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Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment

In his 2008 campaign, then-Democratic presidential candidate Barack Obama promised “comprehensive immigration reform.”¹ Two years into his Administration, and despite continued efforts to promote reform,² there has not even been a vote in Congress on a comprehensive bill. President Obama’s predecessor, Republican George W. Bush, also promised comprehensive immigration reform, which was not produced during his eight years in office. Despite their differing parties, the two Presidents’ proposed immigration reforms look similar: stronger control of the United States–Mexico border, better enforcement of workplace hiring, and legalization of the nearly eleven million illegal immigrants already in the United States.³

The similarity of the Obama and Bush plans for immigration reform, and their similar struggles, suggest a question from the point of view of constitutional law – in particular, from the point of view of William Eskridge, Jr., and John Ferejohn’s recent work on the centrality of statutes in American law and American constitutionalism. They argue that because the Constitution says little about the everyday business of running a country, America is a

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1. *Comprehensive Immigration Reform*, ORGANIZING FOR AM., <http://www.barackobama.com/issues/immigrationreform/index.php> (last visited Mar. 18, 2011).
 2. See, e.g., President Barack Obama, Remarks on Comprehensive Immigration Reform (July 1, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform>.
 3. See John D. Skrentny, *Obama’s Immigration Reform: A Tough Sell for a Grand Bargain*, in REACHING FOR A NEW DEAL: AMBITIOUS GOVERNANCE, ECONOMIC MELTDOWN, AND POLARIZED POLITICS IN OBAMA’S FIRST TWO YEARS (Theda Skocpol & Lawrence R. Jacobs eds., forthcoming 2011) (manuscript at 9–14), available at http://www.russellsage.org/sites/all/files/u4/Obama_Chapter%207_Immigration%20Reform.pdf.

“republic of statutes.” Instead of “Large ‘C’” constitutionalism playing a central role, there is “small ‘c’” constitutionalism derived from specific “superstatutes,” or more general “superstatutory principles,” that are entrenched in American lawmaking.⁴

In their view, entrenchment begins with legislators’ recognition of a problem, which social movements or economic troubles typically bring to their attention. Legislators then deliberate and pass a new statute; public opinion affirms it. Then, agencies and statute supporters find practical and efficient ways to implement and expand it with input from media, experts, judges, and the public. If they avoid the disasters that their opponents predict and win strong support from at least some part of the public, then the statute is repeatedly reaffirmed as Congress and the executive branch elaborate it over the years.⁵ Superstatutes are “constitutional” in the sense that they create normative commitments in law.

Our objectives here are both to use Eskridge and Ferejohn’s theory to explain why it has been a great struggle to enact immigration reform and to use the case of immigration reform to build on Eskridge and Ferejohn’s theory. Immigration provides an excellent case for analyzing Eskridge and Ferejohn’s argument because the Constitution says nothing about immigration and gives Congress no guidance on how to make immigration statutes. In other words, the document that begins “We the People” says nothing about how the people are to be composed. How, then, do legislators make immigration statutes? Put another way, to what extent is statutory entrenchment guiding immigration policy that is “constitutional”? Finally, if we already have many immigration statutes, why is it so difficult for both Republican and Democratic Presidents and Congresses to make new ones?

The high stakes involved in immigration legislation justify this focus as a case study for statutory entrenchment. At stake in President Obama’s attempts at comprehensive immigration reform are: public perceptions of the rule of law and American sovereignty;⁶ tax benefits to the federal government and expenditures at the state and local levels;⁷ growth, firm size, and employer

4. WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 16 (2010).

5. *Id.* at 17-19.

6. See DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* (2002).

7. See CONG. BUDGET OFFICE, PUB. NO. 2500, *THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS* (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf>.

profit margins in a variety of industries;⁸ and potential wage depression effects on Americans as well as other immigrants, particularly those with less education.⁹ Also at stake are the exploitation and human rights abuses of the nearly eleven million undocumented immigrants already here.¹⁰ Finally, the composition of the American people is at issue, because immigration statutes provide answers to the crucial question for national identity and future politics: who shall be included?

We argue that Eskridge and Ferejohn's theory of statutory entrenchment helps us to understand the failure of comprehensive immigration reform under President Bush and, so far, under President Obama. The case of immigration reform also highlights the complexity of the process of entrenchment, provides opportunities for building theory regarding both degrees and dimensions of entrenchment, and helps us understand why attempts to reform immigration law in the United States have repeatedly failed in spite of major legislative efforts that enjoyed the support of the reigning executive.

Specifically, we argue that statutory entrenchment in the area of comprehensive immigration reform has proceeded unevenly, reinforcing claims for border enforcement,¹¹ giving a weak foundation for workplace enforcement,¹² and failing to legitimate legalization.¹³ The case of comprehensive immigration reform shows that varying degrees and dimensions of entrenchment lead to uneven force of arguments for reform and an asymmetry of bargaining power among constituencies. The theory of statutory entrenchment helps us see that comprehensive immigration reform has failed at least in part because it links legal models that differ greatly in the degrees and manner in which they are entrenched.

