.}

Formerly one of the most powerful tribes in New England, the Narragansett tribe of Rhode Island began to lose its land and its sovereignty when settlers came to Rhode Island in large numbers.\footnote{See Bryan J. Nowlin, Conflicts in Sovereignty: The Narragansett Tribe in Rhode Island, 30 Am. Ind. L. Rev. 151, 151 (2005–2006).} In 1675, the Narragansett Tribe attempted to defend its independence and autonomy in King Philip’s War, but it was defeated by the colonists.\footnote{See Kawashima, supra note 68, at 139–143.} In 1880, “Rhode Island passed a ‘detrabilization’ law that abolished tribal authority, ended the State’s guardianship of the Tribe, and attempted to sell all tribal lands.”\footnote{Carcieri III, 129 S. Ct. at 1072 (Stevens, J., dissenting).} The Tribe initially agreed to cede all but two acres of its ancestral lands to the State in exchange for $5000.\footnote{See id. at 1061 (majority opinion). Although Roger Williams’ purchase was amicable, as the colonist population in Rhode Island grew, tensions between the colonists and the Tribe increased, culminating in 1675 and 1676 in King Philip’s war which saw the Tribe defeated at the hands of the colonists. See id.; Yasuhide Kawashima, Igniting King Philip’s War 131–43 (2001); Nowlin, supra, at 151}

(so it believed) those benefits available under the IRA. Shortly thereafter, the Tribe made plans to build low-income housing for its members on a thirty-one acre parcel (“the parcel”) that it had purchased in 1991. When the Tribe began construction, however, the State sought injunctive relief prohibiting the Tribe from continuing without first obtaining state and/or local permits. The Tribe contended that permits were not required because the development would be on tribal land, therefore precluding state jurisdiction. The First Circuit Court of Appeals affirmed the District Court’s decision in favor of the state and ordered an injunction prohibiting the tribe from occupying the lands until they complied with Charlestown’s permitting process.

To resolve the conflict and to escape potential regulations and exactions on the parcel, the Tribe petitioned the Secretary to take the parcel into trust on its behalf pursuant to the Secretary’s authority under the IRA. The Secretary consented and the Board of Indian Affairs (BIA) notified the town of Charlestown and the State of Rhode Island of the Secretary’s intention to take the parcel into trust. The State, town, and governor appealed the decision to the Interior Board of Indian Appeals (IBIA), which affirmed that the Secretary could take the parcel into trust for the benefit of the tribe.

Governor Donald L. Carcieri, the State, and the town petitioned for review of the Secretary’s decision in U.S. District Court for the Dis-

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73 Carcieri III, 129 S.Ct at 1062; see Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177–05 (Feb. 10, 1983). In granting federal recognition, the Bureau of Indian Affairs stated that the Tribe and its predecessors had a documented history stretching back to 1614 and that essentially every member of the Tribe could trace at least one ancestor back to the “detribalization” in 1880. 48 Fed. Reg. 6177–05.

74 Carcieri I, 290 F. Supp. 2d at 170.

75 Id. at 171; see Narragansett Indian Tribe v. Narragansett Elec. Co., 878 F. Supp. 349 (D.R.I. 1995), rev’d in part, aff’d in part, 89 F.3d 908 (1st Cir. 1996). It appears that the State was less concerned about low-income housing and more concerned that if the Tribe were able to build anything it wanted without first gaining State and local approval, the Tribe could build a gaming facility. See Nowlin, supra note 68, at 155. Because the State of Rhode Island did not want gaming within its borders, it responded fiercely to the Tribe’s construction of low-income housing on the parcel. See id. There has been a backlash regarding the “special” rights that American Indians have, especially those related to gaming. See Jeffrey R. Dudas, The Cultivation of Resentment: Treaty Rights and the New Right 7–11, 98–112 (2008).


77 See Carcieri I, 290 F. Supp. 2d at 171.

78 See id. at 171–72.

79 See id. at 172.

80 See Carcieri II, 497 F.3d at 24.
The court held that § 479 of the IRA defined “Indian” to include members of all tribes in existence in 1934 but did not require tribes to be federally recognized at that time. The court held that because the Narragansett Tribe existed in 1934 and subsequently obtained federal recognition, the Secretary was authorized to take land into trust on its behalf. The First Circuit Court of Appeals affirmed, stating that because the word “now” was ambiguous, it would defer to the Secretary’s construction of the provision.

The United States Supreme Court granted certiorari and Justice Clarence Thomas, writing for the majority, reversed the decisions of the Secretary, the BIA, the IBIA, the District Court, and the First Circuit. The Court held “that the term ‘now under federal jurisdiction’ in § 479 unambiguously refer[red] to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934[,]” which limited the Secretary’s authority under § 465 to members of tribes that were under federal jurisdiction at that time. Because the Narragansett Tribe was not under federal jurisdiction in 1934, the Secretary could not take land into trust on its behalf.

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81 Carcieri I, 290 F. Supp. 2d at 169.
82 Id. at 179.
83 Id. at 181.
84 Carcieri II, 497 F.3d at 26, 30. Two First Circuit Judges wrote dissenting opinions that hinted at what was to come. See id. at 48–51 (Howard, J., dissenting); id. at 51–52 (Selya, J., dissenting). Judge Jeffrey R. Howard asserted that the effect of the Rhode Island Indian Claims Settlement Act was to extinguish simultaneously all future claims raised by “Indians qua Indians” and to bring the Tribe under the civil and criminal jurisdiction of Rhode Island. Id. at 48–49 (Howard, J., dissenting). Moreover, Judge Howard noted, the parcel was within the land area the Tribe had claimed in 1975 and the Tribe was therefore estopped from invoking the benefits of the IRA with respect to it. Id. at 49. Judge Bruce Marshall Selya, in a separate dissent, concluded that “the Tribe’s surrender of its right to an autonomous enclave, and the waiver of much of its sovereign immunity suggest[ed] with unmistakable clarity that the parties intended to . . . preserve[ ] the State’s civil, criminal, and regulatory jurisdiction over any and all lands within its borders.” Id. at 51 (Selya, J., dissenting) (citation omitted). Judge Selya went on to assert that “[w]hile ‘hope’ is the official motto of Rhode Island, the State should not be force-fed hope in place of rights for which it has bargained.” Id. at 51–52.
85 Carcieri III, 129 S. Ct. at 1068.
86 Id.
87 See id. Justice Thomas noted that none of the parties or amici, including the Tribe, argued that the Tribe was under federal jurisdiction in 1934. Id. Justice Stephen Breyer, however, cited examples of retroactive federal recognition and extension of IRA benefits to tribes that were in existence in 1934 but not yet federally recognized. See id. at 1069–70 (Breyer J., concurring). Justice David Souter suggested that the respondents did not pursue this line of reasoning because the Secretary believed that after the Tribe obtained Federal recognition in 1983, it was eligible for IRA benefits. See id. at 1071 (Souter, J., dissenting). Given the Secretary’s understanding of Federal recognition, Justice Souter recommended remanding the
Although the majority listed each of the Secretary’s arguments it disagreed with, three particular arguments in the holding deserve attention. First, the majority rejected the Secretary’s argument that the word “now” in § 479 was, in fact, ambiguous. Second, they rejected the Secretary’s argument that Congress’ intent in passing the IRA was to benefit tribal communities regardless of their status in 1934, and that the ambiguity in the word “now” should therefore be interpreted in favor of the Tribe. Instead, the Court held that “Congress’ use of the word ‘now’ in § 479 speaks for itself,” and therefore the Court did not need to consider policy at all. Third, the majority rejected the Secretary’s argument that the definition of “Indian” in § 479 was rendered irrelevant by the broader definition of “tribe” in § 479 and by the fact that § 465 authorized the Secretary to take title to lands “in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired.” They asserted that because the § 479 definition of “tribe” referred to “any Indian tribe,” the temporal restrictions that applied to the word “Indian” also applied to the word “tribe.”

The majority’s conclusions that the definitions in § 479 are unambiguous and do not include the Narragansett tribe are erroneous. In fact, Justice Stephen Breyer, in his concurrence, noted that although the phrase “now under federal jurisdiction” could refer to a tribe’s jurisdictional status as of 1934, it could also refer to the time the Secre-
tary exercises his trust authority. Justice John Paul Stevens, in his dissent, asserted that “[w]ithout the benefit of context, a reasonable person could conclude that ‘Indians’ refers to multiple individuals who each qualify as ‘Indian’ under the IRA. An equally reasonable person could also conclude that ‘Indians’ is meant to refer to a collective, namely, an Indian tribe.” Even if the phrase “now under federal jurisdiction” is as unambiguous as the majority suggests, the rest of § 479 clearly extends benefits to the Tribe.

Although the majority overlays the temporal restrictions of “Indian” onto the definition of “tribe,” the IRA does not support this construction. The original IRA provided that the trust land provision applied only to tribes and not to individuals at all. A plain reading of § 465 supports the conclusion that there are individual beneficiaries of the IRA—“individual Indians”—as well as collective beneficiaries—“Indian tribes.” The [IRA’s] language could not be clearer,” stated Justice Stevens, observing that “[t]o effectuate the Act’s broad mandate to revitalize tribal development and cultural self-determination, the Secretary can take land into trust for a tribe or he can take land into trust for an individual Indian.” Additionally, though the benefits available to individual “Indians” appear to be temporally limited in § 479, tribes do not appear to be similarly limited. Justice Stevens noted that “[f]ederal recognition, regardless of when it is conferred, is the necessary condition that triggers a tribe’s eligibility to receive trust land” and not, as the majority holds, the 1934 date of the IRA’s enact-

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96 Carceri III, 129 S. Ct. at 1076 (Stevens, J., dissenting).

97 Id. at 1072.

98 See id. at 1072.

99 See id. at 1074 (comparing the proposed language of the IRA, which read “[t]itle to any land acquired pursuant to the provisions of this section shall be taken in the name of the United States for the Indian tribe or community for whom the land is acquired” with § 465, which states that “[t]itle to any lands or rights pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land was acquired” (quoting 25 U.S.C. § 465 (2006); H.R. 7902, 73d Cong. (1934)(emphasis added in both extracts))).


101 See Carceri III, 129 S. Ct. at 1073.

102 See 25 U.S.C. § 479 (“The term “tribe” wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.”).
ment. Because no party to the litigation disputed that the Tribe was federally recognized at the time it requested that the Secretary take the parcel into trust, the Secretary lawfully exercised his authority.

The majority’s myopic focus on the individual at the expense of the collective serves not only to deny the Tribe benefits under the IRA, but also makes a clear statement that the Court does not respect the collective rights of tribes. Though the word “tribe” may be defined with reference to the word “Indian,” as the majority asserts, the word “Indian” is just as inextricably linked to the word “tribe.” In a collective society that historically did not recognize individual rights to land, an individual was first and foremost a member of a collective. The majority’s holding that only individuals may claim rights to land denies that, historically, American Indians had a collective view of ownership and imposes a colonial, individualized concept of land ownership onto tribes, to their detriment.

Even a superficial look into the policy behind the IRA shows that it was the most influential part of the “Indian New Deal” of 1934, which Congress intended to restore tribal collective rights to land. Congress adopted the IRA with the recognition that tribes were a permanent part of the American landscape and that tribes’ continued existence depended on encouragement from the federal government to self-govern and to progress collectively as peoples. Congress intended the IRA to be “sweeping in scope” which would seem to include all of the nation’s tribes, and would certainly not exclude those who had obtained federal

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103 Carcieri III, 129 S. Ct. at 1075 (Stevens, J., dissenting).
104 Id.
105 See id. at 1067 (majority opinion). The majority asserts that there is no way to define “tribe” without reference to the definition of “Indian.” See id. The implication is that a tribe has no additional or special meaning beyond its status as a collection of individuals. See id.
106 See id. at 1077 (Stevens, J., dissenting).
107 See Richter, supra note 26, at 54.
109 See id. at 1073 n.4 (Stevens, J., dissenting); e.g., 25 U.S.C. § 477 (2006) (authorizing the Secretary to grant tribes the authority to acquire, manage, and dispose of lands and other property).
110 See Rice, supra note 46, at 580. This is in contrast to the assumption driving the Dawes Act, namely that tribes would eventually disappear and that the federal government needed to make provisions for individual Indians to prepare them for “American” (that is, white American) society. See Matthew Atkinson, Red Tape: How American Laws Ensnare Native American Lands, Resources, and People, 23 OKLA. CITY. U. L. REV. 379, 396 (1998) (“Nobody thought the Indians would survive very long so no provisions were made for long-term inheritance.”); Salamander, supra note 43, at 339.
recognition. The majority’s decision to narrow the purview of the IRA defeats the sweeping intent of Congress and serves to deny the Narragansett and many other tribes the benefits meant to ensure their collective rights to land, to self-determination, and to basic existence.

Not only did the majority refuse to look at the policy behind the IRA, it also refused to consider the foundational principles of Indian law, which would have given the Secretary and the Tribe a greater chance of success. The Court did not abide by or even discuss the principles that, first, Indian treaties must be interpreted as tribal members would have understood them and second, that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” If the Narragansett Tribe believed that federal recognition would allow them to seek benefits under the IRA, the majority needed to defer to this belief.

More importantly, the federal government owes American Indian tribes a fiduciary duty, which obligates the Court to act in the best interests of the Tribe. Though the trustee-beneficiary relationship is predicated on the troublesome view that American Indians are too weak to act in their own best interests, the duty remains. In Carceri, the Court breached its fiduciary duty by unilaterally removing IRA benefits from the Narragansett and from many other tribes through strict construction of a statute that was meant to be sweeping and beneficial in nature. If the intent behind the IRA was to redress the wrongs perpetrated against tribes and their members, the Court must, as a fiduciary, extend the benefits under the IRA to those tribes who

111 See Morton v. Mancari, 417 U.S. 535, 542 (1974). Testifying before the Senate Committee on Indian Affairs on May 21, 2009, Edward Lazarus stated “It makes no sense whatsoever to deny the benefits of the IRA, including the trust land provision, to tribes that, through no fault of their own, were left off the original IRA list or otherwise continuously existed . . . as an Indian tribe from historic times to the present.” Authority to Acquire Trust Lands for Indian Tribes: Hearing Before the S. Comm. on Indian Affairs, 111th Cong. 2 (2009) (statement of Edward P. Lazarus, Partner, Akin Gump Strauss Hauer & Feld, LLP).

112 See Carceri III, 129 S. Ct. at 1068.


115 See id.

116 See id. at 766–67; Seminole Nation v. United States, 316 U.S. 286, 296 (1942). The trust land provision in the IRA is the perfect example of this concept. See 25 U.S.C. § 465 (2006). Instead of placing title to the land in the Tribe’s control, the Secretary holds it on the Tribe’s behalf. See id.; Rice, supra note 46, at 580. Though this is not an ideal arrangement, if the federal government has taken on a fiduciary duty, it is obligated to discharge that dutyfaithfully. See Rice, supra note 46, at 588.


118 See Carceri III, 129 S. Ct. at 1068.
have been wronged.\textsuperscript{119} The Narragansett Tribe, once powerful in New England, has been reduced to mere tenant on its land by centuries of war and difficult relations with the State.\textsuperscript{120} The Tribe has been a victim of a multitude of wrongs and is therefore entitled to whatever benefits the IRA offers, benefits which a loyal fiduciary would not withhold.\textsuperscript{121}

IV. MOVING FORWARD: RECOGNIZING COLLECTIVE TRIBAL RIGHTS

In response to the Court’s decision in \textit{Carcieri}, Congress has taken corrective action.\textsuperscript{122} On September 24, 2009 a bill was introduced in the Senate to strike from § 479 the phrase “any recognized Indian tribe now under federal jurisdiction” and to replace it with “any federally recognized Indian tribe.”\textsuperscript{123} The bill also amends the definition of “tribe” to read “any Indian . . . tribe . . . that the Secretary of the Interior acknowledges to exist as an Indian tribe.”\textsuperscript{124} The same bill was introduced in the House of Representatives on October 1, 2009.\textsuperscript{125} This amendment to the IRA, if it becomes effective, will reverse the Court’s holding in \textit{Carcieri} that the IRA only applies to tribes recognized in 1934 and instead, will extend benefits to any federally recognized tribe.\textsuperscript{126}

Although the United States has expressed concern that recognizing collective rights will lead to the oppression of individuals within those collectives, the United Nations Declaration on the Rights of Indigenous Peoples provides a model for recognizing the collective without sacrificing the individual.\textsuperscript{127} Recognizing the collective rights of American Indians within the framework provided by the Declaration would restore the Court’s position as a trustee acting in the best interests of tribes.\textsuperscript{128} In the midst of the international debate on the collec-

\begin{footnotesize}
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  \item \textsuperscript{120} \textit{Carcieri III}, 129 S. Ct. at 1072 (Stevens, J., dissenting).
  \item \textsuperscript{121} \textit{See id.}
  \item \textsuperscript{122} \textit{See id.}
  \item \textsuperscript{123} \textit{See S. 1703, 111th Cong. (2009); H.R. Res. 3697, 111th Cong. (2009).}
  \item \textsuperscript{124} S. 1703 § 1(a)(1)(B).
  \item \textsuperscript{125} Id. § 1(a)(2).
  \item \textsuperscript{126} \textit{H.R. Res. 3697.}
  \item \textsuperscript{127} \textit{See id.}
  \item \textsuperscript{128} \textit{For a further discussion of the U.S. government’s concern, see} \textit{Benhabib, supra} note 20, at 60; \textit{Dworkin, supra} note 20, at 194; \textit{Shachar, supra} note 20, at 2; \textit{Anaya, supra} note 20, at 257; \textit{Newman, supra} note 20, at 275–280. The Declaration provides multiple protections for individuals within indigenous collectives. \textit{See Declaration on the Rights of Indigenous Peoples, supra} note 15, at arts. 14–15, 17, 21–22, 33, 44.
  \item \textsuperscript{129} \textit{For} \textit{Lyng v. Nw. Indian Cemetery Protective Ass’n}, 485 U.S. 439, 444 (1988) (citing the existence of governmental “trust responsibilities” to protect water and fishing rights reserved to the Hoopa Valley Indians); \textit{Cherokee Nation v. Ga.}, 30 U.S. (5 Pet.) 1, 2 (1831)
\end{itemize}
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tive rights of indigenous peoples, the Court could provide a model for the rest of the world to follow as the global community begins the long task of restoring indigenous rights to land.

**Conclusion**

Among indigenous peoples worldwide, the collective right to own and inhabit land is tantamount to survival, and yet, indigenous peoples across the globe face challenges to retaining or regaining their ancestral homelands. For centuries, the U.S. government and its colonial predecessors removed tribes from land and took land from tribes, consistently refusing to recognize collective rights to land. In *Carcieri v. Salazar*, the U.S. Supreme Court continued this longstanding tradition by withholding collective land rights from the Narraganset Tribe. Despite Congressional action to reverse the effects of the Court’s decision, the damage has already been wrought for the Narragansett Tribe’s low-income housing development. The Court’s myopic focus on the word “now” made the Narragansett and many other tribes ineligible for some of the few benefits the federal government still offers to those who have suffered at its hands.

In the future, the Court must broaden its interpretation of statutes that confer benefits on tribes in order to reverse the land grabbing policies of the past and to restore collective tribal ownership of ancestral lands. The Declaration on the Rights of Indigenous Peoples provides a vision statement that could effectively guide the Court as it remedies the devastation of the Rehnquist era and returns to the principles behind the Indian New Deal and the fundamental canons of Indian law. Proceeding in this way will allow tribes to re-establish themselves as sovereign entities and to begin mitigating the effects of centuries of strife. If the Court acts as a guardian for the collective rights for tribes while still protecting the individual rights of tribe members, American Indians will be able to prosper in ways unheard of since the pre-colonial era. In contrast, failure to guard the collective rights of American Indians will ensure their continued marginalization and the ultimate destruction of the first inhabitants of this nation.

("[American Indian] relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.").
COMPREHENSIVE ECONOMIC SANCTIONS, THE RIGHT TO DEVELOPMENT, AND CONSTITUTIONALLY IMPERMISSIBLE VIOLATIONS OF INTERNATIONAL LAW

Benjamin Manchak*

Abstract: This Comment examines the legality of the comprehensive unilateral embargo imposed by the United States on Cuba within the framework of international law. It argues that, independent of its humanitarian impact or the dubious legality of its extra-jurisdictional components, the comprehensive embargo violates international law because it undermines Cuba’s right to development. International law is, and has always been, a component part of U.S. law—it is enforceable in U.S. courts, it informs judicial interpretation of U.S. statutes, and it guides legislative and executive action in matters of both foreign and domestic policy. In addition to its supplementary interpretive function in our legal system, international law is, through the Supremacy Clause, binding on the United States as a constitutional matter. Because of the role international law plays in the United States, a direct conflict between federal and international law is constitutional anathema. This Comment argues that the tension must be resolved by reference to the substance and timing of the federal enactments that violate international law. Thus, of the coordinate branches, the legislative branch is in the best position to correct the constitutional imbalance. The Comment concludes that Congress must either pass new legislation explicitly renouncing the right to development as an international legal norm, or, in light of the role of international law in our constitutional system, execute faithfully its duty to interpret and uphold the Constitution by repealing the legislation that has created the decades-old embargo.

Introduction

Since the 1990s and the experience with the 661 regime in Iraq, a profusion of scholarship and political discourse has decried the use of comprehensive unilateral and multilateral trade sanctions because of the crippling effects such measures have on a target country’s popula-

tion. Consequently, these all-encompassing, blanket sanctions have been almost universally rejected as the economic weapon of choice in international affairs. Both as a member of the U.N. Security Council and in its sovereign capacity, the United States has tacitly recognized the potential violations of international law occasioned by blanket measures. Even with respect to Cuba, a country on which it has maintained a comprehensive embargo despite widespread international opposition, the United States has made “humanitarian” exceptions to its embargo.

Yet the United States’s efforts to bring its embargo on Cuba more in line with international human rights and international humanitarian legal norms have missed a critical point: the illegality of the embargo under international law is not predicated exclusively, or even primarily, on its humanitarian impact. This Comment argues that the compre-

1 See Joy Gordon, Invisible War: The United States and the Iraq Sanctions 32–38 (2010); see also David Cortright & George A. Lopez, Introduction: Assessing Smart Sanctions: Lessons from the 1990s, in Targeting Economic Statecraft 1, 1 (David Cortright & George A. Lopez eds., 2002) (affirming that the catastrophic impact of the 661 sanctions in Iraq “cast a long shadow” and prompted a rethinking of the comprehensive sanctions paradigm). The 661 regime was the system of trade sanctions imposed on Iraq by U.N. Security Council Resolution 661. See S.C. Res. 661, ¶¶ 3–6, U.N. Doc. S/RES/661 (Aug. 6, 1990). Invoking the specter of “dual-use,” the United States and Great Britain were effectively able to block nearly every type of good required in a modern industrial society from entering Iraq. See Gordon, supra, at 61–85. This stunning unilateralism resulted in a major humanitarian disaster and the devolution of Iraq from a first-world country to a pre-industrial state. See id.

2 See Cortright & Lopez, supra note 1, at 1 (noting that more targeted “smart” sanctions have largely replaced their more expansive precursors, with both the United Nations and the European Union employing, exclusively, selective sanctions since the mid-1990s).


4 See Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. § 7202 (2006). Specifically, the President may not unilaterally restrict the flow of food or medicine into a sanctioned country. Id. As a result of the humanitarian exceptions, the United States is now Cuba’s largest supplier of food; the American people are its most significant humanitarian contributor. See U.N. GAOR, 63rd Sess., 33rd plen. mtg., supra note 3, at 14–15. But see Amnesty Int’l, The U.S. Embargo Against Cuba: Its Impact on Economic and Social Rights 15 (2009) (clarifying that, while the easing of restrictions on agricultural exports has mitigated the severity of food shortages in Cuba, the export of medicines and medical equipment remains “severely limited” in practice).

5 See U.N. GAOR, 63rd Sess., 33rd plen. mtg., supra note 3, at 2, 3, 7, 9–11, 13, 15, 18, 20, 23, 25. In denouncing the U.S. embargo of Cuba, a majority of the nations presenting at the General Assembly, including Egypt, Guyana (speaking on behalf of the fourteen member states of the Caribbean Community), Vietnam, China, Algeria, India, Angola, Nicaragua, Tanzania, Cuba, France, Laos, Indonesia, Myanmar, and Belarus, referred to the U.S. embargo’s effects on Cuba’s right to development as a reason for its illegitimacy.
hensive embargo on Cuba could have no negative “humanitarian” consequences whatsoever, and yet it would violate international law because it undermines a nation’s ability to develop.\(^6\)

Because the federal laws and regulations codifying the Cuban embargo conflict directly with U.S. treaty obligations and its duties under customary international law, they are unconstitutional.\(^7\) Until Congress

under international law. See id. Yet, the delegation from the United States completely ignored the issue of development and focused only on humanitarian questions raised by the other countries. See id. at 14–15.\(^6\) See U.N. Charter arts. 55–56; Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200[B] (XXI), at 52, U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200[A] (XXI), at 49, U.N. GAOR, 21st Sess., 1496th plen. mtg., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); Declaration on the Right to Development, G.A. Res. 41/128, at 186, U.N. GAOR, 41st Sess., 97th plen. mtg., Supp. No. 53, U.N. Doc. A/41/53 (Dec. 4, 1986). Although the right to development certainly implicates other fundamental rights of peoples codified in such instruments as the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, those documents, along with the Declaration on the Right to Development, treat the right as a conceptually—and practically—discrete right protected under international law. See U.N. Charter arts. 55–56; Universal Declaration of Human Rights, supra, arts. 22, 28; International Covenant on Civil and Political Rights, supra, art. 1; International Covenant on Economic, Social and Cultural Rights, supra, arts. 1, 2(1); Declaration on the Right to Development, supra, art. 6. This Comment thus treats the right to the basic necessities of life such as food, potable water, and shelter as conceptually distinct from the right of a nation to develop beyond the capacity only to provide its population with the essentials. See U.N. Charter arts. 55–56; Universal Declaration of Human Rights, supra, arts. 22, 28; International Covenant on Civil and Political Rights, supra, art. 1; International Covenant on Economic, Social and Cultural Rights, supra, arts. 1, 2(1); Declaration on the Right to Development, supra, art. 8. In this manner, the Comment categorically rejects any argument that the embargo on Cuba is legal under international law because it has not had a cataclysmic humanitarian impact based on such measures as life expectancy or infant mortality. See AMNESTY INT’L, supra note 4, at 16 (citing a 1997 report by the American Association for World Health, which concluded that a major humanitarian disaster resulting from the trade embargo, such as the one experienced in Iraq under the 661 regime, has been averted in Cuba only because of the Cuban government’s heavy investment in public health). \(^7\) See Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 HARV. L. REV. 853, 877 (1987). Just as contradictions between co-equal federal enactments must be resolved under the Constitution, so too must discrepancies between customary international law and federal legislation. See id. Although the Supreme Court has never ruled on the point, there is nothing in the text of the Constitution that would preclude the United States from elevating customary international law over regular federal enactments and giving effect to international customary legal norms even in the face of a later congressional enactment. See id. Even under a more conservative understanding, a direct conflict between customary international law and a federal enactment is not simply an issue of domestic law versus international commitments—it is a constitutional question. See id. at 877–78. As Professor Henkin explains,
promulgates new laws that explicitly assert this country’s intentions to contravene international law, the courts should strike down any provision of the embargo on Cuba, which affects Cuba’s right to develop, as unconstitutional. Alternatively, Congress should more seriously approach its duty to uphold the Constitution, rather than simply relying on the judiciary, by admitting the unconstitutionality of its own enactments and duly repealing the various laws comprising the Cuban embargo. President Barack Obama had an opportunity to demonstrate a renewed commitment to complying with the “law of nations” in September 2009, but he instead chose to stay the course of his predecessors, dating back to Jimmy Carter, and extended the executive’s power to implement the embargo. For now, with no meaningful action be-

Like treaties, customary law has now been declared to be United States law within the meaning of both article III and the supremacy clause. If an act of Congress can modify customary law for domestic purposes, it is not because customary law is like federal common law but rather because, like treaties, customary law is equal in status to legislation, and the more recent of the two governs.

See id. at 878 (citation omitted).

8 See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .”). It is an accepted jurisprudential principle that the executive and legislative branches may contravene international law, whether codified in treaties to which the United States is a party or existing in customary international law, especially where the branches act in concert (for example, where Congress “approves of a presidential act violative of customary international law”). See Michael J. Glennon, Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?, 80 Nw. U. L. Rev. 321, 325 (1985). There are two critical limitations to the ability to violate international law, however, one being substantive and the other temporal. See Charming Betsy, 6 U.S. (2 Cranch) at 119. Substantively, an act of Congress or the President must contain a statement, “plainly expressed,” that the action is intended to repeal a norm of customary international law. See id. Temporally, the presidential or congressional action must come after the signing of a treaty or the development of an international legal norm. See Whitney v. Robertson, 124 U.S. 190, 194 (1888); Henkin, supra note 7, at 878.

9 See Paul Brest, Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine, 21 Ga. L. Rev. 57, 62, 63 (1986) (“[B]oth the structure and text of the Constitution require Congress to determine the constitutionality of proposed enactments . . . . [N]othing in Marbury implies that only the courts can interpret the Constitution.”).

10 See Continuation of the Exercise of Certain Authorities Under the Trading with the Enemy Act, Determination No. 2009–27, 74 Fed. Reg. 47,431, 47,431 (Sept. 16, 2009); Determination Extending the Exercise of Certain Authorities Under the Trading with the Enemy Act, 43 Fed. Reg. 40,449, 40,449 (Sept. 12, 1978). On September 11, 2009, three days before the executive’s powers to impose the Cuban embargo (under the Trading with the Enemy Act (TWEA)) were set to lapse, President Obama issued a memorandum to the Secretary of State and Secretary of the Treasury stating, “I hereby determine that the continuation for 1 year of the exercise of those authorities with respect to Cuba is in the national interest of the United States.” See Continuation of the Exercise of Certain Authori-
ing taken by the executive and little likelihood of intervention in this contentious political issue by the judiciary, it is up to Congress to “be cognizant of this country’s global leadership position and the need for it to set an example with respect to human rights obligations.”

This Comment will examine the unilateral trade embargo imposed on Cuba by the United States in light of the role of international law in our constitutional system. Part I provides a brief overview of the embargo itself, as it exists in U.S. domestic law. Part II traces the evolution of the right to development as an international legal norm, highlighting its codification in treaty and crystallization as a norm of customary international law. Part III chronicles some of the devastating effects wrought by the all-encompassing nature of the embargo. Specifically, it focuses on the two areas in which international law and international legal norms are implicated: humanitarian consequences and development effects. After situating international law properly within the discussion of U.S. constitutionalism, Part IV demonstrates why the U.S. blockade of Cuba, which conflicts directly with Cuba’s right to development, is unconstitutional in its present form. Finally, Part V provides several options for “re-constitutionalizing” the blockade. It advocates for outright repeal of the legislative enactments codifying the embargo. Though not the only option, this is both the most expedient solution to the constitutional questions posed by the Cuban embargo and the only practical way to promote future compliance with international law.

I. THE CUBAN BLOCKADE: A BRIEF ACCOUNT OF U.S. DOMESTIC LAW

The legislation and regulations codifying the U.S. embargo of Cuba are paradigmatic of the type of comprehensive unilateral sanctions decried by the international community. Originally imposed through the Trading with the Enemy Act, 74 Fed. Reg. at 47,431. This was the thirty-second time a president continued his powers under the TWEA with respect to Cuba. See infra note 13 and accompanying text.


12 See, e.g., U.N. GAOR, 64th Sess., 27th plen. mtg., supra note 3, at 20 (“[The unilateral Cuban embargo] is a flagrant violation of the provisions of the United Nations Charter, the principles of international law and resolutions adopted year after year by this Assembly . . . .”); The Secretary-General, Report of the Secretary-General on Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries, at 6, Delivered to the General Assembly, U.N. Doc. A/64/179 (July 27, 2009) (stating that unilateral sanctions used as instruments of political and economic coercion against developing countries “are contrary to the principles of international law, the sovereign equality of States, non-interference in the internal affairs of States and peaceful coexistence among States”); U.N. GAOR, 63rd Sess., 33rd plen. mtg., supra note 3, at 7 (“The United States’ unilateral economic, commercial and financial embargo against Cuba represents a violation of in-
powers granted to the president by the Trading with the Enemy Act (TWEA), the embargo has become increasingly more complex in nature and panoptic in breadth with each successive law and regulation.\textsuperscript{13}

\textsuperscript{13} See Trading with the Enemy Act (TWEA) of 1917, 50 U.S.C. app. § 5(b) (2006) (granting the President broad authority to control transactions with designated "enemies," including the ability to investigate, regulate, or prohibit foreign exchange transactions, transfers of credit, payments that involve any banking institution over which the United States has jurisdiction, and the importation or exportation of currency, securities, or precious commodities as well as the ability to wield near absolute control over the property interests, subject to the jurisdiction of the United States, of any foreign country or foreign national covered under the Act); see also Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a)(1) (2006) (excepting Cuba from the provision of any U.S. foreign assistance and granting additional authority to the President to maintain a total embargo on Cuba); Cuban Democracy (Torricelli) Act of 1992, 22 U.S.C. §§ 6001–6010 (extending the embargo to prohibit entry into U.S. ports of ships that have docked in Cuba and allowing the President to impose sanctions on other countries if they do business with Cuba); Cuban Liberty and Democratic Solidarity (LIBERTAD) (Helms-Burton) Act, 22 U.S.C. §§ 6021–6091 (extending further the jurisdictional reach of the embargo to include any person or government doing business with a Cuban enterprise, which either existed prior to January 1, 1959 or is a successor to a business in existence before that date); 31 C.F.R. pt. 515 (2009) (prohibiting an expansive range of economic transactions and providing, generally, for the prohibition of most imports and exports vis-à-vis Cuba). The TWEA is the linchpin in U.S. foreign policy toward Cuba; the congressional delegation of authority to the executive under the TWEA comprises the bulk of the President’s authority to carry out the Cuban embargo. See 50 U.S.C. app. § 5(b); see also 22 U.S.C. § 2370(a)(1) (providing additional authority). This extraordinary grant of authority, most accurately understood as a wartime power, remains vested in the President despite the fact the United States has never engaged in direct hostilities with Cuba. See generally Jennifer K. Elsea & Richard F. Grimmett, Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications (2007), available at http://www.fas.org/sgp/crs/natsec/RL31133.pdf (detailing the history of U.S. armed conflicts, including conflicts not explicitly authorized by Congress). In 1977, Congress amended the TWEA, curtailing the President’s power to exert control over both domestic and international economic transactions under the auspices of the Act’s national emergencies provision. Robert L. Pacholski, Regulation Prohibiting Transactions Incident to Travel to, from, or Within Cuba Held Constitutional, 17 Tex. Int’l L.J. 529, 532–33 (1982). The new law contained a grandfather clause, however, permitting the President to extend, each year for an additional year, the exercise of all TWEA powers relating to national emergencies declared prior to 1977, provided the President believed the extension to be in the “national interest of the United States.” Act of Dec. 28, 1977, Pub. L. No. 95–223, § 101(b), 91 Stat. 1625, 1625 (codified as amended at 50 U.S.C. and 50 U.S.C. app.). In 1978, President Jimmy Carter was the first President to extend executive powers under the TWEA with respect to the Cuban embargo; in September 2009, President Barack Obama became the latest President in an uninterrupted line to do the same. See Determination No. 2009–27, Continuation of the Exercise of Certain Authorities Under the Trading with the Enemy Act, 74 Fed. Reg. 47,431, 47,431 (Sept. 16, 2009); Determination Extending the Exercise of the Exercise of Certain Authorities Under the Trading with the Enemy Act, 43 Fed. Reg. 40,449, 40,449 (Sept. 12, 1978). Peculiarly, the executive’s powers under the TWEA exercised with respect to North Korea, a country that has tested nuclear weapons and intercon-
In its current form, the blockade generally prohibits the export and import of goods and services with Cuba or Cuban entities around the world.\textsuperscript{14} The embargo also covers an exceedingly broad range of economic transactions between the United States and Cuba, including transfers of credit, payments, foreign exchange transactions, securities

continental ballistic missiles capable of reaching sovereign U.S. soil, were voluntarily terminated in 2008. \textit{See} Termination of the Exercise of Authorities Under the Trading with the Enemy Act with Respect to North Korea, Proclamation No. 8271, 73 Fed. Reg. 36,785, 36,785 (June 27, 2008); \textit{see also} Making a Splash, \textit{Economist}, Apr. 11, 2009, at 22–23 (describing the threat the government of North Korea continues to pose both to its neighbors and to nations further afield such as the United States). Cuba is now the only country upon which the executive is authorized to impose a comprehensive embargo pursuant to the powers under the TWEA. \textit{Amnesty Int’l}, supra note 4, at 8 n.15.

Additionally, Cuba was designated a state sponsor of terrorism in 1982 pursuant to the authority granted to the Secretary of State to make such determinations by the Foreign Assistance Act, the Arms Export Control Act, and the Export Administration Act. \textit{See} 22 U.S.C. § 2371(a); Arms Export Control Act of 1968, 22 U.S.C. § 2870(d); Export Administration Act (EAA) of 1979, 50 U.S.C. app. § 2405(j); U.S. Dep’t of State, State Sponsors of Terrorism, http://www.state.gov/s/ct/c14151.htm (last visited Apr. 20, 2010). Viewing the provisions of these three laws together, the principal additions to the embargo occasioned by the designation as a sponsor of terrorism are “restrictions on U.S. foreign assistance, a ban on the sale and exportation of defense-related goods, controls placed upon dual-use goods, and restrictions upon financial transactions.” Lucien J. Dhooge, \textit{Condemning Khartoum: The Illinois Divestment Act and Foreign Relations}, 43 Am. Bus. L.J. 245, 261 n.104 (2006).

\textsuperscript{14} \textit{See} 31 C.F.R. pt. 515 (2009); 15 C.F.R. § 746.1; Terence J. Lau, \textit{Triggering Parent Company Liability Under United States Sanctions Regimes: The Troubling Implications of Prohibiting Approval and Facilitation}, 41 Am. Bus. L.J. 413, 424 (2004). Certainly, its inability to sell to the U.S. market is economically harmful to Cuba, but the economic damage wrought by the regulation of imports from Cuba is considerably less significant, in terms of the country’s development prospects, than that caused by export controls on U.S. goods. \textit{See} The Secretary-General, \textit{Report of the Secretary-General on the Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba}, at 83, \textit{Delivered to the General Assembly}, U.N. Doc. A/63/93 (Aug. 1, 2008) [hereinafter The Secretary-General, 2008]. The United States is the closest and most diversified market, yet the embargo prohibits Cuba and Cuban companies from obtaining any goods, services, or technologies produced in the United States, covered under U.S. patents, or containing any components of U.S. origin. The Secretary-General, \textit{Report of the Secretary-General on the Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba}, at 93, \textit{Delivered to the General Assembly}, U.N. Doc. A/64/97 (June 23, 2009) [hereinafter The Secretary-General, 2009]. Swept into these categories are a scopic range of “development inputs such as medicines, medical equipment, fertilizers, food supplements, laboratory equipment, agricultural implements, computers, office supplies, vehicles, tools, construction materials, electric generators and other basic equipment.” \textit{Id.} Given that the United States is such a dominant force in such areas as technology, with certain technologies exclusively controlled by U.S.-based companies, it is nearly impossible for Cuba to take advantage of many technological advancements currently driving economic growth and development in other countries. \textit{See} The Secretary-General, \textit{Report of the Secretary-General on the Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba}, at 81, \textit{Delivered to the General Assembly}, U.N. Doc. A/62/92 (Aug. 3, 2007) [hereinafter The Secretary-General, 2007].
transactions, and property transfers. Indeed, the types of economic transactions prohibited by the embargo encapsulate virtually every form of economic exchange in modern commerce. As though its unilateral embargo were insufficiently comprehensive, the United States has applied direct sanctions and coercive economic pressure on other state and business entities in order to discourage other trade relationships with Cuba. Thus, by exercising what many commentators would consider illegal extraterritorial jurisdiction, the United States has effectively transformed its blockade of Cuba into a de facto multilateral endeavor.

II. The Right to Development in International Law

The right to development is an inalienable human right intrinsically linked to a peoples’ sovereignty. A state’s right to development occupies an exalted position in international law; it is protected in several of international law’s foundational documents including the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. In addition to the legiti-

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15 See 31 C.F.R. § 515.201.
16 See id. pt. 515.
17 See, e.g., 22 U.S.C. § 6003(a) (allowing the President to pressure other countries to restrict credit relations with Cuba, thereby making it more difficult for Cuba to obtain substantial quantities of goods on a non-cash basis); id. § 6003(b) (allowing the President to impose sanctions on countries that trade with Cuba); id. § 6005(b) (creating an unprecedented six month trade “purgatory” for any ship that docks in a Cuban port); id. § 6082(a)(1)(A) (expanding the United States’s jurisdictional reach to any “person . . . [who] traffics in property which was confiscated by the Cuban government on or after January 1, 1959”); 50 U.S.C. app. § 2405(a)(6) (allowing the President to curtail diplomatic relations with any country exporting goods or technology to Cuba); 31 C.F.R. § 515.201 (prohibiting payments and transfers of credit through any banking institution subject to the jurisdiction of the United States).
19 See Declaration on the Right to Development, supra note 6, art. 1.
20 See U.N. Charter arts. 55–56; Universal Declaration of Human Rights, supra note 6, art. 28; International Covenant on Civil and Political Rights, supra note 6, art. 1; International Covenant on Economic, Social and Cultural Rights, supra note 6, art. 1. These foundational documents—often collectively referred to as the International Bill of Human Rights—are more closely associated with the first and second “generations” of international human rights norms, that is, civil and political rights and economic, social, and cultural rights, respectively. See Jack Donnelly, In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development, 15 Cal. W. Int’l L.J. 473, 482–83 (1985); Stephen Marks, The Human Right to Development: Between Rhetoric and Reality, 17 Harv. Hum. Rts. J. 137, 138 (2004). Under this rubric, the right to development would belong to a third generation of “solidarity rights belonging to peoples and covering global concerns like development,
macy as a principle of international law, which it derives from its inclusion in the International Bill of Human Rights, the right to development has been further entrenched as an international legal norm by later, more specific treaties and resolutions.21 By the early 1970s, the

environment, humanitarian assistance, peace, communication, and common heritage.” Marks, supra, at 138. Some scholars have therefore argued that the right to development, which is not explicitly mentioned in the International Bill of Human Rights, is not even implicated by the foundational human rights law documents. See, e.g., Donnelly, supra, at 482–89 (“If a right to development were enshrined in these documents, as is often claimed, it would indeed be firmly established as a human right in international law. In fact, however, it is not.”). Such views, however, tend to obfuscate substance of international human rights law and oversimplify the process by which international human rights norms develop. See Marks, supra, at 138. Granted, the International Bill of Human Rights does not explicitly define a human right to development as such, but it provides both the conceptual framework for envisioning a fundamental right to development and the substantive underpinnings of the right. See U.N. Charter arts. 55–56; Universal Declaration of Human Rights, supra note 6, art. 28; International Covenant on Civil and Political Rights, supra note 6, art. 1; International Covenant on Economic, Social and Cultural Rights, supra note 6, art. 1; see also The Secretary-General, Report of the Secretary-General on the International Dimensions of the Right to Development as a Human Right in Relation with Other Human Rights Based on International Co-operation, Including the Right to Peace, Taking into Account the Requirements of the New International Economic Order and the Fundamental Human Needs, ¶¶ 57–63, Delivered to the General Assembly, U.N. Doc. E/CN.4/1334 (Jan. 2, 1979) (enumerating the relevant provisions in the various foundational instruments implying and indeed defining the right to development, concluding that “the legal norms relevant to the right to development are to be found primarily in the Charter of the United Nations and the International Bill of Human Rights”).

21 See, e.g., Declaration on the Right to Development, supra note 6, arts. 1–10; Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV), at 49, U.N. GAOR, 24th Sess., 1829th plen. mtg., Supp. No. 30, U.N. Doc. A/7630 (Dec. 11, 1969); Implementation of the Declaration on Social Progress and Development, G.A. Res. 2543 (XXIV), at 53, U.N. GAOR, 24th Sess., 1829th plen. mtg., Supp. No. 30, U.N. Doc. A/7630 (Dec. 11, 1969); see also Marks, supra note 20, at 138. By operation of treaty, not only are states obligated to refrain from impeding the development of other states, but member states of the United Nations also bear the responsibility of “develop[ing] friendly relations among nations based on respect for . . . self-determination of peoples” and actively “promot[ing] conditions of economic social progress and development.” See U.N. Charter arts. 1, 55 (emphasis added). These affirmative duties were reiterated and more clearly defined in later instruments such as the Declaration on the Right to Development. See Declaration on the Right to Development, supra note 6, art. 3. In this Declaration, signatory states further committed themselves to act in accord with the U.N. Charter and to create “national and international conditions favourable to the realization of the right to development,” and “promote a new international economic order based on sovereign equality.” See id. Included among the objectives of the Declaration on Social Progress and Development are “[t]he creation of conditions for rapid and sustained social and economic development, particularly in the developing countries,” as well as “[e]quitable sharing of scientific and technological advances by developed and developing countries.” Declaration on Social Progress and Development, supra, arts. 12, 13. The responsibility for achieving these goals is placed primarily upon each individual nation state. See Declaration on the Right to Development, supra note 6, pmbl.; Declaration on Social Progress and Development, supra, arts. 14–22. The
right to development was undergoing a more formal, comprehensive articulation in the specific language of human rights.\textsuperscript{22} Over the course of the next fourteen years, the right to development was proclaimed in various texts, including regional multilateral instruments.\textsuperscript{23} In 1986, the overwhelming majority of nations, acting through the U.N. General Assembly, built upon the foundation laid in the International Bill of Human Rights and certified the right to development as a human right.\textsuperscript{24} Since the passage of the Declaration on the Right to Development, the right has become a fixture in the pantheon of internationally-recognized human rights, regularly appearing in such texts as multilateral treaties, declarations of international conferences and summits, annual resolutions of the General Assembly, reports of the Secretary General, and annual reports of the Human Rights Council.\textsuperscript{25}

international community—particularly the more economically and technically advanced countries—are nevertheless expected to provide “technical, financial, and material assistance” to help developing countries achieve “the social objectives of national development plans” as well as “benefit fully from their national resources.” See Declaration on Social Progress and Development, supra, art. 23.

\textsuperscript{22} See Marks, supra note 20, at 138. The first President of the Senegal Supreme Court, Keba M’Baye, is generally credited with precipitating what would become a robust discourse on the right to development in the language of human rights in his Inaugural Address of the Third Teaching Session of the International Institute of Human Rights (a the René Cassin Foundation) in 1972. See Héctor Gros Espiell, The Right of Development as a Human Right, 16 Tex. Int’l L.J. 189, 192 (1981); Marks, supra note 20, at 138 n.5.