8. See GORDON H. HANSON, MIGRATION POLICY INST., *THE ECONOMICS AND POLICY OF ILLEGAL IMMIGRATION IN THE UNITED STATES* (2009), available at <http://www.migrationpolicy.org/pubs/Hanson-Dec09.pdf>.

9. See FRANK D. BEAN & GILLIAN STEVENS, *AMERICA'S NEWCOMERS AND THE DYNAMICS OF DIVERSITY* (2003).

10. John D. Skrentny, *Are America's Civil Rights Laws Still Relevant?*, 4 *DU BOIS REV.* 119, 123 (2007).

11. See *infra* Section III.A.

12. See *infra* Section III.B.

13. See *infra* Section III.C.

I. THE PROCESS OF STATUTORY ENTRENCHMENT

In our understanding, entrenchment is akin to what political scientists, sociologists, and organizational theorists call “institutionalization.” Institutionalization is a process whereby a set of actions becomes formalized or taken for granted as appropriate and rational and begin to serve as rules, “standard operating procedure,” or part of a repertoire for dealing with a particular issue.¹⁴ When institutionalized, all but the most marginalized of actors share or behave as if there were a consensus. In this view, a statutory model becomes entrenched when it becomes taken for granted as a rational approach to achieve some objective and therefore becomes a part of lawmakers’ repertoire. Entrenched statutory models are part of a culture shared by those involved in lawmaking: members of Congress and their staffs, White House officials, administrators, judges, and lobbyists. When lawmakers working on a problem ask themselves if they can make statutes to address the issue, entrenched statutory models provide a green light.

Not all cultural elements are institutionalized to the same degree. The same is true of the entrenchment of statutory models. Eskridge and Ferejohn provide the measures to assess degrees of entrenchment: the consistency of support for the statute (specifically, the interplay of Congress, the White House, and administrative agencies in developing regulations and amendments to the statute).¹⁵ Also influencing the degree of entrenchment will be the relative power and marginality to mainstream politics of the proponents and opponents of a statutory model, as well as the availability of constitutional or other legitimate discourses with which opponents can express opposition.

Understanding entrenchment also requires distinguishing between two dimensions of entrenchment—cognitive and moral. Cognitive entrenchment occurs where a legal model is understood as appropriate and rational. Legislators repeatedly use particular models for making statutes to manage some aspect of society; legislators perceive these cognitively entrenched models to make sense and represent smart lawmaking. Cognitively entrenched models may vary over time and between national contexts.¹⁶ They may appear rational because lawmakers perceive them to work—even though objective evidence

14. See Elisabeth S. Clemens & James M. Cook, *Politics and Institutionalism: Explaining Durability and Change*, 25 ANN. REV. SOC. 441 (1999); Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, 2 ANN. REV. POL. SCI. 369 (1999).

15. ESKRIDGE & FEREJOHN, *supra* note 4, at 17-19.

16. For a similar argument on how “policy paradigms” shape lawmaking, see FRANK DOBBIN, *FORGING INDUSTRIAL POLICY: THE UNITED STATES, BRITAIN, AND FRANCE IN THE RAILWAY AGE* (1992).

shows that they do not.¹⁷ When lawmakers attending to a problem ask themselves “how should we do it?”, statutory models that are at least cognitively entrenched provide the answer.

Moral entrenchment occurs where lawmakers consider the model to be just and right. There is a moral commitment to the statutory model—lawmakers care deeply, or they expect enough other people to care deeply, such that there will be some kind of sanction if they do not support the statutory model. Morally entrenched statutes or statutory models will at the least serve as a signal to supporters that lawmakers are paying attention to their beliefs.

If a lawmaker challenges a statute that is only cognitively entrenched, many will see something wrong with that lawmaker’s alternative. If a lawmaker challenges a morally entrenched statute, many will see something wrong with the *lawmaker*. If that statute was morally entrenched to a high degree, the lawmaker’s career may be damaged. Morally entrenched statutory models compel an affirmative answer when lawmakers considering a problem area in society ask themselves, “*Must* we make or maintain legislation? Do our own principles of justice or those of the public require legislation?”

The two dimensions of entrenchment are distinct; cognitively entrenched statutes need not be morally entrenched and vice versa. In the United States, some taxes are cognitively entrenched as a rational way to raise revenue, but there is no moral dimension to advocacy or criticism of tax statutes.¹⁸ Other statutes, such as those making prostitution illegal or imposing sanctions on unpopular foreign states, may be morally but not cognitively entrenched in the sense that many do not believe they actually work or achieve some important end—even though retrenching them will likely cause controversy.¹⁹

Statutes that are both cognitively and morally entrenched achieve the status of “constitutional.” This is clearly the case with the quintessential

17. As we describe below, both Congress and the White House continually augment resources for border enforcement, a policy that is deeply entrenched, even though there is overwhelming evidence that it has thus far failed. On this point, we differ from Eskridge and Ferejohn, who emphasize that entrenched statutes are those that work to achieve stated goals. See ESKRIDGE & FEREJOHN, *supra* note 4, at 17.