\textsuperscript{24} See Declaration on the Right to Development, supra note 6. Of the 159 voting members in the General Assembly at the time, 146 countries voted in favor of the Declaration on the Right to Development, 8 abstained, and 4 did not vote. Rapporteur, Report of the Third Committee on Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, ¶ 8, Delivered to the General Assembly, U.N. Doc. A/41/925 (Dec. 1, 1986). The United States cast the sole negative vote. Id.

Because of its ubiquity and broad-based acceptance by the international community, the right to development has undoubtedly risen to the level of customary international law.26 The development of norms of customary international law is a fluid, evolutionary process, which is ascertained by reference to the general practice of states rooted in a sense of legal obligation over a period of time.27 The right to development is clearly traceable in this manner.28 It has been over sixty years since the foundations of the right were laid in the U.N. Charter and the Universal Declaration of Human Rights, and over forty years since they were strengthened in the International Covenant on Civil and Political Rights

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26 See Statute of the International Court of Justice, art. 38, annexed to U.N. Charter. Article 38 of the Statute of the International Court of Justice, the judicial organ of the United Nations created along with that body in 1945, is the traditional starting point when examining the sources of international law; indeed it is considered the “constitution” of the international community. Henry J. Steiner et al., Comment on International Dimension of Human Rights Movement, in Henry J. Steiner et al., International Human Rights in Context: Law, Politics, Morals 58, 60 (Henry J. Steiner et al. eds., 3d ed. 2007). It lists the following sources of international law:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38; see also Restatement (Third) of Foreign Relations Law of the U.S. § 102(2), (3), rep. n.2 (1987) (noting that general acceptance of states and the “general and consistent practice of states,” which takes many forms including “resolutions, declarations, and other statements of principles” by the U.N. General Assembly, form the basis for customary international law); Marks, supra note 20, at 138–42, 167 (discussing the recognition of the right to development by a majority of governments in the world, but conceding some of the practical difficulties associated with the right).

27 See Statute of the International Court of Justice, art. 38; Restatement (Third) of Foreign Relations Law of the U.S. § 102(2) (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”). Evidence of international law may be gleaned from various authorities, though it is clear that resolutions of universal international organizations such as the U.N. General Assembly are to be accorded substantial weight if the majority of states vote in favor. See Restatement (Third) of Foreign Relations Law of the U.S. § 103 cmt. c (1987). Moreover, the requirement that a norm be recognized in international law for some de minimis period has been significantly limited, if not altogether abandoned, since World War II. See Restatement (Third) of Foreign Relations Law of the U.S. § 102 rep. n.2 (1987).

28 See Marks, supra note 20, at 358.
and the International Covenant on Economic and Social Rights.\textsuperscript{29} It has been thirty-eight years since the right was proposed using the specific language of human rights, twenty-four years since the international community recognized the right in a formal, broad-based multinational instrument, and seventeen years since a consensus involving all governments was reached on the right to development.\textsuperscript{30} The right is consistently invoked by states as a rule of international law.\textsuperscript{31} Indeed, the right is so fundamental, so inviolable, and so broadly accepted, it may even be properly considered a \textit{jus cogens} norm.\textsuperscript{32} States are therefore bound both by treaty and customary international law to respect the fundamental right of other nations to pursue economic and social development in accordance with their own sovereign volition.\textsuperscript{33}

\textsuperscript{29} See U.N. Charter arts. 55–56; Universal Declaration of Human Rights, \textit{supra} note 6, art. 28; International Covenant on Civil and Political Rights, \textit{supra} note 6, art. 1; International Covenant on Economic, Social and Cultural Rights, \textit{supra} note 6, art. 1.\textsuperscript{30} See Declaration on the Right to Development, \textit{supra} note 6, arts. 1–10; \textit{Vienna Declaration}, \textit{supra} note 25; \textit{supra} note 22 and accompanying text; see also Marks, \textit{supra} note 20, at 139–40, 151 (observing that even the United States has joined a consensus on the right to development, specifically at the 1993 World Conference on Human Rights in Vienna).\textsuperscript{31} See \textit{supra} note 5 and accompanying text. Moreover, and in accord with section 103 of the \textit{Restatement (Third) of Foreign Relations Law of the U.S.}, the invocation of the right to development by states regularly goes unchallenged. See, e.g., U.N. GAOR, 64th Sess., 27th plen. mtg., \textit{supra} note 3, at 19–20; U.N. GAOR, 63rd Sess., 33rd plen. mtg., \textit{supra} note 3, at 14–15; U.N. GAOR, 62nd Sess., 38th plen. mtg., \textit{supra} note 3, at 18; U.N. GAOR, 61st Sess., 50th plen. mtg., \textit{supra} note 3, at 6. The United States often objects to the manner in which the Cuban embargo is framed by the government of Cuba and other states, but, at least in the context of the annual vote on the necessity of ending the Cuban embargo, it has not yet lodged an objection to the widespread assertion that its blockade violates Cuba’s right to development. See, e.g., U.N. GAOR, 64th Sess., 27th plen. mtg., \textit{supra} note 3, at 19–20; U.N. GAOR, 63rd Sess., 33rd plen. mtg., \textit{supra} note 3, at 14–15; U.N. GAOR, 62nd Sess., 38th plen. mtg., \textit{supra} note 3, at 18; U.N. GAOR, 61st Sess., 50th plen. mtg., \textit{supra} note 3, at 6.\textsuperscript{32} See Mohammed Bedjaoui, \textit{The Right to Development, in International Law: Achievements and Prospects} 1176, 1193 (Mohammed Bedjaoui ed., 1991) (affirming that the right to development “\textit{should be regarded as belonging to \textit{jus cogens}”}). A \textit{jus cogens} norm is a norm of international law considered so essential that no derogation from it is permitted. \textit{Id.} at 1185. Although there is no precise, authoritative enumeration of these norms, the generally accepted list includes the prohibitions on genocide, slavery, torture, forced disappearance, and prolonged arbitrary detention. See \textit{Restatement (Third) of Foreign Relations Law of the U.S.} § 702 (1987); see also Bedjaoui, \textit{supra}, at 1183 (arguing that “[i]f the right to development does not . . . belong to \textit{jus cogens}, it would have to be concluded . . . that genocide . . . is permitted by international law”). It is beyond the scope of this Comment to argue that the right to development has indeed passed into the realm of \textit{jus cogens}; the fact that this conception of the right has been persuasively argued is only offered as additional support for the proposition that the right to development is, at the very least, a norm of customary international law. See Bedjaoui, \textit{supra}, at 1183, 1193.\textsuperscript{33} See \textit{Restatement (Third) of Foreign Relations Law of the U.S.} § 102(1) (1987) (noting that international law becomes binding through international agreements as well as customary international law).
Despite its near-universal acceptance as a legitimate norm of international human rights law, however, the United States remains hostile to the right to development.\textsuperscript{34} The United States generally votes against any specific resolutions codifying, promoting, or otherwise invoking the right to development.\textsuperscript{35} Relevant, too, is the fact that the United States has signed, but not ratified, the International Covenant on Economic, Social, and Cultural Rights.\textsuperscript{36} While it both signed and ratified the International Covenant on Civil and Political Rights, it lodged a reservation declaring the agreement to be non-self-executing.\textsuperscript{37}

In no way, however, does the inimical stance the United States has taken toward the right to development relieve it of its international obligations with respect to that right.\textsuperscript{38} First, customary international law dictates that, even in the absence of ratification, a state’s signature on a treaty obligates it to refrain from activities that might defeat the object and purpose of that instrument.\textsuperscript{39} Additionally, an assertion that a

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  \item \textsuperscript{34} See Marks, \textit{supra} note 20, at 142.
  \item \textsuperscript{35} See id. Perhaps the most significant example of U.S. opposition to the right to development came in 1986, when it entered the only vote against the Declaration of the Right to Development. See Rapporteur, \textit{supra} note 24, ¶ 8.
  \item \textsuperscript{37} International Covenant on Civil and Political Rights, \textit{supra} note 6; United Nations, \textit{supra} note 36. The U.S. Senate’s ratification of the International Covenant on Civil and Political Rights was subject to a number of reservations, including “[t]hat the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.” International Covenant on Civil and Political Rights, \textit{supra} note 6; 138 Cong. Rec. 8068, 8071 (1992). A declaration that the treaty is non-self-executing is an assertion that the rights guaranteed under the treaty are not enforceable in U.S. courts absent enabling legislation. Louis Henkin, \textit{U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker}, 89 Am. J. Int’l L. 341, 346–47 (1995). When employed by the United States, a declaration of non-self-execution is “designed to keep its own judges from judging the human rights in the United States by international standards.” Louis Henkin, \textit{supra}, at 346; see United States v. Postal, 589 F.2d 862, 875 (5th Cir. 1979).
  \item \textsuperscript{39} See Vienna Convention, \textit{supra} note 38, art. 18; see also Natsu Taylor Saito, \textit{U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study}, 40 B.C. L. Rev. 275, 314 n.204 (1998) (noting that the United States has not ratified the Vienna Convention, but that the rule stated in Article 18 is “widely-recognized” as a principle of customary international law). Because it has signed the International Covenant on
treaty is not binding, either because a state lodged a declaration of non-self-execution or because the state did not sign and ratify it, is irrelevant when the norm in question is one of customary international law.\textsuperscript{40} Regardless of a state’s posture vis-à-vis a treaty (for example, as a non-signatory or a party subject to reservations), if that treaty also embodies customary international law, the state is bound.\textsuperscript{41} The United States, therefore, is not exempt from its dual responsibilities under treaty and customary international law regarding the right to development.\textsuperscript{42}

III. Effects of the Embargo

According to the Cuban government, the United States’s unilateral embargo of the island nation has resulted in over ninety-six billion dollars in aggregate economic losses since it was imposed nearly fifty years ago.\textsuperscript{43} Although the damage wrought on Cuba and its people by the trade embargo can be quantified in monetary terms, this figure does not adequately capture the full cost to the nation of Cuba and its people.\textsuperscript{44} The devastation can be measured by the health of the Cuban Economic, Social and Cultural Rights, the United States cannot undermine the object and purpose of that document, which includes protecting the right of peoples “freely [to] pursue their economic, social and cultural development.” See Vienna Convention, supra note 38, art. 18; International Covenant on Economic, Social and Cultural Rights, supra note 6, art. 1.

\textsuperscript{40} See Vienna Convention, supra note 38, art. 38 (“Nothing [in the present Convention related to a treaty’s effect on third parties] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”); Restatement (Third) of Foreign Relations Law of the U.S. § 324 cmt. e (1987) (“This section does not preclude the possibility that an agreement among a large number of parties may give rise to a customary rule of international law binding on non-party states.”); Chodosh, supra note 38, at 991 (noting that treaties are binding once ratified and conceding that “congressional consent [is arguably not] a prerequisite for customary international law to become binding in the U.S. courts”); Henkin, supra note 7, at 877 (“The law of nations, including both treaties and customary international law, is binding on the United States.”). Because treaties can become binding on states through the operation of customary international law, declarations that a treaty is non-self-executing are not only nugatory, they are also “against the spirit of the Constitution . . . [and] may be unconstitutional.” See Henkin, supra note 37, at 346.

\textsuperscript{41} See Vienna Convention, supra note 38, art. 38; Restatement (Third) of Foreign Relations Law of the U.S. § 324 cmt. e (1987); Chodosh, supra note 38, at 991–92; Henkin, supra note 7, at 877.

\textsuperscript{42} See Vienna Convention, supra note 38, art. 38; Restatement (Third) of Foreign Relations Law of the U.S. § 324 cmt. e (1987); Chodosh, supra note 38, at 991–92; Henkin, supra note 7, at 877.

\textsuperscript{43} The Secretary-General, 2009, supra note 14, at 23.

people, the state of Cuban infrastructure, and most importantly for the purposes of this Comment, the level of economic development attained versus the country’s potential for growth.45

A. Humanitarian Consequences

The destructive impact of comprehensive multilateral trade sanctions, and unilateral sanctions made equally expansive through supra-jurisdictional measures, on the humanitarian situation in target states is well-documented.46 Especially in the last two decades, there has been a growing chorus of disapproval among human rights organizations, scholars, and politicians to end the use of these “blunt instruments” as tools for effecting behavior modification or regime change in target states.47 In response, sanctioning states have adopted a number of policy initiatives, including the use of so-called “smart” sanctions, to mini-

45 See The Secretary-General, 2009, supra note 14, at 24–37; The Secretary-General, 2007, supra note 14, at 19–37. The Secretary-General has issued similar reports on an annual basis for nearly two decades, since the Cuban government first requested that the General Assembly initiate a yearly vote to end the U.S. blockade of Cuba. See Letter from the Permanent Representative of Cuba to the United Nations to the Secretary-General, U.N. Doc. A/46/193 (Aug. 16, 1991).


47 See, e.g., The Secretary-General, Report of the Secretary-General on the Work of the Organization, ¶ 89, Delivered to the General Assembly, U.N. Doc. A/52/1 (Sept. 3, 1997) (calling for “less blunt and more effective” sanctions through which the desired political objectives might be achieved with less pernicious humanitarian consequences); Gordon, supra note 46, at 141 (“The more complete the sanctions, the more effective they will be, in terms of economic damage. . . . The greater the degree to which the economy is generally undermined, the greater the damage to the civilian population, outside the military and political leadership.”); Cortright & Ahmed, supra note 46, at 22 (“[S]anctions inevitably cause the greatest harm to the most vulnerable.”).
imize the humanitarian impact of economic sanctions on civilian populations.\textsuperscript{48}

To date, however, the calamitous humanitarian impact of the comprehensive embargo on Cuba has not caused the United States to align its policy with the general international consensus condemning such sweeping measures, and the humanitarian situation in Cuba continues to deteriorate.\textsuperscript{49} What this means in terms of the legality of the embargo under international humanitarian law and international human rights law is beyond the scope of this discussion.\textsuperscript{50} The humanitarian questions raised by the embargo comprise a critical part of the whole picture that emerges; to the extent these issues are not the focus of this discussion is only to spotlight the topic of development.\textsuperscript{51}

B. Impact on Development

The manner in which the embargo impacts the humanitarian situation in Cuba, and the nature of those effects, is linked with the concept of development.\textsuperscript{52} It is nevertheless possible to parse out the violations of international law related to the humanitarian consequences of the embargo and the violations of international law related

\textsuperscript{48} See Cortright \& Lopez, \textit{supra} note 1, at 1, 6. The idea of smart sanctions emerged during the 1990s in response to the unmitigated, panoptic damage inflicted on target states by comprehensive sanctions regimes, which necessarily affected—often disproportionately so—innocent sectors of the population. \textit{See id.} at 1. The concept of smart sanctions is fairly broad and encompasses measures imposed on a state, which “target” the political establishment in ways that (attempt to) minimize the negative humanitarian impact on the general population. \textit{See id.} at 11–15. In addition to shifting its coercive economic strategies toward the use of smart sanctions since the 1990s, the U.N. Security Council has attempted to mitigate the destructive humanitarian impact of trade sanctions by providing for humanitarian exemptions from comprehensive sanctions regimes, as well as requesting periodic appraisals of the overall impact of sanctions on the people of target nations. \textsc{Jeremy Matam Farrall, United Nations Sanctions and the Rule of Law} 141 (2007).

\textsuperscript{49} See \textsc{Amnesty Int’l, supra} note 4, at 16–19.

\textsuperscript{50} See discussion \textit{infra} Part III.B. Not only is harming the civilian population of the sanctioned state ethically opprobrious, but it may also be illegal under international law. \textit{See Amnest y Int’l, supra} note 4, at 13–21 (providing a clear, concise exposition of this position, which is gaining force in the international community). Although it deals specifically with Cuba, the Amnesty International article may be read to stand for the broader proposition that any sanctions regime or embargo, which has a substantial negative impact on the health of the target state’s populace, is per se illegal under international law. \textit{See id.}

\textsuperscript{51} See discussion \textit{infra} Part III.B.

\textsuperscript{52} See \textsc{Amnesty Int’l, supra} note 4, at 19 (noting, for example, the difficulties in treating conditions such as HIV in the absence of a more highly developed infrastructure and without more advanced medical equipment).
to the impact of the embargo on Cuba’s national development.\footnote{See generally U.N. GAOR, 61st Sess., 50th plen. mtg., supra note 3, at 7–11; The Secretary-General, 2009, supra note 14, at 30–37.} Assuming, arguendo, that the United States could maintain its embargo with absolutely no ill humanitarian effects on the Cuban people (for example, if the people had access to quality healthcare, food, and potable water), the blockade would still prevent the Cuban nation-state from transforming from a third-world service and agricultural society to a second or first-world information-based society.\footnote{See U.N. GAOR, 61st Sess., 50th plen. mtg., supra note 3, at 7–11; The Secretary-General, 2009, supra note 14, at 30–37.} The Cuban people could therefore experience the same levels of such key health indicators as life expectancy, child mortality, or immunization as they did before the embargo, yet the blockade would constitute a separate violation of international law by inhibiting the country from developing up to its potential.\footnote{See The Secretary-General, 2009, supra note 14, at 24–37; Amnesty Int’l, supra note 4, at 16. Cuba’s significant investment in its public health system has forestalled a major humanitarian disaster. See Amnesty Int’l, supra note 4, at 16. The country has managed to blunt the negative impact of the embargo on the health of its people, for example, by increasing the per capita number of doctors (over twice as high as in the United States by 2001) and pursuing innovative healthcare strategies. See Linda M. Whiteford & Laurence G. Branch, Primary Health Care in Cuba 41 (2008). In contrast, Cuba’s ability to cope effectively with the blockade with respect to pursuing its economic development has been considerably more constrained. See The Secretary-General, 2009, supra note 14, at 24–37. In this sense, the infringement on Cuba’s right to development, as a discrete breach of international law, may be even more serious than the violation related to the harm the embargo has wrought on the civilian population. See id. at 30–37.}

The comprehensive unilateral trade sanctions regime imposed by the United States on Cuba specifically targets those aspects of the Cuban nation-state critical for national development.\footnote{See The Secretary-General, 2009, supra note 14, at 28, 31, 32–34, 41, 97, 112; The Secretary-General, 2007, supra note 14, at 19, 27, 29, 38–39, 75, 78, 92, 98–99, 102; U.N. GAOR, 61st Sess., 50th plen. mtg., supra note 3, at 7–11.} While the contours of the right to development are still being defined in international discourse, there is a consensus on at least a few “pillars of development,” including banking, telecommunications and technology, human resources, and infrastructure.\footnote{See Marks, supra note 20, at 141–42 (describing the range of opinions on what is encompassed in the right to development); see also U.S. Agency for Int’l Dev., Securing the Future: A Strategy for Economic Growth 5, 13–14 (2008), available at http://www.usaid.gov/our_work (follow “Economic Growth and Trade” hyperlink; then follow “Securing the Future: A Strategy for Economic Growth (April 2008)” hyperlink) (declaring that finance, infrastructure, and human resources are critical to enabling economic growth and avoiding distorted patterns of development); Senate Econ. Planning Office, Senate of the Phil., An Economic and Social Development Framework: Five Pillars of Growth 7–40} This list is certainly not all-inclusive, but it
provides a basic framework, to which the United States government itself subscribes, for conceptualizing the form and process of development.\footnote{58} Because the U.S. embargo systematically undermines the integrity of Cuba’s banking system and isolates it from the modern commercial world, impedes technological advancement, frustrates its ability to cultivate human capital, and obstructs the proper functioning of its infrastructure, it directly violates Cuba’s right to development.\footnote{59}

By making it illegal for Cuba to trade in U.S. dollars and inhibiting its ability effectively to move money in the international banking system, the embargo precludes the country from accessing the capital necessary to develop.\footnote{60} For example, under the embargo, any bank subject to the jurisdiction of the United States (essentially any bank doing business in or with the United States) is forbidden from engaging in any transfer of credit or payment transaction with Cuba or a Cuban national.\footnote{61} As a result of such far-reaching, extraterritorial measures, Cuba not only has extreme difficulty meeting its financial obligations, but its ability to maintain a normal, properly-functioning banking sector is also severely

\footnote{58} See U.S. Agency for Int’l Dev., supra note 57, at 5, 13–14; Senate Econ. Planning Office, supra note 57, at 7–40. It would be a hallow enterprise indeed to assert that states are entitled to development as a human right without concretely defining that right; yet there is no single, comprehensive, agreed upon schema for effecting development. See U.S. Agency for Int’l Dev., supra note 57, at 3–18; Senate Econ. Planning Office, supra note 57, at 7–40; Marks, supra note 20, at 141–42. Indeed, the United States remains so entrenched in its opposition to the right to development partly because of the all-encompassing manner in which it has been envisioned by other countries, particularly developing nations. See Marks, supra note 20, at 143–52. Circumscribing the conceptual outlines of the right to development according to the views of United States, therefore, undercuts any argument that the right sweeps too broadly and allows for a practical appraisal of the Cuban embargo vis-à-vis that framework. See U.S. Agency for Int’l Dev., supra note 57, at 3–18; Marks, supra note 20, at 143–52. For a more in-depth discussion of economic development in theory and practice, see generally James M. Cypher & James L. Dietz, The Process of Economic Development (2d ed. 2004) (providing a comprehensive overview of the concept of development in terms of history, theory, and practical application).

\footnote{59} See U.S. Agency for Int’l Dev., supra note 57, at 13–14; Senate Econ. Planning Office, supra note 57, at 7–40; The Secretary-General, 2009, supra note 14, at 28, 31, 32–34, 97, 112; The Secretary-General, 2007, supra note 14, at 27, 29, 38–39, 75, 78, 92, 98–99, 102; discussion supra Part II.

\footnote{60} See Senate Econ. Planning Office, supra note 57, at 7.

This has dire implications for Cuba’s development prospects, as “[d]ebt [and] a weak financial and banking sector spoil [a] country’s macroeconomy and serve as major constraints to higher growth.”

By barring access to technology, the embargo inhibits Cuba’s ability to engage in the type of higher-order economic activities so critical to growth and development in the information-based global economy. For example, the Cuban government and Cuban national companies are prohibited from purchasing products, components, technical equipment, or technical inputs that are under United States patents. Cuba’s inability to import various technologies has harmed sectors of its economy ranging from the poultry and agricultural industries to the research science and biotechnology industries. The communications sector has likewise been damaged, highlighting the challenges posed to economic and social development when communications technologies are restricted.