18. We thank Nicholas Parillo for suggesting this point to us.

19. For more on prostitution laws, see M. Anne Jennings, *The Victim as Criminal: A Consideration of California’s Prostitution Law*, 64 CALIF. L. REV. 1235, 1253-54 (1976). On the economic sanctions against rights-violating foreign states, see Stephanie Chan, *Debating U.S. Human Rights Promotion in China: The Missing Moral Challenge to Coercion* 2-8 (Aug. 14, 2010) (unpublished manuscript) (on file with author). For more on the ineffectiveness of sanctions, see generally Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT’L SEC. 90 (1997).

constitutional superstatute, the Civil Rights Act of 1964.²⁰ Superstatute status, however, does not mean that *any* expansion or elaboration will be acceptable or successful. For example, though attempting to retrench the Civil Rights Act will likely earn one the epithet of “racist” or “sexist,” and expansions to include new groups such as the disabled may earn wide support, lawmakers know that not every group can be included. Lawmakers have not included gays and lesbians in that statute’s discrimination prohibitions, and no lawmaker now will even propose including persons of Middle Eastern or Arabic descent in affirmative action regulations.²¹

Exactly where the boundaries are is far from clear. The ability to sense what is politically possible or optimal is what separates the skillful lawmakers from the mediocre. In our view, statutory entrenchment enables and shapes legislative and administrative action but does not determine it. Much of what constitutes politics is in the minefield that exists beyond entrenched statutory models. Lawmakers continually innovate, make the wrong guesses, and face retribution from voters for failing to show links between their innovations and cognitively or morally entrenched statutory models.²²

II. THE CONSTITUTION AND IMMIGRATION

There are two reasons that the history of statutory immigration regulation is especially notable from a constitutional standpoint. First, despite the centrality of immigration in American history, courts did not develop a constitutional jurisprudence on immigration until 1889.²³ One false start found the authority for Congress to make immigration law by considering the

20. See ESKRIDGE & FEREJOHN, *supra* note 4, at 16; Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

21. See JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* (2002).

22. There is a third type of statutory entrenchment: economic entrenchment. In this case, lawmakers may not perceive the statutory model to work to achieve their policy goals, and they may not perceive it to be good or just. However, if a statute is economically entrenched, lawmakers will perceive significant constituent support for the statutory model due to sunk costs. These constituents’ economic investments in the statutes’ maintenance and growth may engender lawmakers’ support. Reaction to retrenchment may lead to attacks on lawmakers similar to those that occur when morally entrenched statutes are retrenched. We thank Richard Primus for highlighting this point for us. For similar arguments, see PAUL PIERSON, *DISMANTLING THE WELFARE STATE? REAGAN, THATCHER AND THE POLITICS OF RETRENCHMENT* (1994); and Sarah Staszak, *Institutions, Rulemaking, and the Politics of Judicial Retrenchment*, 24 STUD. AM. POL. DEV. 168 (2010).

23. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 857 (1987).

movement of people across borders to be an aspect of commerce. In the *Head Money Cases*,²⁴ the Supreme Court unanimously found that a law that taxed immigrants was a constitutional exercise of the power to regulate commerce. This approach was short-lived, however.

Only five years later, in the *Chinese Exclusion Case*,²⁵ the Court found a different rationale for the authority to regulate immigration. In doing so, it radically reframed immigration. This is the second notable aspect of immigration from a constitutional standpoint. Instead of being the presumably nonthreatening (or even enriching) movement of entities across borders and thus analogous to commerce, immigration was seen by the Court as a threat from which the United States needed to defend itself. Legislators' authority to preserve American security, the Court argued, was so basic that the Constitution did not need to explicitly authorize congressional action:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers.²⁶

Consequently, the Court ceded much of its authority over immigration, and in particular, alien classification and admission control, to the other branches of government. The “plenary power doctrine” in immigration law stipulates that Congress and the executive may determine who will be classified as an alien and who will be admitted to the country and that such decisions will be immune from judicial oversight.²⁷ As Peter Schuck notes, the power of the executive and Congress to use statutes to define the national community, choose which aliens could enter the United States, and identify aliens as a separate group was, for much of the nation's history, “virtually unlimited” by

24. 112 U.S. 580 (1884).

25. 130 U.S. 581 (1889).

26. *Id.* at 606.

27. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545 (1990).

judicial intervention.²⁸ However, courts typically have applied strict scrutiny to state laws that discriminate against noncitizens, striking down numerous state laws that exclude noncitizens from government employment, welfare, and other benefits.²⁹

Though there are various parts of immigration legislation that are cognitively and morally entrenched, as described below, it is not easy to identify an immigration superstatute as defined by Eskridge and Ferejohn. The best candidate may be the 1965 Hart-Celler Act,³⁰ which amended the Immigration and Nationality Act. This statute repealed all negative discrimination on the basis of the national origin of immigrants, established, relative to other countries, high overall levels of immigration, and placed family reunification at the center of visa policy.³¹

III. OBAMA'S PROMISED COMPREHENSIVE IMMIGRATION REFORM

President Obama's promised comprehensive immigration reform is variably empowered or handicapped by America's existing immigration statute repertoire. The key reform components are increased border enforcement, increased workplace regulation, and legalization of millions of illegal immigrants now in the country.³² These components roughly mirror the key components of America's only previous comprehensive immigration reform statute, the Immigration Reform and Control Act of 1986 (IRCA),³³ as well as reforms that failed under George W. Bush.³⁴ However, that current reform efforts follow the legal model of IRCA does not mean that IRCA is a superstatute, as we explain below. Instead, each component of reform finds a different degree and dimension of statutory entrenchment. Ironically, and in a pattern quite the opposite of the typical one that Eskridge and Ferejohn

28. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 21 (1984).

29. STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1375-76 (5th ed. 2009).

30. Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

31. *Id.* We thank Mariano Florentino-Cuellar for suggesting this point to us. For background on the origins of the 1965 law, see SKRENTNY, *supra* note 21, at 51-60.

32. See *Comprehensive Immigration Reform*, *supra* note 1.

33. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

34. Skrentny, *supra* note 3 (manuscript at 7-11).

describe, it is precisely the elements of IRCA that have failed—spectacularly so—that are most entrenched.

A. Border Enforcement

The most entrenched part of President Obama’s promised reform, despite obvious failure, is enforcement of restrictions on unauthorized border crossing and visa overstaying. Except on the details, aggressive enforcement of border controls finds little opposition among lawmakers of either party. It does not matter that there is little evidence that increasing the number of officers, border patrols, and deportations or that adding fences and drones will effectively control borders.³⁵ All of these have become standard operating procedure for immigration border enforcement. Border enforcement is the only part of President Obama’s reform that achieves the superstatutory status—it is both cognitively and morally entrenched.

Usually when a statute fails spectacularly, lawmakers try something else. But border enforcement is itself built on a long history of statutes, now deeply entrenched, that restrict entry into the United States and are premised on the notion that immigration is a threat to the nation. The superstatutory status of today’s border enforcement developed through cooperation between the executive and the legislative branches. It expanded on visa and passport checks that are taken for granted as basic immigration regulation around the world.³⁶

As Eskridge and Ferejohn would predict, the entrenchment of statutory immigration control³⁷ began with collective action and localized but strong support among voters and the legislators who represented them.³⁸ The first federal restriction statute came in an 1875 law that excluded convicts and

35. See DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 89-104 (2003).

36. See JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE* (2000).

37. An early effort at immigration control was short-lived. The authority to restrict and expel was a part of the 1798 Act Concerning Aliens, 1 Stat. 570, which was the first immigration statute and notably framed immigration as a threat. The Act gave the President the authority to expel any alien thought to be dangerous. However, this law was repealed after only two years, and over the next several decades, the United States enjoyed a growing population of settlers and imposed no restrictions on immigration. See LEGOMSKY & RODRIGUEZ, *supra* note 29, at 14.

38. DESMOND KING, *THE LIBERTY OF STRANGERS: MAKING THE AMERICAN NATION* (2005); DESMOND KING, *MAKING AMERICANS: IMMIGRATION, RACE, AND THE ORIGINS OF THE DIVERSE DEMOCRACY* (2000).

prostitutes.³⁹ In 1882, the first general immigration statute charged a fifty-cent tax on all migrants and denied entry to idiots, lunatics, convicts, and persons likely to become a public charge.⁴⁰ The same year brought the Chinese Exclusion Act,⁴¹ which included the power of deportation. In 1917, Congress revised these restrictions to include a literacy test and created the Asiatic Barred Zone.⁴² The Quota Law of 1921,⁴³ intended to be in effect for three years, limited migration based on nationality: annual quotas totaled three percent of the foreign-born persons of each European nationality living in the United States in 1910 (a scheme that sharply limited migration from Eastern and Southern Europe) and established an annual total of about 350,000 persons.⁴⁴ Congress made a modified version of this scheme permanent in 1924.⁴⁵

World War II brought the end of Asian exclusion, but Congress's new quotas for Asian nationalities were fractions of those for even the mostly excluded Eastern and Southern European nationalities.⁴⁶ In 1952, Congress passed the Immigration and Nationality Act,⁴⁷ which added new procedures but reaffirmed the norm of legal control of entry with an interest in the security and wealth of American citizens. It maintained the quota system that disadvantaged Eastern and Southern Europeans and especially Asians.⁴⁸ Despite a mostly unregulated border with Mexico, the executive branch periodically engaged in mass deportations of hundreds of thousands of Mexicans, the last being "Operation Wetback" in the 1950s.⁴⁹