By restraining the ability of Cuban students to access information and engage in scholarly discourse, Cuba’s ability to foster and fully utilize its human capital in the pursuit of economic growth is severely curtailed. For example, Cuba’s students, ranging from primary school to the university level, cannot access a variety of internet databases, web

62 See id. § 515.201; The Secretary-General, 2009, supra note 14, at 31; The Secretary-General, 2007, supra note 14, at 38–39.
63 See Senate Econ. Planning Office, supra note 57, at 7.
64 See Manuel Castells, Flows, Networks, and Identities: A Critical Theory of the Informal Society, in Globalization: Critical Concepts in Sociology 65, 72, 81 (Roland Robertson & Kathleen E. White eds., 2003) (declaring that a veritable “technology revolution” is underway wherein “the ability to use . . . information technologies [is] a fundamental tool of development,” while the lack of such technological information capacity undermines a country’s ability to develop).
65 See The Secretary-General, 2009, supra note 14, at 25, 93; The Secretary-General, 2007, supra note 14, at 81. The United States is the most competitive and most diversified market for various technologies. See The Secretary-General, 2007, supra note 14, at 81. If Cuba is unable to obtain goods such as computers, software, and laboratory equipment from the United States, it is often the case that Cuba is foreclosed from obtaining these items entirely because they are too expensive to import from distant markets, do not exist outside the U.S. market, or are otherwise unavailable in Cuba because of licensing restrictions. See id. at 32, 36, 65, 81, 99.
66 See The Secretary-General, 2009, supra note 14, at 28, 32–34; The Secretary-General, 2007, supra note 14, at 27, 75, 78.
67 See The Secretary-General, 2009, supra note 14, at 34–36; The Secretary-General, 2007, supra note 14, at 89.
68 See The Secretary-General, 2009, supra note 14, at 28–29; The Secretary-General, 2007, supra note 14, at 29; see also Senate Econ. Planning Office, supra note 57, at 31 (noting the importance of the education sector’s contribution to development, specifically, “better educated or trained worker[s]”.)
pages, or scientific and technical journals and publications essential to the scholarly enterprise.\(^{69}\) Nor do academics “have access to up-to-date works from United States writers or research and education centres.”\(^{70}\) Moreover, without high-bandwidth internet lines and open access to internet resources, Cuba’s library system cannot effectively deliver information to the Cuban people, and information exchanges with scientific and academic networks in different countries is impeded.\(^{71}\) Despite its heavy investment in education, Cuba is at risk of experiencing a shortage of well-educated, well-trained workers—a deficiency that can undermine and distort patterns of growth.\(^{72}\)

By constraining its ability to import materials and technical knowledge, the embargo subverts the Cuban government’s efforts to create new infrastructure—a prerequisite to economic and industrial development.\(^{73}\) A “stable supply of construction materials, tools and [technological] equipment” is necessary for infrastructural development; without such a supply, Cuba encounters great difficulties constructing and maintaining even the most basic projects such as human settlements.\(^{74}\) The generally poor state of the Cuban infrastructure also severely limits the country’s capacity to trade, process food, distribute water, and produce agricultural goods.\(^{75}\) A working infrastructure is “a key factor in a country’s economic development because it facilitates the movement of goods, services and people . . . [and] induce[s] economic activity.”\(^{76}\)

\(^{69}\) See The Secretary-General, 2009, supra note 14, at 28; The Secretary-General, 2007, supra note 14, at 29, 92, 105. Students and researchers are not only restricted from accessing certain publications, but they are also prohibited from engaging, unimpeded, in the sort of academic collaboration so vital to advancements in scholarship. See The Secretary-General, 2009, supra note 14, at 105–06.

\(^{70}\) The Secretary-General, 2009, supra note 14, at 28. Additionally, academics from Cuba regularly face significant obstacles to participation in international conferences due to the travel restrictions imposed by the embargo. See id. at 105–06. When conferences are held in the United States, Cuban scientists, economists, engineers, and healthcare specialists are banned entirely, thus preventing them from updating their training and knowledge in their respective fields and learning from the experiences of other specialists. See id. at 24–25, 90; The Secretary-General, 2007, supra note 14, at 29.

\(^{71}\) See The Secretary-General, 2009, supra note 14, at 34, 105; The Secretary-General, 2007, supra note 14, at 29.


\(^{73}\) See Senate Econ. Planning Office, supra note 57, at 17; Edward J. Blakely & Ted K. Bradshaw, Planning Local Economic Development: Theory and Practice 183 (3d ed. 2002) (discussing the necessity for infrastructural improvements in order to attract and facilitate industrial expansion).

\(^{74}\) See The Secretary-General, 2007, supra note 14, at 98–99.

\(^{75}\) See id. at 102.

\(^{76}\) See Senate Econ. Planning Office, supra note 57, at 17.
The damage wrought on Cuba’s infrastructure by the U.S. blockade makes it exceedingly more difficult, and in some instances impossible, to create the infrastructure essential for normal rates and patterns of growth, let alone the normal functioning of a society.\textsuperscript{77}

Certainly, the impact of the embargo on Cuba’s development implicates a variety of areas beyond banking, communications and technology, human capital, and infrastructure.\textsuperscript{78} The United Nations Conference on Trade and Development touched on the depth and breadth of the embargo’s effects—specifically with respect to Cuba’s development—when the Secretary-General wrote,

\begin{quote}
[I]t is evident that the United States embargo has resulted in a substantial opportunity cost for Cuba and has impeded Cuba’s efforts to integrate itself into the world trading system. This had an adverse impact on gross domestic product growth, export revenues, industrial and agricultural production, trade and social sectors such as food, health, education, communications, science and technology in Cuba. Moreover, the impact of the extraterritorial aspect of the United States embargo has had important implications for trade diversion and the business environment, given the significant involvement of United States interests in transnational corporations. Not only Cuban citizens but also those in third countries and in the United States are affected by the embargo in terms of the inability to interact with Cuba in the economic, academic and social fields.\textsuperscript{79}
\end{quote}

Such an understanding of the contours of the right to development is more expansive, and perhaps more nuanced, than that to which the United States adheres.\textsuperscript{80} Nevertheless, if it is U.S. domestic law that is in conflict with the international legal right to development, it is necessary to view the embargo in light of the United States’s limited concep-


\textsuperscript{78} The Secretary-General, 2007, \textit{supra} note 14, at 95.

\textsuperscript{79} See id.

\textsuperscript{80} See U.S. Agency for Int’l Dev., \textit{supra} note 57, at 13–14; see also Marks, \textit{supra} note 20, at 141–42 (noting the staunch opposition of the United States to an understanding of development that would consider such factors as “inequities in international trade, the negative impacts of globalization, differential access to technology [and] the crushing debt burden”).
tion. The fact that the United States has recognized the importance of banking, communications and technology, human capital, and infrastructure to the meaningful growth and development of a state—areas of the Cuban nation that are thoroughly eroded by the embargo—demonstrates the illegality of the blockade even under the most restrictive understandings of development.

IV. INTERNATIONAL LAW AND THE U.S. EMBARGO

The obstinacy of the United States in maintaining the Cuban blockade in the face of mounting, and ultimately near absolute international opposition, is one of the most egregious examples of such real-politik in the history of the United Nations. Beginning in 1992, at the request of Cuba, the U.N. General Assembly began voting annually on a resolution calling for the end of the U.S. embargo on Cuba. The first vote, recorded in November 1992, was fifty-nine in favor, three opposed, with seventy-one abstentions. Over the course of the next seventeen years, the vote shifted dramatically in favor of ending the embargo as the abstaining countries lined up to condemn the United States’s policy toward Cuba. In 2009, 187 countries voted to end the

81 See Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804). Conceptualizing the right to development more broadly will allow either Congress or the courts to avoid the constitutional question by construing the legislative enactments codifying the embargo narrowly, according to the Charming Betsy canon. See id. If the right to development is defined narrowly, however, under a rubric already recognized by the U.S. government, it is impossible to avoid the constitutional impasse. See id.

82 See U.S. Agency for Int’l. Dev., supra note 57, at 13–14. In outlining its “Framework for Economic Growth,” The U.S. Agency for International Development (“USAID”) conceives of telecommunications as a subset of infrastructure, which comprises one-third of the growth “enabler” equation (the other two enablers being finance and human resources). See id. According to USAID, the development enablers “cannot by themselves cause economic growth,” although it is clear that weak or missing enablers will have an adverse impact on development. See id.

83 See U.N. GAOR, 64th Sess., 27th plen. mtg., supra note 3, at 22; see also U.N. GAOR, 63rd Sess., 33rd plen. mtg., supra note 3, at 20–21 (noting that, year after year, the arguments proffered by the United States in defense of its Cuban embargo are rejected by more states, but the United States is nevertheless able to flout the express will of the international community because of its economic strength).

84 Letter from the Permanent Representative of Cuba to the United Nations to the Secretary-General, supra note 45.


embargo, with two countries abstaining. The only two countries in the world to vote with the United States were Israel and Palau, and Israel openly violates the embargo contrary to its vote.

Yet the United States’s response to the consistent and vociferous indictments from the international community that its embargo of Cuba is in direct violation of international law, which has ranged from decidedly impassive to manifestly inflammatory, belies the relationship between U.S. and international law. Not only is international law used as an interpretive mechanism for U.S. domestic law, but international law is and always has been a constituent part of U.S. law.  


87 U.N. GAOR, 64th Sess., 27th plen. mtg., supra note 3, at 22.


90 See Rasul v. Bush, 542 U.S. 466, 484–85 (2004); Johnson v. Eisentrager, 339 U.S. 763, 776–77 (1950). The Supreme Court of the United States has invoked international law to interpret U.S. law in a number of cases, including Johnson v. Eisentrager and, more recently, Rasul v. Bush. See Rasul, 542 U.S. at 484–85; Eisentrager, 339 U.S. at 776–77. The Supreme Court has also stated unequivocally that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often
A. International Law Is U.S. Law

By virtue of the Supremacy Clause, international law codified in treaties is elevated to a status, together with federal statutes and the Constitution itself, of “the supreme Law of the Land.”91 Moreover, nothing in this constitutional mandate requires that customary international law be subordinated to treaties.92 If both treaties and customary international law constitute binding international obligations of the United States, it is sound, both logically and constitutionally, to treat them as coordinate forms of law.93 Thus, both treaties and customary international law are subject to the same principles when a conflict exists between the United States’s international commitments and domestic legislation.94

If the Constitution does not preclude the elevation of customary international law to the level of treaties or domestic enactments in theory, then practice has borne this out—the U.S. legal system has long accorded great respect, and deference, to the “law of nations.”95 As the Supreme Court noted in 1796, “[w]hen the United States declared their independence, they were bound to receive the law of nations.”96 The Founders expected

as questions of right depending on it are duly presented for their determination.” The Paquete Habana, 175 U.S. 677, 700 (1900); see also Louis Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1561–62 (1984) (discussing the historical convergence of international law and U.S. law and the manner in which the relationship between the two co-equal forms has evolved).

91 U.S. Const. art. VI, cl. 2. (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .”).

92 See Henkin, supra note 7, at 877.

93 See id. at 877–78.

94 See id. at 878 (“If an act of Congress can modify customary law for domestic purposes, it is . . . because, like treaties, customary law is equal in status to legislation, and the more recent of the two governs.”).

95 See Ryan Goodman & Derek P. Jinks, Note, Filartiga’s Firm Footing: International Human Rights and Federal Common Law, 66 Fordham L. Rev. 463, 464 (1997) (“As new members in the community of nations, the Founders felt bound, both ethically and pragmatically, to inherit and abide by the law of nations.”).

96 Ware v. Hylton, 3 U.S. (1 Dall.) 199, 281 (1796); see also Talbot v. Janson, 3 U.S. (3 Dall.) 133, 161 (1795) (stating “this is so palpable a violation of our own law . . . of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since”); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) (holding “the United States had . . . become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed”); 1 Op. Att’y Gen. 26, 27 (1792) (concluding “the law of nations, although not specifically adopted . . . is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation”).
that the customary law of nations would find application in U.S. courts by virtue of the nation’s membership in the international community; moreover, they unquestionably intended this outcome.\textsuperscript{97} Early jurisprudence reflected this intent.\textsuperscript{98} In the time since the nation’s founding, the incorporation of international law into both federal and state law has continued unabated, with scholars, commentators, and jurists reiterating the propriety of such developments.\textsuperscript{99} Cases arising under international law or international agreements to which the United States has acquiesced are within the jurisdiction of U.S. courts.\textsuperscript{100} These courts “are bound to give effect to international law.”\textsuperscript{101} Similarly, “[c]ases arising under treaties to which the United States is a party, as well as cases arising under customary international law” are “within the Judicial Power of the United States under Article III, Section 2 of the Constitution.”\textsuperscript{102}

B. The U.S. Embargo Contravenes International Law

The overwhelming weight of research and scholarly discourse on the subject of the U.S. embargo of Cuba has exposed a very damning pattern of behavior on the part of the United States.\textsuperscript{103} By the standards

\textsuperscript{97} See Jordan J. Paust, \textit{Customary International Law and Human Rights Treaties Are Law of the United States}, 20 Mich. J. Int’l L. 301, 301 (1999) (“The Founders clearly expected that the customary law of nations was binding, was supreme law, created (among others) private rights and duties, and would be applicable in United States federal courts.”).

\textsuperscript{98} See, e.g., \textit{The Paquete Habana}, 175 U.S. at 700 (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . .”).

\textsuperscript{99} See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (declaring that “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today,” and then applying those principles to provide federal courts with jurisdiction to adjudicate rights “already recognized by international law”); \textit{Restatement (Third) of Foreign Relations Law of the U.S.} § 111(1) (1987) (noting that “[i]nternational law and international agreements are law of the United States and supreme over the law of the several States”); see also Goodman & Jinks, supra note 95, at 466 (identifying a wide range of adherents to the notion that customary international law has legal effect in the United States, including a number of federal courts, the executive, the American Law Institute, and the American Bar Association). \textit{But see} Medellin v. Texas, 552 U.S. 491, 522–23 (2008) (refusing to create, based on the international obligations of the United States to comply with judgments of the International Court of Justice, automatically-binding domestic law in the absence of enabling legislation).

\textsuperscript{100} See \textit{Restatement (Third) of Foreign Relations Law of the U.S.} § 111(1) (1987). Moreover, the President has the obligation and authority to make sure that international law is faithfully executed within the boundaries of this nation. \textit{See id.} § 111 cmt. c.

\textsuperscript{101} \textit{Id.} § 111(2), (3).

\textsuperscript{102} \textit{Id.} § 111 cmt. e.

\textsuperscript{103} \textit{See Amnesty Int’l, supra} note 4, at 13–19.
of nearly every government in the world except the United States, the comprehensive embargo on Cuba incontrovertibly violates international human rights law and international humanitarian law due to its devastating humanitarian impact. In reality, the views of the world community and those of the United States may not be as far apart as commentators might suggest. The government does continue to argue publicly that its conduct is wholly consistent with international law. Recent modifications to the embargo undertaken for “humanitarian reasons,” however, undercut this position. At least with respect to the embargo’s humanitarian consequences, there is evidence the United States appreciates that its embargo may violate certain international legal norms.

104 See generally U.N. GAOR, 61st Sess., 50th plen. mtg., supra note 3 (documenting the statements of governments on the subject of the Cuban embargo). The comments of the South African delegate, speaking on behalf of the Group of 77 and China on the subject of the embargo imposed by the United States against Cuba, are paradigmatic of the views generally held and expressed by the international community to describe the embargo in recent years:

[The] long-standing economic, commercial and financial embargo [of Cuba] has been consistently rejected by a growing number of Member States to the point at which the opposition has become almost unanimous. Thus, the need to respect international law in the conduct of international relations has been recognized by most members of this body, as has been evidenced by the growing support for the draft resolution [condemning the embargo] . . . . I believe that the presence of such a large number of Member States in this Hall today and their participation in these deliberations are indications of their opposition to unilateral extraterritorial measures. They express their firm opposition to unilateral measures as a means of exerting pressure on developing countries, as such measures are contrary to international law, international humanitarian law, the United Nations Charter and the norms and principles governing peaceful relations among States.

Id. at 2.

105 See id. at 6.

106 See supra notes 3, 4 and accompanying text.

Yet, the international community’s efforts to impel the United States to lift its embargo for humanitarian reasons, and the United States’s efforts to minimize the humanitarian impact of the embargo, have only addressed violations of a discrete set of international legal norms. Even if the United States were somehow able to mitigate, or eliminate entirely, the ruinous consequences the embargo has on the Cuban people, such a comprehensive embargo would nevertheless be illegal under international law. In other words, the illegality of such measures under international law is not simply predicated on its effect on the Cuban people on a micro-level—it also is established by reference to the nation-state itself and the macro-level concept of development.

Because the embargo of the Cuban nation completely inhibits the country’s ability to pass from a third-world service and agricultural economy to more advanced stages of development, it violates international law to which the United States is bound by both treaty and custom. First and foremost among such violations has been the abroga-
tion of its duties under the Charter of the United Nations.\textsuperscript{112} Having signed the International Covenant on Economic, Social and Cultural Rights as well as signed and ratified the International Covenant on Civil and Political Rights, the United States has further breached its international obligations codified in treaties.\textsuperscript{113} While the United States has resisted the codification of the right to development in more specific instruments and the evolution of the right into a legitimate norm of international law, its often sole opposition to the right has not prevented it from becoming customary international law binding on the United States.\textsuperscript{114}

V. CONSTITUTIONALIZING THE EMBARGO: EXECUTIVE, LEGISLATIVE, AND JUDICIAL RESPONSIBILITIES

Although international law is a constituent element of U.S. law, the attitudes of the bodies charged with preserving that close relationship have, at various times throughout the nation’s history, run the gamut between deferential and derisive, complimentary and contentious.\textsuperscript{115} On the one hand, the judiciary, the executive, and the legislative


\textsuperscript{113} See supra notes 36–42 and accompanying text.

\textsuperscript{114} See discussion supra Part II.

branches are required to give force to international law. On the other hand, both the executive and legislative branches of the U.S. government may act in violation of a treaty or customary international law. The Supreme Court has also recognized a distinction between treaties that “automatically have effect as domestic law” and are “equivalent to an act of the legislature,” and those that “do not by themselves function as binding federal law” and require an additional congressional enactment to give them force.

As a matter of domestic law, it is clear the United States may disavow or ignore its obligations under international law. This principle does not extend to the international arena—failure to give domestic effect to international legal commitments does not absolve the United States of those obligations on the international level. With respect to both treaty obligations and international legal norms that have risen to the level of customary international law, then, the United States is bound to follow international law or risk defaulting on its obligations as a member of the international community. In the absence of meaningful enforcement mechanisms, this does not seem particularly prob-

116 See U.S. Const. art. VI, cl. 2.; Louis Henkin, Foreign Affairs and the U.S. Constitution 198–202 (2d ed. 1996) (describing congressional declarations carving out exceptions or expressing reservations to international instruments as “anti-Constitutional in spirit and highly problematic as a matter of law”).
117 Glennon, supra note 8, at 325.
118 See Medellin, 552 U.S. at 504–05.
119 See Glennon, supra note 8, at 325; see also Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (stating that if “Congress has made its intent in the statute clear, [a court] must give effect to that intent”) (internal quotations omitted).
120 See Medellin, 552 U.S. at 504–05, 522–23. Although the Supreme Court held in Medellin v. Texas that a non-self-executing treaty does not create enforceable rights in U.S. courts, implicit in the decision was the notion that the absence of automatic domestic legal effect does not render an international obligation any less binding vis-à-vis the world community. See id.; see also Xuncax v. Gramajo, 886 F. Supp. 162, 180 n.21 (1995) (positing that, while individual nations may be left to fashion specific domestic legal remedies for a cause of action, countries still have a duty to redress international law violations). Signed and ratified treaties “comprise international commitments” even if the treaty itself does not give rise to domestically-enforceable federal law. See Medellin, 552 U.S. at 505. Moreover, a state party to a non-self-executing treaty must “implement it promptly, and failure to do so would render [the state] in default under its treaty obligations.” Restatement (Third) of Foreign Relations Law of the U.S. § 111, rep. n.5 (1987). Whether the rights or obligations under the treaty can be sued upon in domestic courts is, therefore, an issue distinguishable from whether the state party to the treaty is fulfilling its obligations under international law. See id. § 115(1)(b).
121 See Restatement (Third) of Foreign Relations Law of the U.S. § 115(1)(b) (1987) (“That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.”).
lematic.\textsuperscript{122} So much more is at stake, though—if the United States wishes to use international legal mechanisms to pursue its interests, it must demonstrate to the world that it takes international law seriously within the constitutional framework.\textsuperscript{123} Especially in the context of the Cuban embargo, where U.S. federal law is in direct conflict with international law, the United States must accord adequate respect for the latter and take steps to resolve the tension.\textsuperscript{124} In order to accomplish this, each branch of government—executive, legislative, and judicial—has a role to play.\textsuperscript{125}

The judiciary possesses the constitutional authority to overturn the Cuban embargo as unconstitutional by virtue of its departure from the law of nations.\textsuperscript{126} The embargo presents a very clear question of statutory and constitutional interpretation, specifically, whether the trade blockade imposed on Cuba and codified in U.S. law directly conflicts with the right to development as it is described in international instruments to which the United States is a party, or as it is framed as a norm of customary international law to which the United States is bound.\textsuperscript{127}

Nevertheless, courts regularly refuse to reach the merits of claims relating to the blockade of Cuba at all, asserting that they present non-


\textsuperscript{123} See \textit{id.} at 799–800.

\textsuperscript{124} See Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

\textsuperscript{125} See infra notes 126, 134, 139 and accompanying text.

\textsuperscript{126} See The Paquete Habana, 175 U.S. 677, 700 (1900). If international law is U.S. law by virtue of the Supremacy Clause, and it is the “duty of the judicial department to say what the law is,” then it is clearly within the Court’s authority to rule on questions of international law. See \textit{id.;} Marbury v. Madison, 5 U.S. 137, 177 (1803). See also \textit{Restatement (Third) of Foreign Relations Law of the U.S.} § 111(2), (3) (1987) (noting that cases arising under international law or international agreements to which the United States has acquiesced are within the jurisdiction of U.S. courts).

\textsuperscript{127} See Japan Whaling Ass’n v. Am. Cetacean Soc’y, 478 U.S. 221, 229–30 (1986). When faced with a legal question of statutory interpretation touching on international law, the Supreme Court has held:

\begin{quote}
[I]t is “error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”

\ldots \textsuperscript{128}

[The courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. \ldots \textsuperscript{129}[U]nder the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.]

\end{quote}
justiciable political questions. Where courts have addressed the constitutional questions posed by the international legal implications of the embargo, they have either 1) ruled purely on domestic legal grounds, or 2) found no direct conflict with international law. To date, no court has ruled on whether Cuba’s right to development, protected under customary international law, would render any aspect of the Cuban embargo postdating the development of this norm unconstitutional. If the judiciary is ever asked to rule on the conflict between Cuba’s right to development and most, if not all, the provisions of the embargo, it should not shy away from its constitutional duty to invalidate the provisions in question. In light of the powerful currents of judicial restraint that have guided courts’ rulings on the subject to date, however, a sweeping judicial invalidation of a half-century of foreign policy is unlikely. Consequently, the task of bringing U.S. foreign policy toward Cuba in accord with international legal norms is, in all practicality, left to the political branches.

The executive possesses significant authority to alter the nature of the embargo such that it does not completely undermine Cuba’s right

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128 See, e.g., Regan v. Wald, 468 U.S. 222, 242 (1984) (declining to hear the claim that Cuban embargo no longer implicated the national security concerns sufficient to justify its continued existence); Sardino v. Fed. Reserve Bank, 361 F.2d 106, 112 (2d Cir. 1966) (declaring to consider claim that nature of Cuba’s foreign policy did not justify regulations freezing Cuban assets).

129 See Charming Betsy, 6 U.S. at 118 (“[A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). The approach followed by the court in Freedom to Travel Campaign v. Newcomb is paradigmatic of the judiciary’s general reluctance to strike down federal law as incompatible with international law. See 82 F.3d 1431, 1438–41 (9th Cir. 1996). In ruling on the constitutionality of the Cuban Asset Control Regulations, the court focused mainly on domestic constitutional implications, holding that the Regulations are neither an unconstitutional delegation of congressional authority nor unconstitutionally vague under the Fifth and First Amendments. See id. at 1438, 1440. To the extent the court was forced to address the embargo’s constitutionality in light of international law, the court summarily rejected the argument that any conflict between the two existed. See id. at 1441–42.

130 See Charming Betsy, 6 U.S. at 118, 119; Marks, supra note 20, at 142, 167. Indeed the United States has not formally recognized that the right development has matured into a legitimate norm of customary international law; thus no court would have occasion to rule on the relationship of the Cuban embargo to that norm. See Charming Betsy, 6 U.S. at 118, 119; Marks, supra note 20, at 142, 167.

131 See Japan Whaling Ass’n, 478 U.S. at 229–30. Until Congress passes new legislation which explicitly and unequivocally demonstrates an intent to disregard the right to development, the provisions of the embargo on Cuba bearing on its development remain unconstitutional. See Charming Betsy, 6 U.S. at 118.

132 See Regan, 468 U.S. at 242; Sardino, 361 F.2d at 112.

133 See Regan, 468 U.S. at 242; Sardino, 361 F.2d at 112.
to development. President Obama has already taken some positive steps toward compliance with international law, easing some of the restrictions on remittances and travel restrictions for Cuban-Americans with relatives in Cuba. The steps taken exhibit the same fundamental deficiency of past actions with respect to easing the embargo, however, in that they focus almost exclusively on the humanitarian impact and largely ignore the development issue. With respect to Cuba’s capacity for development, the most debilitating components of the Federal Regulations promulgated by the executive remain in force. By renewing his TWEA powers in September 2009, President Obama has ensured Cuba’s vulnerability for at least another year.

Congress’s capacity to bring the embargo on Cuba back onto sound constitutional footing, by ensuring its conformity with international law, far exceeds that of the other branches. While the regulations promulgated by the executive certainly play a significant role in stifling economic development in Cuba, the president’s authority to carry out the embargo is derived entirely from legislative enactments. Likewise, the judiciary is limited in its ability to alter fundamentally the nature of U.S. policy toward Cuba both by its own prudential concerns about non-justiciable political questions and the constitutional constraints on jurisdiction. For both constitutional and practical reasons, then, the prospective constitutionality of the embargo rests in the hands of Congress.

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134 See 22 U.S.C. § 2370(a)(1) (2006); 50 U.S.C. app. § 5(b) (2006). Pursuant to the President’s expansive powers with respect to the Cuban embargo, he may repeal or otherwise alter the Federal Regulations if certain conditions are met. See 31 C.F.R. pt. 515 (2009). Thus, it is within the executive’s power to eliminate those aspects of the embargo that currently have a direct and substantial negative impact on Cuba’s development. See id; Amnesty Int’l, supra note 4.


136 See 22 U.S.C. § 7202 (facilitating Cuba’s importation of agricultural products and medical supplies but failing to accommodate Cuba’s need for materials necessary for the development of infrastructure and industry).


138 See MacFarquhar, supra note 135.

139 See Brest, supra note 9, at 61–65 (discussing Congress’s capacity to engage in constitutionalism and the need for such engagement where, for example, judicial review has been foreclosed).


141 See U.S. Const. art. III, § 2, cl. 1. If an argument that the embargo on Cuba undermines its right to development does not reach an Article III court in the context of a case or controversy, the judiciary will never have an opportunity to pass on the constitutionality of the embargo. See id.

142 See Brest, supra note 9, at 63–65.
Especially in situations where, as here, congress is the only branch of government practically capable of upholding the Constitution, it cannot shirk this solemn responsibility.\(^{143}\) If the ultimate goal is to “constitutionalize” what is otherwise a constitutionally impermissible breach of international law, Congress has two options, both of which require a genuine appreciation for the role of international law in the constitutional framework.\(^{144}\)

Congress’s first option involves duly recognizing the right to development as a legitimate norm of international law, conceding that the right conflicts directly with federal law, and resolving the conflict by passing new legislation unequivocally rejecting the norm under the Charming Betsy canon.\(^{145}\) Where, as here, the development of an international legal norm postdates a federal legislative enactment, that rule requires a clear statement from Congress that it specifically intends to contravene an international legal norm.\(^{146}\) Under this approach, Congress could simply pass new legislation as or even more harmful to Cuban development as long as it explicitly recognizes the right to development as an international legal norm and provides a clear legislative mandate to repeal that norm.\(^{147}\) Certainly, a newly-codified embargo would still violate international law, but the constitutional tension between these co-equal forms of law would be resolved, by reference to the timing and language of the enactment, in favor of the new legislation.\(^{148}\)

Contrastingly, Congress may, out of respect for the views of every single nation in the world (except Israel and Palau) and concomitant appreciation of the role the Founders wished international law to play in our legal system, repeal the legislation creating the embargo.\(^{149}\) The

\(^{143}\) See id. at 63.

\(^{144}\) See Henkin, supra note 7, at 877–78.

\(^{145}\) See Charming Betsy, 6 U.S. at 118, 119; see also Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that if a treaty and a federal statute conflict, “the one last in date will control the other”); Henkin, supra note 7, at 877–78 (explaining that customary international law and treaties are both on equal footing with legislative enactments and thus subject to the “last in time” rule).

\(^{146}\) See Charming Betsy, 6 U.S. at 119.

\(^{147}\) See, e.g., Zadvydas, 533 U.S. at 696 (stating where congressional intent is clear, courts will resolve constitutional tensions in favor of that intent); I.N.S. v. St. Cyr, 533 U.S. 289, 315–16 (2001) (holding Congress may enact ex post facto law as long as it provides a clear statement).

\(^{148}\) See Whitney, 124 U.S. at 194; Charming Betsy, 6 U.S. at 119; Henkin, supra note 7, at 877–78.

\(^{149}\) See The Federalist No. 80 (Alexander Hamilton) (stating that all members of the world community, of which the United States was a part upon independence, are reciprocally “answerable to foreign powers”); see also Maria v. McElroy, 68 F. Supp. 2d 206, 231 (E.D.N.Y. 1999).
economic blockade of Cuba represents one of the most egregious violations of international law in modern statecraft. See generally The Secretary-General, 2009, supra note 14 (documenting the ire of the international community with respect to the Cuban embargo). No other modern act of state has provoked such widespread, unanimous condemnation by the international community. See Chomsky, supra note 88, at 83 (noting that the United States is “100 percent isolated” in its stance toward Cuba, and further that Israel—the only country that purportedly supports the U.S. position—regularly violates the embargo).

150 See Joseph Kahn, In Response, China Attacks U.S. Record on Rights, N.Y. TIMES, Mar. 10, 2006, at A12. Other countries have taken notice of U.S. violations. See id. For example, in response to the State Department’s annual report on human rights conditions globally, the Chinese government responded, “As in previous years, the State Department pointed the finger at human rights situations in more than 190 countries and regions, including China, but kept silent on the serious violations of human rights in the United States.” Id. Cuba has similarly questioned whether the United States has any legitimate claim to “moral authority” with respect to enforcing human rights norms when it regularly disregards such norms. See U.N. GAOR, 61st Sess., 50th plen. mtg., supra note 3, at 11.

151 See Medellín, 552 U.S. at 504–05, 522–23; Whitney, 124 U.S. at 194; Charming Betsy, 6 U.S. at 119; Henkin, supra note 7, at 877–78; supra note 149 and accompanying text.

152 See Posner, supra note 122, at 842.

Although it is critical, as a matter of domestic law, to constitutionalize the embargo, simply recodifying it and explicitly stating an intention to violate Cuba’s right to development can only further damage the United States’s standing in the community of nations. Thus, if the United States is to accord the appropriate respect for international law and thereby maintain its position of global leadership, especially on issues of fundamental rights and liberties, Congress must end the embargo on Cuba. 153

**Conclusion**

When the Obama administration took office, it entered the debate on Cuba and the nearly half-century old embargo that has crippled the tiny island nation with a self-avowed respect for the law of nations. Despite easing some restrictions on the ability of Cuban-Americans with family in Cuba to travel and send remittances, the President’s promises on Cuba have gone largely unfulfilled. The Cuban embargo, in its current form, remains a constitutionally impermissible violation of international law, specifically, the international legal norm prohibiting interference with a nation’s right to develop.
Although both the executive and the judiciary can play a role in constitutionalizing the blockade, it is the U.S. Congress that possesses the greatest power to square federal enactments with international law. The legislature can accomplish this either by passing new legislation stating the United States’s intentions to flout international legal norms, or repealing altogether the legislative enactments giving force to the embargo. If the United States values its reputation as an advocate of human rights and the rule of law in the international sphere, the choice between these two options is obvious.
E-VERIFY: AN EXCEPTIONALIST SYSTEM EMBEDDED IN THE IMMIGRATION REFORM BATTLE BETWEEN FEDERAL AND STATE GOVERNMENTS

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Abstract: The immigration debate has proven to be fertile ground for promoting exceptionalist practices, where certain groups of people are isolated from the rest of the population and regarded as a subclass. The federal electronic employment verification system, E-Verify, is a prime example of such a practice. Passed under the Procurement Act, the goal of E-Verify was to promote efficiency and economy in government procurement. Unfortunately, the system falls far short of these goals because of problems inherent in the electronic database and increased state involvement over immigration reform. E-Verify is often criticized as unreliable because it relies on inaccurate databases, imposes an undue financial burden on employers, and leaves immigrant workers vulnerable to subjective determinations about their legal status. While Congress works on resolving these issues, the legal landscape is nevertheless changing as states enact and enforce their own immigration laws, including those that mandate the use of E-Verify. State entry into the immigration arena not only expands the reach of the system’s problems, but it also threatens to legitimate the exclusion of immigrants, documented or undocumented. This Comment describes how the implementation of E-Verify has frustrated the goals of efficiency and economy, and argues that Congress should establish definitive boundaries between state and federal immigration reform to restore the political imbalance.

Introduction

On February 11, 2009, Julian Mora was taking his regular route to work when, without provocation, a vehicle from the Maricopa County Sherriff’s Office (MCSO) pulled up behind him while another cut in front of him.¹ After forcing him to stop abruptly, MCSO deputies ques-

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* Staff Writer, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2009–2010).
¹ Brief for Plaintiffs Julio and Julian Mora at 6, Mora v. Arpaio, No. 209 Civ. 01719 (D. Ariz. Aug. 19, 2009), 2009 WL 3488718; Press Release, ACLU, ACLU Sues Maricopa County
tioned Mora about his destination but failed to proffer any explanation for the stop. 2 Cooperating with the deputies, Mora informed them that he was going to work at Handyman Maintenance, Inc. (HMI) and provided a valid Arizona driver’s license. 3 MCSO deputies ordered Mora and his nineteen-year-old son, Julio, out of their vehicle. 4 Without suspicion of any criminal activity, the deputies proceeded to frisk and handcuff them. 5 Julio asked for an explanation but was given no answers. 6 Although there was no reason to believe that the Moras were in the country illegally, MCSO deputies transported them to the HMI worksite, where MCSO was conducting a raid. 7

At the worksite, MCSO personnel, allegedly carrying semi-automatic rifles, had already detained all HMI employees for interrogation. 8 Detainees were never informed of their constitutional right to legal advice; on the contrary, they were forbidden from using their cell phone. 9

The ordeal was especially degrading for Julian who, as a diabetic, had difficulty controlling his bladder. 10 The deputies, however, denied his repeated requests to use the restroom. 11 It was not until Mora told the deputies that he would have to relieve himself in front of everyone that they escorted him to the parking lot, where he urinated behind a

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2 Brief for Plaintiffs, supra note 1, at 6.
3 Id.
4 Id.
5 Id. at 7.
6 Id.
7 Press Release, ACLU, supra note 1.

9 Brief for Plaintiffs, supra note 1, at 7.
10 Press Release, ACLU, supra note 1.
11 Id.
Shortly thereafter, when Julio asked to use the bathroom, a deputy took him to a proper facility but refused to un-cuff his hands. Watching the young man struggle with his hands tied together, the deputy mocked him, saying, “[w]hat’s the matter, you can’t find it?” When he returned from the restroom, Julio asked another deputy if he could leave because he was not an HMI employee. He was told he could leave only after he got to the front of the line and verified his immigration status, nearly three hours later.

Workplace raids and detentions, such as the one described above at the HMI worksite, provide a contemporary example of how various cities and towns across the country are increasingly structuring society “along the lines of ‘the exception’” to deal with the immigration crisis. In her book *The Law into Their Own Hands: Immigration and the Politics of Exceptionalism*, Roxanne L. Doty defines exceptionalism as a phenomenon in which certain individuals or groups are “segmented from the general population and denied the rights and protections accorded to the rest of the population.” At its core, exceptionalism creates a group of “others,” considered to be “potential enemies.”

Doty examines the “attrition through enforcement” strategy embraced by several states to prevent undocumented migrants from “embedding” themselves in their communities and eventually forcing

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12 Brief for Plaintiffs, *supra* note 1, at 8.
13 Id.
14 Id.
15 Id.
16 Id. at 9. On August 19, 2009, the American Civil Liberties Union and the ACLU of Arizona filed a lawsuit challenging the illegal arrest and detention of the Moras by MSCO deputies. See Press Release, ACLU, *supra* note 1. Because these arbitrary detentions prevent law-abiding citizens and legal residents from going about their business without government interference, the complaint alleges that MSCO deputies violated the Fourth and Fourteenth Amendments of the United States Constitution. See Brief for Plaintiffs, *supra* note 1, at 7; Press Release, ACLU, *supra* note 1.
18 DOTY, *supra* note 17, at 84.
19 See id.
them to either leave the country or relocate to another city.20 The voluntary federal electronic verification program (E-Verify) provides a contemporary example of this practice.21 E-Verify is an Internet-based database operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA), which allows employers to electronically verify an employee’s work eligibility.22

The principal grant of legislative authority on which President George W. Bush relied in expanding the scope of E-Verify was the Federal Property and Administrative Services Act of 1949 (”Procurement Act”).23 The Procurement Act’s express purpose is to provide an “economical and efficient system” of government procurement.24 Accordingly, the President may “prescribe policies and directives that [he or she] considers necessary,” as long as these directives are “consistent with” the Procurement Act’s provisions.25 Despite its vagueness, the Procurement Act does not give the President unlimited authority to make decisions that he believes will result in savings to the government.26 Instead, it qualifies Presidential directives with the goals of “economy” and “efficiency.”27

The terms “economy” and “efficiency,” however, are not narrowly construed.28 In addition to price, they include factors such as the quality of goods or services, their suitability for government purposes, and

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20 See Doty, supra note 17, at 83, 85 (arguing that the proliferation of border vigilante groups and the subsequent expansion of their mission beyond “the physical patrolling of the US-Mexico border, has been a major factor in the unprecedented grassroots movement against undocumented migrants”).


25 Id. § 121(a).

26 See Am. Fed’n of Labor & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 793 (D.C. Cir. 1979) (“[The Court’s] decision does not write a blank check for the President to fill in at his will. The procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power.”) (citation omitted).


28 See Kahn, 618 F.2d at 789.
their availability in the market. The broad nature of this power allows the President to implement any social or economic goal he sees fit, provided that there is some conceivable connection, no matter how attenuated, to the goals of the Procurement Act. Courts therefore routinely defer to the President’s findings insofar as his directives promote “efficiency” and “economy.”

The issue of whether a presidential directive, like E-Verify, is effective in meeting its objective is beyond judicial scrutiny. Nevertheless, the fact remains that the system is broken. Congress’s recent decision to reauthorize E-Verify as a voluntary program, rather than a mandatory one, demonstrates its own reservations. Because the system relies on flawed databases, mandatory participation will cripple American businesses and workers by driving “workers from tax-paying, above-board work into the underground, black market, cash economy.”

While Congress debates federal immigration reform and the role of E-Verify, the legal landscape at both the state and local levels is changing. With no clear pathway to reform in sight, local communities have begun to enact their own immigration-related ordinances. Although these ordinances propose solutions to the immigration crisis, they undermine the democratic fabric of our society because they “attribute worth to human beings” on the basis of having or not having certain documents. By denying immigrants access to jobs, identification, housing, and education, state and local governments “fan the flames” of xenophobic sentiments. These laws not only promote defensive hiring practices, but they also incite state and local police offi-

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29 Id.
30 See id. at 805–06 (MacKinnon, J., dissenting).
31 See id. at 789 (upholding President Carter’s Executive Order requiring contractors to use certain wage-and-price standards); see also City of Albuquerque v. U.S. Dep’t of Interior, 379 F.3d 901, 914 (10th Cir. 2004) (noting that the Procurement Act is a “broad delegation of authority” and upholding the Executive Order at issue).
32 See Kahn, 618 F.2d at 807 (MacKinnon, J., dissenting).
34 Id.
35 Id.
36 See Julia Preston, Surge in Immigration Laws Around U.S., N.Y. TIMES, Aug. 6, 2007, at A2 (noting that in 2006 there were eighty-four laws passed regarding immigration issues).
37 See Emily Bazar, Illegal Immigrants Moving Out, USA TODAY, Sept. 27, 2007, at 3A.
38 See Doty, supra note 17, at 84.
39 See id. at 85, 90–91.
cers to improperly prosecute immigrants, affecting legally documented migrants like the Moras.\footnote{See Karla M. McKanders, The Constitutionality of State and Local Laws Targeting Immigrants, 31 U. Ark. Little Rock L. Rev. 579, 589 (2009); see also Press Release, ACLU, Over 500 Organizations Demand White House End Flawed State and Local Immigration Enforcement Program (Aug. 27, 2009) (on file with ACLU) ("Since its inception the 287(g) program has drawn sharp criticism . . . because it has led to illegal racial profiling and civil rights abuses, including the unlawful detention and deportation of U.S. citizens and permanent residents, while diverting scarce resources from traditional local law enforcement functions and distorting immigration enforcement policies.").}

This Comment, through an examination of E-Verify, argues that Congress, and not the states, should enforce existing immigration laws and enact laws that clearly circumscribe when state and local governments can assist the federal government. Part I provides a brief overview of the E-Verify program. Part II explains how the E-Verify program frustrates the Procurement Act’s goals of ensuring efficiency and economy. Part III discusses how states are transforming the legal landscape by enacting and enforcing their own immigration laws, including those governing the use of E-Verify. Because these laws expand the use of E-Verify, they compound the systemic problems inherent in the federal program and further frustrate the goals of the Procurement Act. Finally, Part IV proposes that Congress should assert greater control in the immigration arena to resolve the inefficiencies brought about through the implementation of E-Verify.

I. What Is E-Verify?

A. The Origins of E-Verify

bility, many of which are prone to fraud and forgery, it was difficult for employers to differentiate between the documented and undocumented immigrant. Consequently, the IRCA did not adequately fulfill its goals of increasing job security for U.S. citizens and curbing unauthorized employment.

In response to a growing population of undocumented migrants, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) in 1996. Under the IIRIRA, the federal government rolled out the Basic Pilot/Employment Eligibility Verification Program, allowing employers to confirm a new hire’s eligibility via an electronic verification system. This supplement to the paper based I-9 system was initially only available in the five states with the largest undocumented populations: California, Florida, Illinois, New York, and Texas. By 2003, all fifty states were participating in the pilot program.

In 2007, the Bush administration enhanced the internal enforcement of immigration laws. This effort rebranded the Basic Pilot/Employment Eligibility Verification Program as the E-Verify Program. Under this program, the employer enters an employee’s social security number, date of birth, and citizenship status into the E-Verify website. The system then verifies this information against the information contained in the SSA and U.S. Citizenship and Immigration


44 See Electronic Verification of Employee Eligibility: Hearing Before the Subcomm. on Government Management, Organization and Procurement of the Comm. on H. Oversight and Government Reform, 111th Cong. (2009) (statement of Jean Baker McNeill, Policy Analyst, The Heritage Foundation) [hereinafter Employee Eligibility Hearing] (noting that the failure of the IRCA was due, at least in part, to the ease with which immigrants could obtain forged documents to show that they were employment eligible); see also Maria Trevino, Assimilation Key to Immigration Reform, USA TODAY, Feb. 9, 2007, at 15A (noting that the failure to enforce vigorously employer sanctions was among the reasons the IRCA was unsuccessful).


46 Chichester & Adams, supra note 45, at 50.
47 Id.
48 Id.
49 Id.
50 Id. at 51.
Services (USCIS) databases. Additionally, the government pledged to expand both civil and criminal investigations of employers who hire unauthorized workers. In particular, it sought to increase civil fines by approximately twenty-five percent and bolster the enforcement efforts of U.S. Immigration and Customs Enforcement.

The Administration also launched a rulemaking process to mandate that all contractors and sub contractors doing business with the federal government use E-Verify not only for new hires but also for existing employees. In fact, on June 6, 2008, President Bush signed Executive Order 13,465 which instructs:

Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract.

B. A Change in the Scope of E-Verify

The SSA indicated that approximately 137,000 employers were participating in the E-Verify program as of July 11, 2009. Participation in the program is likely to grow as federal and state governments adopt

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52 Id. If the SSA database cannot verify an employee’s citizenship status, the query will then run through the USCIS database, which maintains employment eligibility information for immigrant workers. Id.


54 See id. (noting that as of July 31, 2007, ICE had made 742 criminal arrests in connection with its investigations of employers who hire undocumented migrants).

55 See id. (indicating that with more than 200,000 companies doing business with the federal government, it “ought to lead by example. . . . and make it more difficult for illegal immigrants to obtain jobs”).


57 See Employee Eligibility Hearing, supra note 44 (statement of David A. Rust, Deputy Comm’r, Soc. Sec. Admin.).
procurement policies of only soliciting contractors that agree to use E-Verify.\(^{58}\)

State laws have taken on a variety of iterations of the federal law.\(^{59}\) Some states, like Missouri and Nebraska, require participation by state governments and agencies only.\(^{60}\) But others—including Arizona, Georgia, Mississippi, and South Carolina—have gone a step further by making the verification system mandatory for private businesses as well.\(^{61}\) The impact of E-Verify is even noticeable at the local government level.\(^{62}\) In 2007, Mission Viejo, California passed a law obligating the city and city contractors to verify work eligibility via E-Verify.\(^{63}\)

This cornucopia of local ordinances and state laws has imposed a new dimension in addition to the federal program.\(^{64}\) Because it shifts the focus from the undocumented migrant to the unscrupulous employer, the effects of the once voluntary program are not confined to

\(^{58}\) See Chichester & Adams, supra note 45, at 53; Press Release, Dep’t Homeland Sec., supra note 53.


\(^{60}\) See Mo. Rev. Stat. § 285.530(3) (2009) (“All public employers shall enroll and actively participate in a federal work authorization program.”); Neb. Rev. Stat. § 4-114(2) (2009) (“Every public employer and public contractor shall register with and use a federal immigration verification system to determine the work eligibility status of new employees physically performing services within the State of Nebraska.”).


\(^{62}\) Chichester & Adams, supra note 45, at 53.

\(^{63}\) See Mission Viejo, Cal., Code of Ordinances tit. 2, ch. 2.80, § 2.80.030 (2007). The ordinance requires:

As a condition for the award or renewal of any City contract . . . to a Business Entity or Contractor after July 1, 2007 for which the reasonable value of employment, labor, or personal services shall exceed $15,000, the Business Entity or Contractor shall enroll in the Basic Pilot Program and thereafter shall provide the City documentation affirming its enrollment and participation in the Basic Pilot Program. The Business Entity or Contractor shall be required to continue its participation in the Basic Pilot Program throughout the course of its business relationship with the City.

Id.