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39. An Act Supplementary to the Acts in Relation to Immigration, ch. 141, 18 Stat. 477 (1875).
 40. An Act To Regulate Immigration, ch. 376, 22 Stat. 214 (1882).
 41. Act of May 6, 1882, 22 Stat. 58 (repealed 1943).
 42. An Act To Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, § 13, 39 Stat. 874, 876-77 (1917) (repealed 1952).
 43. An Act To Limit the Immigration of Aliens into the United States, Pub. L. No. 67-5, 42 Stat. 5, (1921) (repealed 1952).
 44. Patrick Weil, *Races at the Gate: Racial Distinctions in Immigration Policy*, in *MIGRATION CONTROL IN THE NORTH ATLANTIC WORLD* 271, 276 (Andreas Fahrmeir, Olivier Faron & Patrick Weil eds., 2003).
 45. LEGOMSKY & RODRIGUEZ, *supra* note 29, at 16.
 46. DAVID M. REIMERS, *UNWELCOME STRANGERS: AMERICAN IDENTITY AND THE TURN AGAINST IMMIGRATION* 22 (1998); SKRENTNY, *supra* note 21, at 43-44.
 47. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).
 48. *Id.*
 49. Bill Ong Hing, *Immigration Policy: Thinking Outside the (Big) Box*, 39 *CONN. L. REV.* 1401, 1427-28 (2007).

The history of immigration statutes that governed immigrant admissions from 1875 to 1965 vividly illustrates that the federal government exercised the right to deny admission to immigrants using any criteria it saw fit. Though Presidents often vetoed these laws, which they saw as having unwelcome repercussions for foreign policy,⁵⁰ lawmakers took for granted the authority to legislate to protect the nation from what the *Chinese Exclusion Case* referred to as the “vast hordes” seeking entry from abroad.⁵¹

Congress’s amendments in 1965, the Hart-Celler Act,⁵² ended national origin and racial discrimination in the law. At first look, this appears to be an opening of the borders, as the amendments brought immigration law in line with the Civil Rights Act of 1964 as well as emerging global norms codified by the U.N.’s Convention on the Elimination of All Forms of Racial Discrimination.⁵³ But even this move had national security implications: the U.S.S.R. and China had been highlighting the discriminatory anti-Asian laws in propaganda aimed at emerging states in the developing world, and Secretary of State Dean Rusk, as well as other advocates, promoted reform because they believed that discriminatory laws were damaging the U.S. image abroad.⁵⁴ The 1965 amendments were also restrictive in a crucial way for the future of American immigration law: for the first time there was a quota (of 120,000) on natives of the Western Hemisphere. The immigration quotas would prove to be far too limited for the demand in the United States for migrant labor and the demand from foreign nationals to come to the United States, contributing to the problem of the growing population of illegal immigrants since the 1970s.⁵⁵

By 1965 there was much evidence of at least a cognitive entrenchment of statutory immigration control. Not only has Congress continually legislated in this area since 1875, the Departments of Justice, Labor, and Homeland Security have joined in, issuing regulations refining visa policy that now take up more than 1300 pages of the *Code of Federal Regulations*.

The entrenchment of border enforcement that legislators now take for granted thus built on venerable statutory norms of exclusion and the

50. SKRENTNY, *supra* note 21, at 38-39.

51. , 130 U.S. 581, 606 (1889).

52. Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

53. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195; *see also* SKRENTNY, *supra* note 21, at 57.

54. SKRENTNY, *supra* note 21, at 57.

55. MASSEY ET AL., *supra* note 35, at 52.

perception of immigration as a threat. With IRCA in 1986, Congress made the move from immigration restriction in the form of passport and visa controls to immigration restriction as border and internal enforcement against unauthorized entry. It called for increased enforcement by the Border Patrol, authorized a fifty percent increase in appropriations for the Immigration and Naturalization Service's enforcement budget, revamped criminal penalties for immigrant smugglers, and gave Presidents the power to declare an "immigration emergency."⁵⁶

The addition of physical barriers to prevent illegal entry began in the early 1990s through the initiative of the INS. Following the recommendation of a division of Lockheed Martin's Sandia National Laboratories, the INS built a fence near San Diego, California ("Operation Gatekeeper") and then expanded the fence-building project to El Paso, Texas (called "Operation Blockade" and "Operation Hold-the-Line").⁵⁷ Congress began to authorize money specifically for fence building with the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. More legislation and administrative action followed, including the Secure Fence Act of 2006, which authorized the construction of fencing on the border with Mexico and the use of other technology to prevent unauthorized entry.⁵⁸ The border enforcement norms were so deeply morally entrenched that some citizens, calling themselves "Minutemen," formed organizations to contribute voluntarily to border security.⁵⁹

While critics maintained that this effort was inhumane, there is little evidence of a strong anti-fence or anti-border enforcement constituency to press that point either through lobbying or at the ballot box.⁶⁰ Moreover, there

56. *Id.* at 49, 90.

57. Bill Ong Hing, *The Case for Amnesty*, 3 STAN. J. C.R. & C.L. 233, 277-78 (2007). For more on the role of defense contractors such as Sandia, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-95-30, BORDER CONTROL: REVISED STRATEGY IS SHOWING SOME POSITIVE RESULTS (1994), available at <http://www.gao.gov/archive/1995/gg9530.pdf>.