\(^{64}\) See Chichester & Adams, supra note 45, at 50.
those without proper documentation.\(^6^5\) As these ordinances become commonplace, local residents begin to view immigrants as enemies, eventually leading to the dissolution of entire migrant communities.\(^6^6\) Essentially, the current state of E-Verify is reconfiguring immigration policy around the state of exception.\(^6^7\)

II. The Problems with E-Verify

In a recent federal court decision, *Chamber of Commerce v. Napolitano*, a Federal District of Maryland Court upheld the validity of Executive Order 13,465, which mandated that federal contractors use the E-Verify system.\(^6^8\) The court explained that the President has broad discretion to regulate government contracting under the Procurement Act as long as the directive provides “an economical and efficient system” of government procurement.\(^6^9\)

Although Executive Order 13,465 is valid, the E-Verify system is a “half–hearted and flawed” approach to immigration reform.\(^7^0\) Critics frequently note that the system is unreliable and unduly burdensome because it relies on inaccurate databases, imposes a financial burden on employers without reducing potential liability, and invites invidious discrimination.\(^7^1\) Thus, even if the Procurement Act purportedly provides

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\(^{65}\) See Doty, *supra* note 17, at 99 (noting that the anti-immigrant ordinance introduced in Hazelton, Pennsylvania forced local store owners to close their businesses because their client base consisted mostly of recent immigrants); Nat’l Assoc. of Gov’t Contractors, *supra* note 59.

\(^{66}\) See Doty, *supra* note 17, at 99.

\(^{67}\) See id.


\(^{69}\) See 40 U.S.C. § 101 (2006); *Napolitano*, 648 F. Supp. 2d at 737–38. To support a finding for a reasonably close nexus, the *Napolitano* court required nothing more than the President’s reasonable and rational explanation of how an Executive Order promotes efficiency and economy. See *Napolitano*, 648 F. Supp. 2d at 738.


\(^{71}\) See id.
the basis for the Executive Order, the practical implementation of the E-Verify system undermines the policy goals of efficiency and economy.\textsuperscript{72}

\textbf{A. Lack of Accurate and Reliable Databases}

A major problem with E-Verify is that it relies on the flawed databases of the SSA.\textsuperscript{73} In 2008, Intel Corporation reported that the system erroneously identified twelve percent of its new hires as employment ineligible.\textsuperscript{74} As a result of its own investigation, the SSA estimated nearly 17.8 million discrepancies in its database.\textsuperscript{75} With such a large margin of error, nearly 2.5 million legal residents are at risk of losing their jobs as a result of being misidentified as an unauthorized worker.\textsuperscript{76}

Supporters of the system note that approximately 96.9\% of queries confirm that the employee has authorization to work.\textsuperscript{77} The remaining 3.1\% of all queries resulted in a Tentative Nonconfirmation (TNC), indicating that the employee’s information does not correspond with the information in the SSA or Department of Homeland Security (DHS) databases.\textsuperscript{78} If the query results in a TNC, the employer must notify the employee and initiate a referral to the SSA so that the employee can resolve the discrepancy.\textsuperscript{79} Nevertheless, from the time the employer refers the employee to the SSA, the employee has only eight business days to settle the nonconfirmation.\textsuperscript{80}

The USCIS reported that successful resolution results in only 0.3\% of all TNC cases.\textsuperscript{81} Of the remaining 2.8\% of TNCs, final nonconfirmation for an eligible employee often results when the employee did not follow proper procedures to contest or, alternatively, was not aware of


\textsuperscript{73} Chichester & Adams, supra note 45, at 51.

\textsuperscript{74} See \textit{Employment Verification Hearing}, supra note 70 (statement of Sen. Russ Feingold).


\textsuperscript{77} See \textit{Employment Verification Hearing}, supra note 70 (statement of Michael Aytes, Acting Deputy Director of U.S. Citizenship and Immigration Services) (noting that statistics from October through December 2008 provide the basis for the 96.9\% figure).

\textsuperscript{78} See \textit{id}.

\textsuperscript{79} Chichester & Adams, supra note 45, at 51.

\textsuperscript{80} See \textit{id}.

\textsuperscript{81} \textit{Employment Verification Hearing}, supra note 70 (statement of Michael Aytes, Acting Deputy Director of U.S. Citizenship and Immigration Services).
either the TNC or the opportunity to contest because his employer failed to initiate a SSA referral. In a country with an eligible working population (defined as individuals between the ages of eighteen and sixty-five) of approximately 190 million, a margin of error of even one percent is troublesome. The difficult question, and one that currently remains unanswered, is what recourse is available to legal residents who are subject to final nonconfirmation under the E-Verify system?

B. Unreasonable and Disproportionate Costs for Employers

Although E-Verify is a “free, Internet-based system,” participation in the program is hardly without its costs. In fact, the Final Employment Eligibility Verification Rule (Final Rule) estimated that employers’ startup costs for compliance with the requirement would total $188 million in fiscal year 2009 alone.

To comply with Final Rule, an employer must enter into an E-Verify Memorandum of Understanding (MOU) with DHS and SSA. The MOU stipulates that the employer must periodically allow DHS and SSA “to review Forms I-9 and other employment records and to interview the employer and its employees regarding the [e]mployer’s

[82] See id. An independent examination of the E-Verify program disclosed that many recently naturalized citizens are subject to misidentification. See id. Although the USCIS notes that it instituted an automated check with its naturalization data to reduce such mismatches, these “enhancements” only affect a small percentage of TNCs, and they do not prevent the initial TNC. See id.


[87] See Final Employment Eligibility Verification Rule, 73 Fed. Reg. at 67,651 (noting that the terms of the MOU, as established by the USCIS, are non-negotiable and that any violation of these terms may lead to termination of the employer’s participation in E-Verify).
use of E-Verify.” By signing the MOU before enrolling in the E-Verify Program, the employer consents to the release of records that may be beyond the scope of immigration matters.

Even those employers who scrupulously follow verification procedures face the possibility of a DHS audit or raid. The Immigration and Customs Enforcement (ICE) raids of six Swift & Co. processing plants in December 2006 provide a compelling example of potential liability. Resulting in arrests of 1282 legal and illegal immigrants, the raid not only disrupted the workforce but also cost the company more than $50 million. In a testimony before the House Judiciary Committee in April 2007, Jack Shadley, Senior Vice President of Swift & Co., noted that the company had been participating in E-Verify since 1997. Yet, many ineligible employees slipped through cracks, not through any wrongdoing by the company but because of the system’s inability to identify fraudulent documents. Cases like this raise doubts as to whether the “rebuttable presumption,” that an E-Verify participant did not knowingly hire an ineligible employee, affords any meaningful protection.


89 See id.; Interview with Francis Chin, supra note 84.


91 See id.


93 See Current Employment Verification Hearing, supra note 90 (statement of Lynden Melmed, former Chief Counsel of USCIS) (quoting Mr. Shadley’s prior testimony that “[i]t is particularly galling to us that an employer who played by all the rules and used the only available government tool to screen employee eligibility would be subject[] to adversarial treatment by our government”).

94 See Legal Workforce Hearing, supra note 43 (statement of Susan R. Meisinger, President and CEO of the Society for Human Resource Management); Valerie Richardson, Meatpackers’ Union Sues Over Illegal Alien Raids, WASH. TIMES, Sept. 15, 2007, at A2 (noting that, of the workers arrested, 274 faced criminal charges for identity theft).

95 See Final Employment Eligibility Verification Rule, 73 Fed. Reg. 67,652 (Nov. 14, 2008) (to be codified at 48 C.F.R. pt. 2, 22, and 52) (noting that where E-Verify confirms the identity of an employee, there is a rebuttable presumption in favor of the employer that it did not knowingly hire an unauthorized worker); Jackson, supra note 92.
The conjunctive imposition of periodic visits and unfettered access to records will increase employers’ exposure to fines and penalties. Civil penalties range from $375 to $16,000 for every ineligible employee hired and from $110 to $1100 for Form I-9 errors and omissions. Finally, failure to comply with the MOU may result in contract termination or suspension.

One way that employers internalize the risk of such fines and sanctions is by reducing wages. Generally, undocumented workers are paid ten to fifty-five percent less than their documented colleagues. This wage penalty has a direct impact on documented and native-born immigrants because employers are unsure of the employee’s work status.

C. Disparate Impact on Employees, Documented or Otherwise

Increasingly, employers must walk a tightrope as a result of enforcement activities. The decision of American Apparel Inc. to reduce its workforce by more than a quarter amid an investigation by immigration officials illustrates how employers are likely to react to such increased pressure.


98 See Final Employment Eligibility Verification Rule, 73 Fed. Reg. at 67,704 (“If DHS or SSA terminates a contractor’s MOU, the terminating agency must refer the contractor to a suspension or debarment official for possible suspension or debarment action.”). The Federal Acquisition Regulation (FAR) also provides: “Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action.” 48 C.F.R. § 9.405(a) (2008).


100 Id.

101 Id.


103 See Miriam Jordan, American Apparel Sets Layoffs Tied to Probe, WALL ST. J., Sept. 4, 2009, at B3 (indicating that American Apparel terminated 1500 of its 5600 employees after receiving notification from ICE that approximately 1600 employees were not employment eligible).
Enforcement efforts promote defensive hiring practices.104 These practices typically result in the refusal to hire immigrants, documented or otherwise, because employers fear that they might mistakenly hire an undocumented immigrant and be subject to sanctions.105 In the case of E-Verify, the potential for such abuse arises where employers use the system to pre-screen new hires.106 Specifically, an employer may rely on query results—namely a TNC—to make hiring decisions.107 Because those who receive TNCs are disproportionally foreign-born, the disparate impact is especially striking.108

By stripping them of the opportunity to work, laws mandating the use of E-Verify deprive immigrants of the benefits of citizenship that facilitate belonging.109 Because immigrant workers buy goods from locally-owned stores, eat in local restaurants, and start new businesses, they generate approximately $700 billion in economic activity each year.110 Consequently, wrongly forcing them out of work will not only promote exceptionalism but will also disrupt the economy.111

III. THE ADOPTION OF E-VERIFY AS AN EXERCISE OF STATE SOVEREIGNTY

Traditionally, the focus of immigration law has been on issues of foreign affairs and national security.112 Recently, however, this focus shifted into the domestic sphere as states enter the immigration arena.113 State legislatures across the country continue to introduce, pass, or con-
sider immigrant-related ordinances. In the first half of 2009, state legislators in all fifty states introduced more than 1400 immigration related bills, surpassing last year’s totals.

Among other contributing factors, two significant reasons form the foundation of this phenomenon. First, although the IRCA expressly forbids states from regulating unauthorized employment, it carves out an exception to preemption when a state regulates “licensing and similar laws.” Second, the federal government encouraged state assistance in the enforcement of immigration laws after September 11, 2001. Pursuant to agreements with ICE, the federal government delegated its immigration authority to state law enforcement officials, allowing them to investigate, arrest, and detain suspected violators.

The advent of E-Verify has contributed to this distracting patchwork of state laws, exacerbating the politics of exceptionalism. Several states have sought to enact and enforce immigration laws under the guise of state police powers to protect the safety and welfare of their constituents. For instance, Janet Napolitano (former Arizona governor and current Secretary of Homeland Security) signed the Legal Arizona Workers Act because it was “abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reform

115 Id. In 2008, state legislatures considered approximately 1305 bills related to immigration, of which 206 were enacted and 3 were vetoed. Id.
117 See 8 U.S.C. § 1324a(h)(2) (“The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens.”).
118 See McKanders, supra note 40, at 584; Memorandum from Jay S. Bybee, supra note 116.
119 See 8 U.S.C. § 1357(g)(1) (providing authority for the Attorney General to deputize state and local law enforcement officers to enforce immigration law after training them under the supervision of federal authorities); McKanders, supra note 40, at 584.
120 See Doty, supra note 17, at 86; Nat’l Assoc. of Gov’t Contractors, supra note 59.
our country needs.”

This is a classic example of a state exercising its sovereignty by legitimizing the exclusion of non-citizens. In so doing, the state endorses a bifurcated society structured around the notion of an “us” versus “them.”

A. Arizona: A Microcosm of State Enactment and Enforcement

The Legal Arizona Workers Act, enacted in 2007, requires all employers to use E-Verify to determine employment eligibility. The Act imposes a series of sanctions for violations ranging from the filing of quarterly reports of all new hires during a three-year probationary period to the suspension and revocation of the employer’s business license.

Under the IRCA’s preemption provision, each state retains the right to regulate licensing laws. The Ninth Circuit, in *Chicanos Por La Causa, Inc. v. Napolitano*, upheld the constitutionality of the Act for precisely this reason. Relying on the IRCA provision, the court noted that the Arizona law does not attempt to define employment eligibility; rather, the federal immigration law standards provide the basis for the Act’s adoption. Additionally, the court found that even though participation in E-Verify is voluntary at the federal level, the mandatory nature of the Arizona statute does not raise conflict preemption concerns because Congress did not intend to prevent the states from making it mandatory. Consequently, the court held that regulating em-

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126 *Ariz. Rev. Stat. Ann.* § 23–212(F) (distinguishing between knowingly and intentionally employing undocumented immigrants for purposes of determining the applicable punishment). For instance, a court may suspend an employer’s business license for up to ten days if the employer is a first-time offender who “knowingly” hired an undocumented immigrant. *See Ariz. Rev. Stat. Ann.* § 23–212(F)(1)(d). If, however, an employer “intentionally” hired an undocumented immigrant, the employer’s business permit will be suspended for a minimum of ten days. *See Ariz. Rev. Stat. Ann.* § 23–212(F)(1)(c). Both knowing and intentional violators must terminate all undocumented workers and “file an affidavit within three business days” asserting that the “employer has terminated the employment of all unauthorized aliens in this state and that the employer will not intentionally or knowingly employ an unauthorized alien in this state.” *See Ariz. Rev. Stat. Ann.* § 23–212(F)(1)(a), (c).


128 *See Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2009).

129 *Id.*

130 *Id.* at 867.
ployment of undocumented workers is “within the mainstream” of the state’s police powers.131

Chicanos Por La Causa highlights the current transformation of immigration law away from border control matters and toward enforcement of employment law issues.132 Requiring cooperation with local police, it operates against the silent backdrop of national security concerns.133 As a result, enforcing immigration laws has become implicit in the role of local law enforcement officials.134

A decentralized approach to enforcement of immigration laws by local police creates confusion between state and federal enforcement.135 As highlighted in the case of the Moras, the sheriff of Maricopa County in Arizona, Joe Arpaio, has taken such a tough approach in enforcing immigration laws that federal officials are currently investigating his tactics.136 His campaign of terror includes parading chain-ganged prisoners through downtown Phoenix in pink underwear and detaining them in army tents from the Korean War.137 Known for targeting anyone who merely looks Hispanic, his abusive practices are not confined to undocumented migrants.138 In fact, the improper arrest and detention of Julio (a U.S. citizen) and Julian Mora (a legal resident) resulted from a workplace raid conducted by Arpaio.139 Notwithstanding the fact that the Department of Homeland Security stripped Arpaio’s deputies of their authority to enforce immigration laws, he remains defiant.140 His

131 Id. at 864 (quoting De Canas v. Bica, 424 U.S. 351, 365 (1976)); see also De Canas, 424 U.S. at 356 (discussing each state’s “broad authority under their police powers to regulate . . . employment relationship[s] to protect workers within the [s]tate.”).
132 See Chicanos Por La Causa, 558 F.3d at 864; Stumpf, supra note 121, at 1583.
134 See Ashcroft, supra note 133.
137 See id.
138 See id.
139 See Press Release, ACLU, supra note 1.
140 Still Going After Them, supra note 136.
express goal is to “catch them coming through.”141 To that end, he will continue to arrest suspected immigrants “for cracked windshields, loose tailpipes, or whatever,” and then verify their citizenship status under state laws.142

B. The Enactment and Enforcement of Unilateral State Immigration Laws Mandating the Use of E-Verify Undermines Efficiency

The complex web of city, county, and state laws governing employment verification standards undermines efficient immigration enforcement.143 Local enforcement of laws mandating the use of E-Verify necessarily leads to a diversion of a state’s already limited resources.144 A recent study, comparing the immigration policies of the United States with that of other countries, revealed that laws enforcing closed-door policies invariably lead to stagnation.145 In the case of E-Verify, fragmented state policies interfere with the federal government’s ability to implement comprehensive immigration reform.146

The fact that E-Verify disproportionately misidentifies those who are foreign-born could lead to the development of a subclass of immigrants.147 In Plyer v. Doe, the Supreme Court contemplated the development of this subclass.148 While the Plyer Court dealt with the status of immigrant children, its rationale can arguably be applied to the immigrant community at large.149 While some undocumented immigrants may leave the country altogether, many will remain indefinitely.150

141 See id.
142 See id.
143 See Morse, supra note 135, at 528.
145 See Morse, supra note 135, at 514.
146 See id. at 528.
147 See INST. FOR SURVEY RESEARCH & WESTAT, supra note 106, at 29; Ndulo, supra note 144, at 878.
149 See Ndulo, supra note 144, at 878–79.
150 See Plyer, 457 U.S. at 230; Alberto Dávila et al., The Short-Term and Long-Term Deterrence Effects of INS Border and Interior Enforcement on Undocumented Immigration, 49 J. ECON.
Those that remain will then flood states with seemingly pro-immigrant laws, raising the potential for political turmoil in that state. The end result is that certain localities will have a concentrated population of undocumented immigrants, who would otherwise be spread across the country. The advent of a subordinated class of immigrants would only “add[] to the problems and costs of unemployment, welfare, and crime.” Consequently, the long-term costs outweigh the perceived short-term benefits of enacting and enforcing stringent immigration laws.

IV. THE ROLE OF CONGRESS

The proliferation of local immigration laws highlights the need for congressional overhaul of federal immigration system so that “local communities do not take matters into their own hands.” To realign immigration reform with the goals of efficiency and economy, Congress should establish clear boundaries over which level of government should regulate immigration.

A. Immigration Federalism

There are three models that balance the level of state and federal regulation of immigration: a) federal exclusivity; b) state and local cooperation; and c) state and local regulation. The federal exclusivity model precludes states from enacting their own immigration laws. On the opposite end of the scale is the state and local regulatory scheme, which encourages enactment and enforcement of immigration laws under states’ inherent police power to protect the general welfare.
of their people.\textsuperscript{159} Meanwhile, the cooperative model lies somewhere in between these extremes.\textsuperscript{160} Under this model, the federal government has the exclusive power to enact and enforce immigration policies; but, it may seek state and local assistance as needed.\textsuperscript{161}

The federal exclusivity model reinforces the notion that the power to regulate immigration lies exclusively with Congress.\textsuperscript{162} Although it is not expressly stated in the Constitution, scholars agree that the immigration power is a derivative of the Naturalization Clause, the Foreign Affairs Clauses, and the Commerce Clause.\textsuperscript{163} When considered in conjunction with the Supremacy Clause, which states that the federal law is the “Supreme Law of the Land,” it seems that Congress has the upper hand in the immigration arena.\textsuperscript{164}

The line between federal and state authority, however, is blurred when the federal government remains silent and states rely on their Tenth Amendment police powers to pass laws aimed at immigrants.\textsuperscript{165} States’ exercise of the Tenth Amendment police powers is especially troublesome where, as in the case of E-Verify, local immigration laws are enacted with the pretense of protecting the safety and welfare of those communities.\textsuperscript{166} Instead, the true purpose of such laws is to encourage immigrants to relocate or self-deport.\textsuperscript{167}

Congress should embrace the cooperative model and enact laws that clearly circumscribe the role of state and local governments with respect to immigration.\textsuperscript{168} When federal statutes “explicitly command[] that state law be displaced,” there is no doubt that states are kept out of the immigration arena.\textsuperscript{169} Enforcement of federal immigration laws would nevertheless be permissible when the federal government requests it.\textsuperscript{170} Under no circumstances, then, would states be able to enact

\textsuperscript{159} Id.
\textsuperscript{160} Id. at 599.
\textsuperscript{161} See id.
\textsuperscript{162} See De Canas v. Bica, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); McKanders, supra note 40, at 599.
\textsuperscript{164} See U.S. Const. art. VI, cl. 2; Pham, supra note 163, at 1381.
\textsuperscript{165} U.S. Const. amend. X (providing that “powers not delegated to the United States by the Constitution . . . are reserved to the States”); McKanders, supra note 40, at 599.
\textsuperscript{166} McKanders, supra note 40, at 598.
\textsuperscript{167} See id.
\textsuperscript{168} See id. at 599.
\textsuperscript{170} See McKanders, supra note 40, at 599.
laws, like the Legal Arizona Workers Act, mandating the use of E-Verify to target immigrants.171

Conclusion

Passed under the Procurement Act, the goal of E-Verify was to promote efficiency and economy. At both the federal and state levels, however, E-Verify leaves workers vulnerable to subjective determinations about their legal status and therefore, promotes exceptionalism. The complex web woven by state immigration laws, including a mandate to use E-Verify, has only compounded the reach of the system’s problems—inaccurate databases, disproportionate costs on employers, and disparate impact on immigrants. Moreover, the proliferation of these laws has also empowered local law enforcement officials to use draconian tactics, such as workplace raids, to weed out undocumented workers. Because these measures often unfairly target legal workers and disrupt workplace dynamics, they undermine the Procurement Act’s goals of efficiency and economy.

To realign E-Verify with the goals of the Procurement Act, Congress must overhaul the federal immigration system by establishing definitive boundaries between state and federal regulation of immigration. One way to do this is to adopt a cooperative immigration model, which limits state involvement in the immigration arena. Under this model, states would have no authority to enact their own immigration laws. In fact, the only avenue by which states could enter the immigration arena is through the enforcement of federal laws. Notably, under the cooperative model, even those activities would be contingent on a federal call for assistance.

171 See id.
FIRST, DO NO HARM: TORT LIABILITY, REGULATION AND THE FORCED REPATRIATION OF UNDOCUMENTED IMMIGRANTS

DANIEL J. PROCACCINI*

Abstract: In Montejo v. Martin Memorial Medical Center, a jury found that it was not unreasonable for a hospital to return a traumatically injured, undocumented immigrant to his native country against the will of his guardian. Also known as forced repatriation, the practice of international patient dumping results from the disjointed federal regulations governing the intersection of immigration and health care law. This Comment examines the underlying causes of forced repatriation and whether tort liability is a suitable means for preventing this practice. It concludes that direct regulation, rather than tort law, is a preferable method of preventing this harm and calls upon Congress to adopt uniform regulations regarding the medical transfer of all patients to foreign hospitals, regardless of their immigration status.

Introduction

When is it acceptable to terminate medical care for a severely injured non-citizen? On July 27, 2009, a Florida jury answered that question when it found that it was not unreasonable for a hospital to stop providing medical care and send a traumatically brain-injured patient back to Guatemala against the wishes of his guardian. This verdict ex-

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1 See Florida Hospital Flies Patient to Guatemala; Courts to Address Care of Non-U.S. Citizens, 12 Health L. Rep. (BNA) 1130, 1131 (Jul. 17, 2003) (quoting a hospital association vice president stating repatriation represents the “financial and ethical dilemma . . . . When does care stop?”).
posed to scrutiny the “rare but widespread” practice of forced medical repatriation—or international patient dumping.³

The facts of Luis Jimenez’s experience illuminate the grave nature of this dilemma.⁴ Late in the afternoon on February 28, 2000, an ambulance hastened Luis Jimenez—a catastrophically injured accident victim—to Martin Memorial Medical Center, a community hospital in “upscale” Stuart, Florida.⁵ He was injured in a head-on collision with a drunken driver operating a stolen van.⁶ When the ambulance arrived at the hospital, Mr. Jimenez was unconscious and in shock; his injuries included extensive bleeding, three broken limbs, multiple internal injuries, and severe head trauma.⁷ His prognosis was “poor.”⁸ Despite his condition, Martin Memorial’s staff was able to provide extensive medical treatment to Mr. Jimenez, and he stabilized.⁹ Nevertheless, Mr. Jimenez deteriorated and was readmitted to the hospital in January 2001.¹⁰ The hospital subsequently determined that he should be returned to the Florida District Court of Appeals. See Montejo II, 935 So. 2d at 1268. The Court found in favor of Montejo and remanded for the limited purpose of determining whether the hospital’s conduct was reasonable. See id. at 1272.

³ See Sontag, supra note 2. Accurately framing this issue is a challenge because “[t]he terms ‘medical deportation’ and ‘medical repatriation’ often have been used interchangeably by the press and public when discussing this issue.” Joseph Wolpin, Recent Development, Medical Repatriation of Alien Patients, 37 J.L. MED. & ETHICS 152, 155 n.1 (2009). “Deportation” has a specific meaning in immigration law. See 8 U.S.C. § 1227(a) (2006); BALLentine’s LAW DICTIONARY 337 (3d ed. 1969). Additionally, the term “forced” is somewhat ambiguous. See Wolpin, supra at 153. This Comment adopts the term “repatriation” denoting “to restore or return to one’s country of origin, allegiance, or citizenship.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1924 (Phillip Babcock Grove ed., 1986). The phrase “forced repatriation” shall encompass the circumstances relevant here, where the transfer was made without consent from the patient or his or her guardian. See Wolpin, supra at 153.


⁵ See Sontag, supra note 4.

⁶ See id. The blood alcohol level of the driver was four times the legal limit. See id. Two of the four passengers in the vehicle were killed. See id. The driver eventually pled guilty to D.U.I. manslaughter, D.U.I. injury, and grand theft auto. See id. The driver, however, was uninsured. See id. The victims’ families subsequently filed an unsuccessful lawsuit against an irrigation company arguing that its employees had enabled the accident by leaving their keys in an unattended van. See id.

⁷ See id.

⁸ See id.

⁹ See id.

¹⁰ See Montejo I, 874 So. 2d at 656; Sontag, supra note 4. Mr. Jimenez was “emaciated and suffering from ulcerous bedsores so deep that the tendons behind his knees were exposed.” Sontag, supra note 4.
treated in a traumatic brain rehabilitation facility. Mr. Jimenez, however, was an uninsured, undocumented immigrant, meaning that long-term care would be difficult—if not impossible—to arrange.

The regulations governing the intersection of immigration and health care law are a "patchwork of illogical policies" which not only victimizes critically injured patients, but also unfairly burdens health care providers. Medicare-participating hospitals like Martin Memorial are required by the Emergency Medical Treatment and Active Labor Act (EMTALA) to provide appropriate medical screening and necessary stabilizing treatment to any individual who enters an emergency department. Additionally, Medicare's Conditions of Participation require that hospitals transfer patients in need of post-hospital care to an appropriate facility capable of meeting the patient's medical needs. The Professional Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, however, terminated undocumented immi-

11 See Montejo I, 874 So. 2d at 657.
12 See id. at 656; Sontag, supra note 4. Although uninsured and illegal, Mr. Jimenez was working in the United States. See Montejo I, 874 So. 2d at 655; Sontag, supra note 4. "[T]here is no consensus on what to call people who work in the United States in contravention of immigration laws." Beth Lyon, When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws That Disadvantage Unauthorized Workers, 6 U. PA. J. LAB. & EMP. L. 571, 573 (2004). In her article, Professor Lyons argues for the adoption of set terminology that appropriately reflects the different groups of people illegally working in the United States. See id. at 575–82. “[I]migrants who are unauthorized to work are not all undocumented and those who are undocumented did not all enter the country illegally.” Id. at 582. Moreover, the term “illegal alien” is “racially loaded, ambiguous, imprecise, and pejorative.” Id. at 576 (citations omitted). Accordingly, this Comment uses the term “undocumented immigrant” to refer to any individual “who presently possess[es] no proof of any right to be present in the United States, whether or not [he or she has] been declared deportable by the U.S. government(and the vast majority have not).” See id. at 581.
13 See Adrianne Ortega, Note, . . . And Health Care for All: Immigrants in the Shadow of the Promise of Universal Health Care, 35 AM. J.L. & MED. 185, 185–90, 195–96 (2009). In her Note, Ortega comprehensively describes the substance of the laws governing health care for immigrants and concludes that cash-strapped hospitals treating undocumented immigrants often resort to tactics like repatriation. See id. at 196; see also Ryan Knutson, Note, Deprivation of Care: Are Federal Laws Restricting the Provision of Medical Care to Immigrants Working as Planned?, 28 B.C. THIRD WORLD L.J. 401, 404 (2008) (“[M]edical providers are also struggling under the general prohibition on providing preventative care to immigrants.”). 14 See Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd(a)–(i) (2006). Although hospitals could theoretically opt out of federal funding and be relieved of the burden of emergency care, most hospitals are in no position to do so. See Knutson, supra note 13, at 405 n.27.
15 See 42 C.F.R. § 482.43(d) (2008); Medicare and Medicaid Programs; Revisions to Conditions of Participation of Hospitals, 59 Fed. Reg. 64,414, 64,149 (Dec. 13, 1994) (providing the official comment as to what appropriate medical facility means).
grants’ eligibility for non-emergency health care benefits.\textsuperscript{16} Without insurance coverage, no qualified nursing facility would accept Mr. Jimenez as a patient.\textsuperscript{17} As a result, Martin Memorial provided uncompensated treatment for more than two years at a cost of over one million dollars.\textsuperscript{18}

Montejo Gaspar Montejo, Mr. Jimenez’s cousin and legal guardian, argued that it was the hospital’s responsibility to provide his cousin with the rehabilitation he required.\textsuperscript{19} Martin Memorial “declined to take out [its] checkbook” to pay for his care in another facility.\textsuperscript{20} Having reached an impasse, Martin Memorial sought and received the approval of a Florida trial court to privately return Luis Jimenez to Guatemala.\textsuperscript{21} On June 27, 2003, sometime before 7:00 A.M., the hospital took Mr. Jimenez to the airport and flew him by private plane back to his native country without consent from or notice to his guardian.\textsuperscript{22} “We went to see him at the hospital,” Montejo told a reporter for the \textit{The New York Times}, “and his bed was empty.”\textsuperscript{23} Since arriving in Guatemala, Mr. Jimenez has received no further medical care and his condition has continued to deteriorate.\textsuperscript{24} Left without any viable alternative, Montejo filed a lawsuit against Martin Memorial for false imprisonment, or “what he essentially saw as the hospital’s kidnapping and de-


\textsuperscript{17} See Montejo I, 874 So. 2d at 657. EMTALA provides “a participating hospital that has specialized capabilities or facilities . . . shall not refuse to accept an appropriate transfer . . . if the hospital has the capacity to the treat the individual.” 42 U.S.C. § 1395dd(g). Interestingly, when the hospital inquired about transferring Mr. Jimenez to various Florida facilities, the typical response was simply “unable to take patient.” See Sontag, \textit{supra} note 4.

\textsuperscript{18} See Montejo I, 874 So. 2d at 656. The hospital was reimbursed for about $80,000 with emergency Medicare funds. See \textit{id}. An average stay at Martin Memorial lasts 4.1 days and costs $8188. See Sontag, \textit{supra} note 4.

\textsuperscript{19} See Montejo I, 874 So. 2d at 656; Sontag, \textit{supra} note 4.

\textsuperscript{20} See Sontag, \textit{supra} note 4 (internal quotation marks omitted).

\textsuperscript{21} See Montejo II, 935 So. 2d at 1267; Montejo I, 874 So. 2d at 657. Martin Memorial argued that Montejo was not acting in Mr. Jimenez’s best interest. See Montejo II, 935 So. 2d at 1267. This argument was predicated on a letter from a Guatemalan health official suggesting Mr. Jimenez could receive all necessary care at an orthopedic hospital in his native country. See Montejo I, 874 So. 2d at 657. The hospital to which the letter alluded was described as “the asylum wing of an orthopedic hospital . . . . [t]hat’s much like a homeless shelter in Guatemala, where people who can’t take care of their relatives leave them.” See Douglas, \textit{supra} note 1, at 1130 (quoting JoNel Newman, a legal services attorney representing Montejo). The letter was subsequently found to be both inadmissible hearsay and insufficient evidence of proper discharge. See Montejo I, 874 So. 2d at 658.

\textsuperscript{22} See Montejo II, 935 So. 2d at 1268; Sontag, \textit{supra} note 4.

\textsuperscript{23} See Sontag, \textit{supra} note 4.

\textsuperscript{24} See \textit{id}. 
portation of his profoundly disabled cousin.”25 The all-white Florida jury disagreed with Montejo and found for the hospital.26

This Comment examines whether forced repatriation should be addressed through tort law, Montejo’s approach, or through some other means. Part I examines the socioeconomic and legal barriers between undocumented immigrants and health insurance in the United States. Part II analyzes a hospital’s obligation to provide medical care under EMTALA and Medicaid. This section also assesses the relationship between those obligations and the forced repatriation of undocumented immigrants. Part III discusses the merits of tort law as a solution to this problem and compares it to the alternative approach of direct regulation. Finally, this comment concludes that tort law, in light of its traditional functions and purposes, is an inadequate solution and urges Congress to adopt unambiguous regulations governing the discharge and transfer of all patients. Undocumented immigrants are not “beasts of burden that can be dumped over the border when [they] have outlived [their] usefulness.”27 Rather, the law governing the provision of health care for undocumented immigrants should reflect Western medicine’s most honored maxim: “First, do no harm.”28

I. UNDOCUMENTED IN AMERICA: UNINSURED AND UNPROTECTED

The United States is a nation of immigrants.29 Since the 1970s, the proportion of immigrants to U.S. residents has steadily increased.30 In 2007, one in eight U.S. residents was an immigrant.31 As of early 2009, the Department of Homeland Security estimated that roughly thirty

25 See Montejo II, 935 So. 2d at 1268; Sontag, supra note 2.
26 See Jury Verdict, supra note 2, at 1; Sontag, supra note 2.
27 Deborah Sontag, Deported in a Coma, Saved Back in U.S., N.Y. TIMES, Nov. 9, 2008, at A1 (quoting a legal immigrant who was repatriated by an Arizona hospital).
29 See Peter H. Schuck, The Morality of Immigration Policy, 45 SAN DIEGO L. REV. 865, 871 (2008) (“All Americans, with the possible exception of Native Americans, are immigrants or the descendants of immigrants.”). Professor Schuck suggests that Americans proudly identify themselves as descended from immigrants, and explains that this sentiment is often invoked against proponents of restrictive immigration policy. See id. at 871–72.
31 See id.
percent of the foreign-born resident population was undocumented.\textsuperscript{32} The large and rapidly growing undocumented immigrant population suffers from a chronic lack of health insurance.\textsuperscript{33} Uninsured, undocumented patients like Luis Jimenez are the most susceptible to the practice of forced repatriation because socioeconomic conditions, in conjunction with restrictive federal regulations, effectively preclude this class of residents from obtaining health care coverage.\textsuperscript{34}

\textbf{A. Poverty and Poor Education: A Recipe for the Uninsured}

The story of Luis Jimenez illustrates many of the typical qualities of an undocumented immigrant in the United States.\textsuperscript{35} His journey was propelled by the dream of earning a living to support his family in Guatemala.\textsuperscript{36} Indeed, most undocumented immigrants journey to America seeking employment.\textsuperscript{37} Just over half are high school graduates.\textsuperscript{38} Their limited educational experience is associated with a disproportionate concentration in low-wage jobs such as farming, groundskeeping, construction, and the food service industry.\textsuperscript{39} At the time of his accident, Mr. Jimenez was working as a landscaper in Florida.\textsuperscript{40} Despite being


\textsuperscript{33} See Dana P. Goldman et al., Legal Status and Health Insurance Among Immigrants, 24 \textit{Health Aff.}, 1640, 1640, 1651 (2005).

\textsuperscript{34} See \textit{id}. at 1644, 1649; Ortega, \textit{supra} note 13, at 186–87.


\textsuperscript{36} See Sontag, \textit{supra} note 4. While residing in Guatemala, Mr. Jimenez and his wife supported their family on an income of about six dollars per day. See \textit{id}.

\textsuperscript{37} See Marc L. Berk et al., Health Care Use Among Undocumented Latino Immigrants, 19 \textit{Health Aff.}, 51, 56 (2000) (describing a sampling of four Latino populations, the majority of whom said work was the primary reason for immigrating to the United States).

\textsuperscript{38} See Passel & Cohn, \textit{supra} note 35, at iv. An estimated forty-seven percent of undocumented immigrants ages twenty-five to sixty-four have less than a high school education, compared to only eight percent of U.S. residents in the same age range. See \textit{id}. Ironically, the younger the age of arrival of an undocumented immigrant into the United States, the greater his or her chances of attending college. See \textit{id}. at 14.

\textsuperscript{39} See \textit{id}. at 15–16.

\textsuperscript{40} See Sontag, \textit{supra} note 4.
employed, he was indigent and unable to afford medical care or insurance. Twenty-one percent of adult, undocumented immigrants live in poverty—more than double the rate for U.S.-born adults. Along with their U.S.-born children, undocumented immigrants account for eleven percent of those living below the poverty level, which is more than twice their representation in the U.S. population.

Indigent immigrants with low wage jobs fair poorly in a health care system reliant on employer-provided health insurance. In 2005, approximately 68% of undocumented immigrants lacked health insurance. With a median income of only $36,000, most cannot afford to purchase their own health care plans. Undocumented immigrants overwhelmingly work in the construction, food service, and hospitality industries. These types of employers are unlikely to provide health care benefits to their employees. The owner of the landscaping service employing Mr. Jimenez did not. Practically speaking, the door to private insurance is firmly closed on the undocumented.

B. PRWORA: The Barrier to Public Benefit Programs

In 1996, Congress passed the Professional Responsibility and Work Opportunity Reconciliation Act (PRWORA). PRWORA was intended

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42 See Passel & Cohn, supra note 35, at 17.
43 See id.
45 See Goldman et al., supra note 33, at 1645.
47 See Alker, supra note 44; Passel & Cohn, supra note 35, at 4.
48 See Alker, supra note 44.
49 See Montejo II, 935 So. 2d at 1267 (stating that Mr. Jimenez was indigent and did not qualify for Medicaid); Alker, supra note 44; Passel & Cohn, supra note 35, at 14.
50 See Goldman et al., supra note 33, at 1645 (finding that virtually no undocumented immigrants purchase private health insurance and very few had employer-based coverage).
to deter immigration to the United States by encouraging self-reliance.\textsuperscript{52} It attempted to further this goal by reducing immigrants’ access to public benefit programs.\textsuperscript{53} The Act excludes virtually all undocumented immigrants from its definition of “qualified aliens” who are able to access services.\textsuperscript{54} Accordingly, most undocumented immigrants cannot receive compensated medical care under Medicare or Medicaid.\textsuperscript{55} Because Mr. Jimenez was excluded from Medicare coverage by PRWORA, any treatment by the hospital was uncompensated.\textsuperscript{56}

II. Forced Repatriation: Causes and Costs

A single avenue of medical care survived PRWORA’s wholesale elimination of benefits for undocumented immigrants: the emergency

\textsuperscript{52} 8 U.S.C. § 1601(5) (“It is a compelling government interest to enact new rules for eligibility . . . to assure that aliens be self-reliant.”). The statute claims that the policy reflects long-standing, basic principles of U.S. immigration. \textit{See id.} § 1601(1). \textit{But see Knutson, supra} note 13, at 412 (“Restrictions on immigrant access to public health benefits are a relatively recent trend.”).

\textsuperscript{53} \textit{See} § 1601(2) (stating that it is U.S. immigration policy that “the availability of public benefits not constitute an incentive for immigration to the United States”). At the heart of this legislation was an image rooted in the zero-sum paradigm of American health care discourse. \textit{See} Brietta R. Clark, \textit{The Immigrant Healthcare Narrative and What It Tells Us About the U.S. Health Care System}, 17 ANNALS HEALTH L. 229, 249 (2008) (arguing that often the health care debate in America is based on an assumption that granting access to one person necessarily means depriving someone else). In the 1990s, this discourse was dominated by uncorroborated, anecdotal evidence suggesting access to health care benefits incentivizes immigration into the United States. \textit{See} Julia Field Costich, \textit{Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the “Contract with America” Congress}, 90 Ky. L.J. 1043, 1044–45 (2001). “[G]overnment-sponsored services are so far down the list of reasons for immigration to the U.S. that they scarcely arise at all.” \textit{Id.}; \textit{see also} Francine J. Lipman, \textit{The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation}, 9 HARV. LATINO L. REV. 1, 1–2 (2006) (“The widespread belief . . . that ‘illegal aliens’ cost more in government services than they contribute to the economy . . . is demonstrably false.”) (citations omitted).

\textsuperscript{54} \textit{See} §§ 1611(a), 1641(b). PRWORA’s narrow definition of eligibility for undocumented immigrants is a significant break with the past. \textit{See} Costich, \textit{supra} note 53, at 1046, 1053–54. Previously, a far more generous standard applied to undocumented immigrants, though many were still denied benefits. \textit{See id.}

\textsuperscript{55} \textit{See} §§ 1611(a), (c)(1)(B), 1621(a), (c)(1)(b). If a state desires to provide unqualified immigrants with state-sponsored benefits, then it may enact laws affirmatively reinstating their eligibility. \textit{See id.} § 1621(d). This provision implicitly requires states to take the onerous step of reenacting any pre-existing state legislation authorizing state public benefits for unqualified aliens. \textit{See id.;} Costich, \textit{supra} note 53, at 1052–53. New York and Maryland took the additional step of denying health care services to legal immigrants. Ortega, \textit{supra} note 13, at 191–92. The laws were subsequently invalidated on state and federal constitutional grounds. \textit{Id.} at 192.

\textsuperscript{56} \textit{See} §§ 1611(a), (c)(1)(b), 1641(b); Montejo II, 935 So. 2d at 1267; Sontag, \textit{supra} note 4.
Federal law requires hospitals to provide stabilizing medical treatment to emergency room patients regardless of their immigration status. Medicare’s Conditions of Participation prohibit discharging a patient in need of post-hospital care unless he or she is transferred to a facility capable of meeting his or her medical needs. Hospitals, therefore, are duty-bound to provide indefinite, uncompensated care to severely injured, uninsured, undocumented immigrants. Because providing that treatment is expensive, forced repatriation is an “attractive solution” to this hodgepodge of contradictory duties when a foreign facility will accept the transfer.

A. EMTALA: One Step Forward, One Step Back

Domestic patient dumping has been recognized as a national problem since the late 1980s. Congress attempted to curb this practice by passing EMTALA. Enacted in 1986, EMTALA requires hospitals receiving federal funds to provide emergency medical treatment to any individual, regardless of his health care coverage or eligibility for public benefit programs. This effectively forbids hospitals from altering care in any way because of a patient’s immigration status. Its purpose was “to protect those vulnerable members of society who were suffering from life threatening medical conditions and were the object of

59 See 42 C.F.R. § 482.43(d) (2008); Medicare and Medicaid Programs; Revisions to Conditions of Participation of Hospitals, 59 Fed. Reg. 64,414, 64,149 (Dec. 13, 1994).
60 See 8 U.S.C. § 1611(a)–(b)(1)(A); 42 U.S.C. § 1395dd(b)(1)(A); 42 C.F.R. § 482.43(d); Ortega, supra note 13, at 193.
61 See Douglas, supra note 1, at 1131; Wolpin, supra note 3, at 152–53.
64 See 42 U.S.C. § 1395dd(a)–(b).
65 See id.; Knutson, supra note 13, at 422.
economically-based discrimination.” The statute creates two distinct legal obligations: First, the hospital must provide “appropriate medical screening” when the patient arrives in the emergency department to determine whether he is suffering from what the statute defines as an “emergency condition.” Second, if such a condition exists, the hospital must then either provide necessary stabilizing treatment or transfer the patient to another facility that can provide such treatment.

A number of scholars harshly criticize EMTALA for both its substance and its drafting. Its terms have been extensively litigated. Congress’s attempt at ending patient dumping—well intentioned as it may have been—was a band-aid solution to a more pervasive problem, or in the words of one commentator, “merely an attempt to flatten the tip of the uninsured iceberg with the hope that we will forget the looming bulk below the surface.” Although it increased a hospital’s obligation to provide emergency care, EMTALA did nothing to reduce the economic incentive motivating hospitals to dump patients.

67 See § 1395dd(a). The Act defines the term “emergency medical condition” as:

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—
   (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
   (ii) serious impairment to bodily functions, or
   (iii) serious dysfunction of any bodily organ or part; or
(B) with respect to a pregnant woman who is having contractions—
   (i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or,
   (ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.
§ 1395(e)(1).
68 See § 1395dd(b)(1).
69 See, e.g., Mark A. Hall, The Unlikely Case in Favor of Patient Dumping, 28 Jurimetrics J., 389, 382–96 (1988) (suggesting it would have been better for Congress to have done nothing at all than pass EMTALA); David A. Hyman, Patient Dumping and EMTALA: Past Imperfect/Future Shock, 8 Health Matrix 29, 30, 50–56 (1998) (“EMTALA’s flaws far exceed its limited virtues. . . . The premise of the statute is silly at best.”). But see Lebedinski, supra note 63, at 147 (suggesting EMTALA successfully accomplished Congress’s goal of reducing patient dumping).
70 See Mark A. Hall et al., Health Care Law And Ethics 126–27 (7th ed. 2007).
71 Hall, supra note 69, at 393–96.
sence, the combination of EMTALA and PROWRA requires hospitals to provide and fund medical care for the traumatically injured and uninsured.\textsuperscript{73} It is the cost of this care that drives hospitals to repatriate patients.\textsuperscript{74}

B. The Cost of Uncompensated Care and Repatriation

Treating uninsured patients is expensive; Mr. Jimenez alone cost Martin Memorial over one million dollars.\textsuperscript{75} As such, private hospitals have an economic incentive to avoid providing them with treatment beyond what is required by statute.\textsuperscript{76} In 2008, the cost of providing uncompensated care to the uninsured by hospitals and physicians was approximately fifty-six billion dollars.\textsuperscript{77} Funding from the federal government covered about seventy-five percent of that total cost.\textsuperscript{78} The proportion of uncompensated care generated through the treatment of undocumented immigrants is uncertain.\textsuperscript{79} Martin Memorial received about $80,000 for providing Luis Jimenez with emergency treatment, but was left with an unpaid balance of over one million dollars.\textsuperscript{80} This is a recurring problem; in 2008, the


\textsuperscript{74} See Ortega, supra note 13, at 196; Sontag, supra note 4; see also Lebedinski, supra note 63, at 161 (suggesting the cost of uncompensated care “prompts hospitals to be creative”).

\textsuperscript{75} See Montejo I, 874 So. 2d 654, 656 (Fla. Dist. Ct. App. 2004); Ortega, supra note 13, at 196.

\textsuperscript{76} See Treiger, supra note 72, at 1187. “[A] phenomenon known as patient dumping . . . occurs when a hospital that is capable of providing the needed medical care (the transferring hospital) sends a patient to another facility (the receiving hospital) or simply turns the patient away because the patient is unable to pay.” Id. at 1186–87 (internal quotation marks omitted).