58. See Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (codified as amended in scattered sections of 8 U.S.C.).

59. Roxanne Lynn Doty, *States of Exception on the Mexico-U.S. Border: Security, "Decisions," and Civilian Border Patrols*, 1 INT'L POL. SOC. 113 (2007).

60. It is possible to go too far on border enforcement, however. In 2006, the House of Representatives passed a bill that made unauthorized entry or stay in the United States a felony and criminalized some forms of aiding illegal aliens. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). The bill provoked large protests in Los Angeles, Chicago, and other cities, and the Senate never acted on it. See ANDREW WROE, THE REPUBLICAN PARTY AND IMMIGRATION POLITICS: FROM PROPOSITION 187 TO GEORGE W. BUSH 195 (2008). For more on the role of the protests, see Irene Bloemraad, Kim Voss & Taeku Lee, *The Immigration Rallies of 2006: What Were They, How Do We Understand Them, Where Do We Go?*, in RALLYING FOR IMMIGRANT

was no constitutional or moral discourse available, either regarding rights of persons or powers of government, to object to border enforcement. Despite the evidence that it has failed, and a series of negative consequences ranging from the corrupt⁶¹ to the tragic⁶² to the perverse,⁶³ border enforcement is cognitively entrenched as a rational strategy to protect American security and sovereignty, and it is morally entrenched as just and right to protect these same interests. The solution to the problem of the failure of border enforcement has been more of it; it is a superstatutory principle in immigration law.⁶⁴

There are some academic and media advocates for open borders.⁶⁵ In an echo of the old Supreme Court jurisprudence of immigration-as-commerce, they argue that people should move as freely as goods across borders since the United States, Canada, and Mexico signed the North American Free Trade Agreement and point to the modern precedent of the European Union's Schengen Agreement. But no one in lawmaking circles suggests this as an alternative: as long as lawmakers perceive immigration (but not goods) to be threats to sovereignty and self-preservation, there is no available discourse to oppose strong border enforcement laws and regulations. Both Republican and Democratic Congresses and Presidents have supported border enforcement and continue to do so. Today, billions of dollars are spent on border enforcement in bills that receive wide, bipartisan support. Indeed, the only immigration legislation to pass under President Obama was a \$600 million package to build up yet more enforcement on the border, which occurred quickly and quietly with little opposition.⁶⁶

RIGHTS (Kim Voss & Irene Bloemraad eds., forthcoming 2011) (manuscript at 15-74) (on file with authors).

61. Post-IRCA immigrants were forced to buy fake documents to show to employers. MASSEY ET AL., *supra* note 35, at 119. Increased border enforcement has led to escalating fees paid to smugglers. *Id.* at 129.
62. Migrant deaths while crossing the border have increased markedly since IRCA. *Id.* at 113-14.
63. The difficulty of crossing the border creates a disincentive to return to Mexico and has made permanent settlement more likely. *Id.* at 131-33.
64. Eskridge and Ferejohn argue that superstatutes compel compliance from even those not technically affected by the law. See ESKRIDGE & FEREJOHN, *supra* note 4, at 8. There is a similar phenomenon in border enforcement where American citizens have formed organizations to protect the borders themselves.
65. See, e.g., KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2007); JASON L. RILEY, *LET THEM IN: THE CASE FOR OPEN BORDERS* (2008); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); Joseph H. Carens, *Realistic and Idealistic Approaches to the Ethics of Migration*, 30 INT'L MIGRATION REV. 156 (1996).
66. Skrentny, *supra* note 3 (manuscript at 13).

B. Workplace Enforcement

Less entrenched is another aspect of President Obama's promised comprehensive immigration reform: improvement of workplace enforcement of laws prohibiting employers from hiring illegal immigrants. Here the history of federal legislation is far shorter. Indeed, there were statutory efforts to allow employers to hire illegal immigrants if they wished. In the 1952 Immigration and Nationality Act, Congress made it illegal to "harbor" illegal immigrants, but a section known as the "Texas proviso," urged by growers in the state of Texas, specifically stated that employers would not be harboring if they hired illegal immigrants.⁶⁷

Workplace enforcement began through a state initiative in 1971 when California passed a law sanctioning employers of illegal immigrants, and eleven other states followed suit.⁶⁸ The Supreme Court approved of the effort in 1976.⁶⁹ In 1973, the AFL-CIO and the NAACP began to lobby Congress to make it a violation of federal law to hire illegal immigrants.⁷⁰ In 1982, Congress directed the General Accounting Office (GAO) to study workplace enforcement laws in other countries. It found that workplace enforcement rarely worked to control immigration due to weak effort and problems with intra- and inter-agency coordination.⁷¹

In 1986, Congress nevertheless passed its first national workplace enforcement regulation with the Immigration Reform and Control Act. Business interests, joined by immigrant advocates, lobbied hard against the provision and succeeded in making the law weak and difficult to enforce.⁷² Because employers would violate the law only if they "knowingly" hired illegal immigrants, illegal immigrants showing some reasonably convincing fraudulent documents could shield their employers.⁷³

Workplace enforcement statutes are thus relatively recent and written with a significant loophole. Moreover, unlike border enforcement, which fails

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

68. Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1111 & n.18 (2009).

69. *De Canas v. Bica*, 424 U.S. 351 (1976).

70. Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION POL'Y INST. (Sept. 2005), <http://www.migrationinformation.org/Feature/display.cfm?ID=332>.

71. *Id.*

72. See, e.g., TICHENOR, *supra* note 6, at 232, 260; Peter H. Schuck, *The Politics of Rapid Legal Change: Immigration Policy in the 1980s*, 6 STUD. AM. POL. DEV. 37, 61, 65 (1992).

73. MASSEY ET AL., *supra* note 35, at 49, 90.

despite continually augmented effort, administration and enforcement of the workplace statutes have always been weak. There are strong constituencies on the political right and on the political left who resist enforcement (employers and immigrant advocates, respectively), as well as strong privacy advocates, armed with a compelling constitutional discourse, who have prevented what arguably may be the most effective implementation strategy: a national identification card. The public is not active on the issue; this may be due to the fact that many are aware that they are benefiting from employers' use of this low-cost and efficient workforce in restaurants and other businesses—or they may hire illegal immigrants themselves.⁷⁴ The Urban Institute and the Rand Corporation conducted early studies that found IRCA's workplace law was having little impact because—just as the GAO had predicted based on experiences with other countries—it was hampered by limited enforcement and poor coordination in the government.⁷⁵

The workplace enforcement effort has never been a serious deterrent to employers. At its most aggressive, Immigration and Customs Enforcement (ICE) and its predecessor, INS, conducted workplace raids directed at workers rather than employers. The Obama Administration has sought to find a more humane but effective way of preventing the employment of illegal workers by directing efforts to auditing employers and fining them rather than conducting dramatic raids. The government succeeded in imposing record fines and numbers of audits in 2009,⁷⁶ but John Morton, the head of ICE, said in 2010 that the Administration was still trying to create a “culture of compliance” among employers.⁷⁷

Despite poor results, immigration reformers have kept workplace enforcement in their repertoire, struggling to find new ways to regulate the workplace. President Obama's campaign promised better control of employers, and his first budget offered increased funding of the electronic “E-Verify” employment system, now required of government contractors, which compares immigrant documents with a centralized, electronic database.⁷⁸ Senator Charles Schumer propounded a plan, supported by President Obama and developed

74. We thank Mariano Florentino-Cuellar for suggesting this point to us.

75. See, e.g., *THE PAPER CURTAIN: EMPLOYER SANCTIONS' IMPLEMENTATION, IMPACT, AND REFORM* (Michael Fix ed., 1991); Brownell, *supra* note 70.

76. Skrentny, *supra* note 3 (manuscript at 13).

77. Julia Preston, *Illegal Workers Swept from Jobs in Silent Raids*, N.Y. TIMES, July 9, 2010, at A1, available at <http://www.nytimes.com/2010/07/10/us/10enforce.html>.

78. U.S. Department of Homeland Security, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/fy2010_department_homeland (last visited Mar. 18, 2011) (providing an overview of the Department of Homeland Security's 2010 budget).

with Senator Lindsey Graham, that would require all job applicants, including American citizens, to show a new Social Security card with biometric identifiers in order to be hired legally.⁷⁹ However, a variety of organizations, including the American Civil Liberties Union and Americans for Tax Reform, have opposed the proposed card.⁸⁰

Another factor preventing a deeper moral entrenchment of workplace enforcement is that it also goes against antidiscrimination norms established by the Civil Rights Act of 1964 and its various progeny, such as the Age Discrimination in Employment Act⁸¹ and the Americans with Disabilities Act.⁸² The federal government tells employers that they cannot discriminate on the basis of race, national origin, sex, religion, age, disability, or veteran status. IRCA added to this that employers must also not discriminate on the basis of citizenship status—but that they must discriminate on the basis of legal status. While employers can be in compliance with all of these directives, the legal requirement to discriminate on the basis of a particular status goes against the thrust of American antidiscrimination law and may account for its weaker entrenchment.

In short, workplace enforcement provisions are a part of nearly all comprehensive immigration reform bills and appear to be cognitively entrenched as a rational way to control immigration. But this entrenchment seems weak, and there is little evidence of any moral entrenchment of this part of comprehensive reform bills and, indeed, little moral judgment of employers who hire illegal immigrants. While members of Congress support workplace provisions, they do not follow through with strong enforcement, and there is less public outcry than there is over porous border enforcement.