\textsuperscript{77} Jack Hadley et al., Kaiser Comm’n on Medicaid and the Uninsured, Covering the Uninsured in 2008: A Detailed Examination of the Current Costs and Sources of Payment, and Incremental Costs of Expanding Coverage 66 (2008), http://www.kff.org/uninsured/upload/7809.pdf.

\textsuperscript{78} See id. In 2008, uncompensated care accounted for about two percent of the total amount of health care spending in the United States. See id.

\textsuperscript{79} See U.S. Gen. Accounting Office, GAO-04-472, Undocumented Aliens: Questions Persist About Their Impact on Hospitals’ Uncompensated Care Costs 21 (2004); Ortega, supra note 13, at 194–95. Data used in studying this phenomenon is difficult to collect because hospitals usually do not record the immigration statuses of their patients. See U.S. Gen. Accounting Office, supra at 8. Even if hospitals were to inquire about a patient’s immigration status, undocumented immigrants are unlikely to identify themselves. See id. Therefore, any estimate of the proportion of the costs generated by the treatment of undocumented immigrants is purely speculative. See id. at 8–9.

\textsuperscript{80} See Montejo I, 874 So. 2d at 656.
hospital was providing uncompensated treatment for at least six other severely injured, uninsured immigrants.\textsuperscript{81} Recently, the hospital was investigated for repatriating another brain-injured patient into Mexico without approval from the Mexican government.\textsuperscript{82} In 2002, Florida hospitals absorbed more than forty million dollars in uncompensated care costs for the treatment of uninsured noncitizens.\textsuperscript{83}

The cost of uncompensated medical care and federal law’s elliptical imprecision encourages the forced medical repatriation of acutely injured noncitizens.\textsuperscript{84} Although it is difficult to paint an accurate portrait of the number of repatriations occurring each year, anecdotal evidence suggests that it is a serious and widespread problem.\textsuperscript{85} One medical center located in Phoenix, Arizona admits repatriating as many as ninety-six immigrants a year.\textsuperscript{86} In 2007, the Mexican consulate handled the medical cases of at least eighty-seven immigrants, most of which resulted in repatriation.\textsuperscript{87} The practice is common enough to support several air ambulance companies purporting to have expertise in providing such services.\textsuperscript{88} The price of undertaking the repatriation of a patient can be considerable: Martin Memorial spent $30,000 to charter the plane that returned Luis Jimenez to Guatemala.\textsuperscript{89} Given the cost of repatriating a patient and the number of reported incidents, the cost of unreimbursed care provided to undocumented immigrants

\begin{footnotesize}
\begin{enumerate}
\item See Sontag, supra note 4.
\item See id.
\item See Douglas, supra note 1, at 1131.
\item See Hadley \textit{et al.}, supra note 77, at 66; Ortega, supra note 13, at 195–96; Wolpin, supra note 3, at 152–53.
\item See Sontag, supra note 4; Sontag, supra note 27 (describing in detail four other cases of successful or attempted forced medical repatriations across the United States); see also Lebedinski, \textit{supra} note 63, at 161–62 (suggesting that the cost of uncompensated care has lead to the closure of emergency rooms).
\item See Wolpin, \textit{supra} note 3, at 152; Sontag, supra note 4. Arizona suffers acutely from this problem because it is a border state with low state financing for immigrant health care. See Sontag, supra note 27.
\item See Sontag, supra note 4.
\item See Sontag, \textit{supra} note 4.
\end{enumerate}
\end{footnotesize}
must be significant. This financial burden was explicitly acknowledged by Congress in 2003 by its allocation of one billion dollars for the reimbursement of otherwise uncompensated care provided by hospitals to undocumented immigrants. Nevertheless, there are alternatives to the continual appropriation of federal dollars.

III. TORT LIABILITY VS. DIRECT REGULATION

After Luis Jimenez was repatriated, Montejo filed a tort action against Martin Memorial for false imprisonment. The jury found in favor of the hospital because its actions were not unreasonable under the circumstances. This verdict casts doubt on tort law’s ability to prevent the forced repatriation of undocumented immigrants. The tort system is most effective for redressing injuries that fall within traditional categories. Nevertheless, forced repatriation is a novel dilemma unsuited to traditional tort law analysis. Even if a theory of tort liability is pursued, the structure and operation of direct regulation is better suited to preventing the forced repatriation of undocumented immigrants. In Democracy in America, Alexis de Tocqueville concluded, “There is almost no political question in the United States that is not resolved sooner or later into a judicial one.” A public forum for civil

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90 See U.S. GEN. ACCOUNTING OFFICE, supra note 79, at 21 (noting difficulties in estimating the cost of treating uninsured non-citizens); HADLEY ET AL., supra note 77, at 66 (estimating uncompensated medical costs); Douglas, supra note 1, at 1131 (noting that Florida hospitals spent more than forty million dollars in providing uncompensated care for non-citizens); Sontag, supra note 4 (reporting that Mr. Jimenez’s repatriation cost $30,000).
92 See Ortega, supra note 13, at 203–04; Wolpin, supra note 3, at 155.
93 See Montejo v. Martin Mem’l Med. Ctr. (Montejo II), 935 So. 2d 1266, 1268 (Fla. Dist. Ct. App. 2006); Jury Verdict, supra note 2, at 1.
94 See Jury Verdict, supra note 2, at 1; Susan Rose-Ackerman, Tort Law in the Regulatory State, in TORT LAW AND THE PUBLIC INTEREST 84, 100 (Peter H. Schuck ed., 1991); Thomas A. Gionis et al., The Intentional Tort of Patient Dumping: A New State Cause of Action to Address the Shortcomings of the Federal Emergency Medical Treatment and Active Labor Act (EMTALA), 52 AM. U. L. REV. 173, 299 (2002); Steven Shavell, Liability for Harm Versus Regulation of Safety, 13 J. LEGAL STUD. 357, 358–64, 368–71 (1984); Sontag, supra note 2.
95 See Jury Verdict, supra note 2, at 1; Sontag, supra note 2.
96 See Rose-Ackerman, supra note 94, at 100.
97 See Gionis et al., supra note 94, at 299–300.
98 See Rose-Ackerman, supra note 94, at 81–82, 100; Shavell, supra note 94, at 358–64, 368–71.
claims provides instrumental and intrinsic social benefits. Under these particular circumstances, however, direct regulation is a more suitable solution for the problem at hand.

A. Substantive Shortcomings

The tort system is a field that defies strict definition. Simply stated, it is “the body of principles that determines when one who suffers personal injuries may shift that loss to another.” Though its function is contested, “[a]ll tort scholars concede that tort law seeks to compensate injured parties.” Not every injury, however, creates a right to compensation. Liability is limited by the presence or absence of duty, and has a “tripartite” structure encompassing intentional torts, negligence, and strict liability. If there is no recognized duty between the alleged tortfeasor and the injured party, then the loss “must lie where it falls”—with the injured party.

1. Strict Liability

Based on a traditional strict liability analysis, forced repatriation does not create circumstances appropriate for the imposition of liability without fault. The Restatement (Second) of Torts lists six factors courts should consider when determining whether to impose strict liability for abnormally dangerous activities. Notions of fairness, economic effi-

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100 See Wendy E. Parmet, Populations, Public Health, and the Law 237 (2009) (suggesting tort law is a valuable tool for bringing attention to ignored public health issues and for the promotion of regulatory action); Rose-Ackerman, supra note 94, at 85 (“The right of individuals to present their claims to a judge and lay jury is a well-entrenched social value.”).
101 See generally Rose-Ackerman, supra note 94, at 81–82, 100; Shavell, supra note 94, at 358–64, 368–71.
103 Peter H. Schuck, Introduction: The Context of the Controversy to Tort Law and the Public Interest, supra note 94, at 1, 17.
104 See Parmet, supra note 100, at 220.
106 See id. at 1269, 1272.
107 Oliver Wendell Holmes, Jr., The Common Law 94 (Little, Brown & Co. 1951) (1881); see Grey, supra note 105, at 1272.
108 See Restatement (Second) of Torts § 520 (1977). Strict liability is defined as “liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence.” See Keeton et al., supra note 102, § 75, at 534.
109 See Restatement (Second) of Torts § 520(a)–(f) (1977).
ciency, risk-spreading, and deterrence inform this inquiry.\textsuperscript{110} If no party is at fault, and one party benefited economically from the activity that created the risk of harm, then that party should bear the burden of loss.\textsuperscript{111} The internalization of costs increases economic efficiency because the price of a product will reflect the risk of injury.\textsuperscript{112} It is most commonly employed in products liability actions or cases involving hazardous activities.\textsuperscript{113} When compared to hazardous activities and products liability—traditional dominion of strict liability—it is evident that the forced repatriation of undocumented immigrants is beyond the reach of this doctrine.\textsuperscript{114}

2. Negligence

“[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”\textsuperscript{115} Liability under a theory of negligence is predicated upon the defendant owing a duty of care to the plaintiff.\textsuperscript{116} At common law, neither hospitals nor physicians are obligated to provide medical care absent the existence of a physician-patient relationship.\textsuperscript{117} The “no duty” rule absolves hospitals of any obligation to undertake the treatment of uninsured patients at common law.\textsuperscript{118}

Assuming that a treatment relationship exists—as it did in the case of Mr. Jimenez—a plaintiff might pursue a theory of medical malprac-


\textsuperscript{111} See \textit{id.} at 593.

\textsuperscript{112} See \textit{id.} at 595–97 (“Imposing strict liability on . . . manufacturers promotes product safety because it creates a financial incentive for manufacturers to find cost-effective ways to minimize risks associated with their products.”).

\textsuperscript{113} See \textit{id}. at 592.

\textsuperscript{114} See \textit{id}. 590–603; see also \textit{supra} note 3 (defining forced repatriation as a non-consensual transfer of a patient).

\textsuperscript{115} Restatement (Second) of Torts § 282 (1965).

\textsuperscript{116} See Grey, \textit{supra} note 105, at 1258–59.

\textsuperscript{117} See \textit{Hall et al.}, \textit{supra} note 70, at 113. The physician-patient relationship is essentially contractual. See Castillo v. Emergency Med. Assocs., 372 F.3d 643, 648 (4th Cir. 2004) (“[A] physician’s duty arises only upon the creation of a physician-patient relationship; that relationship springs from a consensual transaction.”) (internal quotation marks omitted); Hurley v. Eddingfield, 59 N.E. 1058, 1058 (Ind. 1901) (holding that medical licensure by the state does not require a physician to practice “on other terms than he may choose to accept”). This is commonly referred to as the “no duty” rule. See \textit{Hall et al.}, \textit{supra} note 70, at 113.

\textsuperscript{118} See \textit{Hall et al.}, \textit{supra} note 70, at 113.
tice if a hospital undertakes his care and then repatriates him.\footnote{See Keeton et al., supra note 102, § 32, at 187 (stating that the standard of care for physicians is that a “doctor must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing”); Michelle M. Mello, Of Swords and Shields: The Role of Clinical Practice Guidelines in Medical Malpractice Litigation, 149 U. Pa. L. Rev. 645, 654–59 (2001) (noting difficulties presented by a custom-based standard of care); Sontag, supra note 4 (noting that the hospital provided care for Mr. Jimenez). The physician-patient relationship arises where “a patient seeks care, and a physician provides the care.” See Hall et al., supra note 70, at 146.} The physician or hospital has a duty to exercise the same degree of care as “a physician in good standing in the same medical specialty in a similar community in like circumstances.”\footnote{See Mello, supra note 119, at 655.} In this respect, the medical profession is privileged; as the professional consensus shifts regarding particular practices, so does the standard of care.\footnote{See Keeton et al., supra note 102, § 32, at 189.} Repatriation is arguably already a customary medical practice.\footnote{See Wolpin, supra note 3, at 152–53 (reporting that the American Medical Association recently commissioned a study to consider this widespread practice); Sontag, supra note 4; Sontag, supra note 27 (describing in detail four other cases of successful or attempted forced medical repatriations across the country).} “Although courts have been reluctant to view a defendant’s compliance with custom as conclusive evidence of non-negligence, it is still fairly unusual for a court to strike down a professional custom as falling short of the standard of reasonable care.”\footnote{See Mello, supra note 119, at 658.} Medicare’s Conditions of Participation that regulate discharge do little to enhance this duty of care.\footnote{See 42 C.F.R. § 482.43(d) (2008) (requiring hospitals to transfer patients to an appropriate facility); Medicare and Medicaid Programs, Revisions to Conditions of Participation of Hospitals, 59 Fed. Reg. 64,141, 64,149 (Dec. 13, 1994) (codified at 42 C.F.R. pt. 482) (providing the official comment interpreting “appropriate facility” broadly as capable of meeting the patient’s medical needs, and not providing specific guidelines regarding repatriation).} Similarly, professional organizations do not provide significant guidance to physicians in this area.\footnote{See Wolpin, supra note 3, at 153 (noting that the American Medical Association did not adopt a draft resolution condemning forced repatriation, but agreed to study the issue). But see id. (noting that the California Medical Association openly opposes the practice).} Under these circumstances, it is unlikely that a claim of medical malpractice would prevail for a repatriated patient.\footnote{See Keeton et al., supra note 102, § 32, at 187 (discussing the physician’s standard of care); Mello, supra note 119, at 654–59 (noting the difficulties presented by a custom-based standard of care); Sontag, supra note 4 (describing the facts of Luis Jimenez’s case).}
3. Intentional Torts

Like domestic patient dumping, Martin Memorial’s decision to return Luis Jimenez to Guatemala can be characterized as an intentional tort.127 Broadly defined, intentional torts are acts committed “with the intent to injure the plaintiff or with substantial certainty that [the] action would injure the plaintiff.”128 The repatriation of an uninsured, undocumented immigrant can be interpreted as an act of economic or non-economic discrimination unrelated to a patient’s medical care.129 According to some scholars, this kind of discriminatory decision making “exists in a zone outside the practice of medicine” and should be analyzed like an intentional tort.130

In Montejo, the plaintiff filed a claim for false imprisonment—an intentional tort—and failed only on the element of reasonableness.131 Florida’s definition of false imprisonment includes abduction, but the circumstances of forced repatriation do not comport with the standard definition of the tort.132 The lack of a clearly recognized cause of action is not necessarily fatal; tort law’s “ongoing recognition of legally cognizable rights, duties, interests, and injuries” is well-recognized.133 Notwithstanding that possibility, tort liability has proven to be an inadequate deterrent where an injury falls outside of the traditional category of injury.134

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127 See Gionis et al., supra note 94, at 180, 300; Sontag, supra note 4.
129 Compare Gionis et al., supra note 94, at 180, 300–07 (describing the proposed elements of an intentional tort of patient dumping), with Sontag, supra note 4 (describing the facts of Mr. Jimenez’s repatriation).
130 See Gionis et al., supra note 94, at 180.
131 See Montejo II, 935 So. 2d 1266, 1268 (Fla. Dist. Cl. App. 2006); Sontag, supra note 2.
132 See Fla. Stat. § 787.02(1)(a) (2007); Restatement (Second) of Torts § 35 (1965) (defining traditional elements of false imprisonment without abduction); supra note 3 (defining forced repatriation for purposes of this Comment).
133 Gionis et al., supra note 94, at 297; see also Keeton et al., supra note 102, § 1, at 4 (“The law of torts is anything but static, and the limits of its development are never set. . . . [T]he mere fact that the claim is novel will not itself operate as a bar to the remedy.”).
134 See Gionis et al., supra note 94, at 299; Rose-Ackerman, supra note 94, at 100.
B. The Structural Superiority of Regulation

1. Ex Ante Regulation vs. Ex Post Liability

The fundamental structural distinction between tort liability and direct regulation is procedural. Statutory rules and regulatory standards have an immediate effect on the behavior of individuals. They are public in nature and operate ex ante, independent of the harm they are directed at preventing. Regulations are uniform and speak to all similarly situated potential injurers. In contrast, the tort system is “backward-looking.” It relies on private actors and “works not by social command but rather indirectly, through the deterrent effect of damage actions that may be brought once harm occurs.” These were the circumstances in Montejo; the plaintiff’s personal injury suit was brought after Mr. Jimenez’s repatriation seeking damages to cover the cost of his care in Guatemala and partially to curb the victimization of undocumented immigrants.

2. Factors Favoring Regulation

Whether liability or regulation should be employed to encourage particular behavior and prevent injury depends upon the nature of the regulated activity. Professor Steven Shavell has developed a multi-factor analysis to determine the relative desirability of these two alternatives. Applying this analysis to forced repatriation, regulation proves to be the most suitable method for preventing harm to undocumented immigrants.

135 See Rose-Ackerman, supra note 94, at 83.
136 See Shavell, supra note 94, at 357.
137 See id.
138 See Rose-Ackerman, supra note 94, at 84.
139 See id. at 83.
140 Shavell, supra note 94, at 357.
141 See Wolpin, supra note 3, at 154; Sontag, supra note 2.
142 See Shavell, supra note 94, at 357. Admittedly, these means of controlling behavior are not mutually exclusive and may be more effective when acting in concert. Rose-Ackerman, supra note 94, at 86–94 (discussing different ways in which torts may compliment statutory regulation); Shavell, supra note 94, at 365–66 (discussing the joint use of liability and regulation to control conduct).
143 See Shavell, supra note 94, at 358–64. “Shavell’s underlying assumption is that tort law is a regulatory system that should be evaluated in terms of its consequences for the efficient control of accidents.” Rose-Ackerman, supra note 94, at 85.
144 See Rose-Ackerman, supra note 94, at 83–86, 100; Shavell, supra note 94, at 358–64, 368–71; Wolpin, supra note 3, at 152–55.
The first factor in this analysis is knowledge about the activity being regulated.\textsuperscript{145} This knowledge may include “the benefits of [the] activities, the costs of reducing risks, or the probability or severity of the risks.”\textsuperscript{146} Civil liability is preferable when private parties have greater access to knowledge of these risks.\textsuperscript{147} Evaluating the sufficiency of foreign facilities for cross-border patient transfers, however, may be a challenge for individual health care providers.\textsuperscript{148} Professor Shavell argues that rule-making authorities may have better access to or ability to evaluate information regarding health or medical-related information.\textsuperscript{149} The public nature of regulation and the private nature of tort law are also relevant to this informational factor.\textsuperscript{150} Where the same information about benefits and risks is relevant to many instances of harm, regulation’s ability to speak uniformly and universally is an advantage.\textsuperscript{151}

A second consideration is the ability of parties to adequately compensate the injured for the harm caused.\textsuperscript{152} Under a regulatory regime, a party’s financial status is largely irrelevant unless significant fines are levied for violations.\textsuperscript{153} The importance of controlling costs cannot be overstated in the context of uncompensated health care given the relatively modest budgets of many hospitals.\textsuperscript{154} Martin Memorial operated with a profit margin of just 3.6% in 2007.\textsuperscript{155} The effect of a plaintiff’s verdict in cases like Montejo could be significant for a hospital and could harm the delivery of health care to the surrounding population.\textsuperscript{156}

The third consideration is the plaintiff’s ability to sue.\textsuperscript{157} If injured parties are unlikely or unable to bring suit, then the tort system cannot

\textsuperscript{145} See Shavell, supra note 94, at 359. In principle, negligence itself propels parties to collect information about due care. See id.
\textsuperscript{146} Id.
\textsuperscript{147} See id.
\textsuperscript{148} See Wolpin, supra note 3, at 154.
\textsuperscript{149} See Shavell, supra note 94, at 369. Regulations are preferable where they are based on either common sense or complex information; tort liability implicitly holds the middle ground. See id.
\textsuperscript{150} See Rose-Ackerman, supra note 94, at 84.
\textsuperscript{151} See id.
\textsuperscript{152} See Shavell, supra note 94, at 360.
\textsuperscript{153} See id. at 361 n.7.
\textsuperscript{154} See Lebedinski, supra note 63, at 161–62 (describing the closure of emergency rooms due to the cost of uncompensated care); Sontag, supra note 4 (describing the burden of uncompensated care on Martin Memorial and other hospitals).
\textsuperscript{155} See Sontag, supra note 4.
\textsuperscript{156} See Lebedinski, supra note 63, at 161–62; Sontag, supra note 4.
\textsuperscript{157} See Shavell, supra note 94, at 363.
effectively deter harmful conduct.\textsuperscript{158} The importance of this factor can vary given the injured party’s reasons for not pursuing a legal claim.\textsuperscript{159} Indigent, undocumented immigrants have the weightiest of reasons: “In the United States, there is no general right to state-funded counsel in civil proceedings.”\textsuperscript{160} Luis Jimenez was fortunate enough to have his cause championed by a well-established West Palm Beach law firm.\textsuperscript{161} The probability or frequency of private lawsuits has no bearing on a regulatory regime’s effectiveness.\textsuperscript{162}

The administrative cost associated with each of these methods is the final factor.\textsuperscript{163} Notwithstanding the many different costs associated with litigation, including both private legal fees and public court-related expenses, the tort system is usually more efficient than regulation in terms of administration.\textsuperscript{164} Even if the harm is eliminated by regulation, statutes must be continually enforced to ensure compliance and maintain the regulatory system.\textsuperscript{165} Where non-compliance is easily detected, however, the administrative costs of regulation may be reduced.\textsuperscript{166} The forced repatriation of undocumented immigrants has garnered no small amount of national attention.\textsuperscript{167} Moreover, the problem has been acknowledged by the professional medical community.\textsuperscript{168} Physicians and health care providers are already calling for the government to address the dilemma of repatriation through the existing Medicare system by the promulgation of minimum standards for transferring patients to foreign facilities.\textsuperscript{169} Considered within Professor


\textsuperscript{159} See Shavell, supra note 94, at 363.

\textsuperscript{160} Alan W. Houseman, \textit{The Future of Civil Legal Aid: A National Perspective}, 10 UDC/DCSL L. Rev. 35, 52 (2007). Many states provide a right to counsel in civil proceedings under limited circumstances. See id. at 53.

\textsuperscript{161} See Sontag, supra note 4.

\textsuperscript{162} See Shavell, supra note 94, at 363.

\textsuperscript{163} See id.


\textsuperscript{165} See Shavell, supra note 94, at 364.

\textsuperscript{166} See id. at 370.

\textsuperscript{167} See, e.g., Sontag, supra note 4; Sontag, supra note 27; Sontag, supra note 2.

\textsuperscript{168} See Wolpin, supra note 3, at 153 (noting that the American Medical Association recognizes that forced repatriation presents “significant professional challenges for physicians”).

\textsuperscript{169} See id. at 155.
Shavell’s analytical framework, direct regulation of forced repatriation proves to be the most effective and efficient method for preventing harm to undocumented immigrants.\textsuperscript{170}

**Conclusion**

In the words of the attorney representing the interests of Luis Jimenez, the forced repatriation of undocumented immigrants “clearly cries out for a legislative solution.”\textsuperscript{171} This shameful practice is the result of a tangled web of federal regulations standing at the intersection of immigration and health care law. EMTALA requires hospitals to provide emergency medical treatment to all individuals regardless of immigration status, and the Medicare Conditions of Participation prohibit discharging patients in need of further medical care. Nonetheless, Congress terminated access to Medicare and Medicaid for undocumented immigrants by passing PRWORA. Due to a number of socioeconomic factors, virtually no undocumented immigrants are covered by private health insurance. Under these circumstances, forced repatriation is an attractive solution for cash-strapped hospitals like Martin Memorial. The structure and operation of direct regulation, in comparison to that of tort law, is better suited to solving this difficult dilemma. Accordingly, Congress should heed the call of health care providers to adopt unambiguous regulations governing the transfer of all patients to foreign hospitals.


\textsuperscript{171} See Wolpin, *supra* note 3, at 154.