C. Legalization of Unauthorized Immigrants

President Obama's promised reform, like that of President George W. Bush before him, includes a series of procedures and requirements, such as paying fines, that would allow the majority of the nearly eleven million illegal

79. Charles E. Schumer & Lindsey O. Graham, *The Right Way To Mend Immigration*, WASH. POST, Mar. 19, 2010, at A23, available at http://www.washingtonpost.com/wpdyn/content/article/2010/03/17/AR2010031703115_pf.html.

80. Press Release, Am. Civil Liberties Union, Broad Coalition Urges President Obama and Congress To Oppose Biometric National ID (Apr. 13, 2010), available at <http://www.aclu.org/immigrants-rights-technology-and-liberty/broad-coalition-urges-president-obama-and-congress-oppose-b>.

81. 29 U.S.C. §§ 621-634 (2006).

82. 42 U.S.C. §§ 12101-12213 (2006).

immigrants to gain permanent legal residency.⁸³ Legalization is the least entrenched statutory model, either cognitively or morally, and advocates have to contend with the counter-entrenching impacts of IRCA's mass legalization paired with spectacularly failed enforcement.

To be clear, there are statutory precedents to allow illegal immigrants to adjust their status. The Registry Act of 1929 allowed persons who could document that they were in the country on or before June 3, 1921, had good moral character, were not subject to deportation, and were eligible for citizenship to have a "record of lawful admission" and earn legal residence and the right to naturalize.⁸⁴ Congress periodically extended the cutoff dates.⁸⁵ Registry remains today as section 249 of the Immigration and Nationality Act. The cut-off date is currently January 1, 1972, which means few in 2011 can use its provisions.⁸⁶

While the rationale for registry was similar to that for contemporary immigrant legalizations (i.e., to provide relief for illegal immigrants who had become integrated into the community), the registry benefited considerably fewer people over a longer period of time than the nearly three million the IRCA legalized or the nearly eleven million whom President Obama hopes to legalize. Between 1929 and 1945, about 200,000 persons used the registry to adjust their status.⁸⁷

Federal statutes have also provided another avenue for legalization: suspension of deportation, later renamed cancellation of removal. While technically a route for legalization, this was considerably narrower in scope than registry. Under the Alien Registration Act of 1940, applicants needed to show that they had demonstrated good moral character in the preceding five years and that their deportation would result in hardship for a spouse, child, or

83. See *Comprehensive Immigration Reform*, *supra* note 1 (advocating maintaining border security, increased enforcement in the workplace, greater efficiency in the visa and naturalization process, and requiring illegal immigrants to register, pay taxes, pay a fine, and learn English).

84. Registry Act of 1929, Pub. L. No. 70-962, 45 Stat. 1512 (repealed 1940); see also Richard A. Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV. J. LEGIS. 175, 182-84 (2010).

85. Boswell, *supra* note 84, at 184.

86. PATRICK WEIL, ALL OR NOTHING? WHAT THE UNITED STATES CAN LEARN FROM EUROPE AS IT CONTEMPLATES CIRCULAR MIGRATION AND LEGALIZATION FOR UNDOCUMENTED IMMIGRANTS 13 (2010).

87. Boswell, *supra* note 84, at 182.

parent who had permanent resident status or were citizens.⁸⁸ Success here would result in a suspension of deportation and a report made to Congress; the person would gain permanent residence unless both the House and the Senate issued a joint resolution objecting.⁸⁹ In the 1950s, Congress passed amendments that sharply curtailed opportunities for this suspension on the belief that the system was being abused.⁹⁰ In 1996, Congress renamed the procedure “cancellation of removal” and capped it at 4000 per year.⁹¹ Between 1986 and 2009, nearly 250,000 persons benefited from this procedure.⁹²

Finally, there have been several statutes that have allowed refugees and asylum seekers to adjust their status. These have typically targeted those fleeing from states controlled by Communist or Marxist parties, such as Chinese, Nicaraguans, Cubans, or those with family ties to Cubans, though Haitians have also benefited from these statutory status adjustment opportunities.⁹³ In refugee and asylum cases, lawmakers saw claimants as political migrants fleeing oppressive regimes and thus in a very different category than today’s economically motivated illegal immigrants.⁹⁴

Though these statutes can be seen as precedents, their narrow scope, obscurity, and targeting suggest that they did not entrench mass illegal immigrant legalization as would be required by President Obama’s desired comprehensive immigration reform statute. Even if they did represent a statutory entrenchment of legalization, this was undone by the widely perceived failure of IRCA. The Act was made possible by a grand bargain between immigration restrictionists and immigrant rights advocates. In a sense, the law embodied a promise: members of Congress understood that the price of legalization was sealed borders and workplaces. The statute prominently brought together border control, the first federal workplace

88. Alien Registration Act, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385 (2006)).

89. Boswell, *supra* note 84, at 190.

90. *Id.* at 192; *see also* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

91. Boswell, *supra* note 84, at 193; *see also* Monica Gomez, Note, *Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States*, 22 GEO. IMMIGR. L.J. 105, 118 (2007).

92. DONALD M. KERWIN, MIGRATION POL’Y INST., MORE THAN IRCA: US LEGALIZATION PROGRAMS AND THE CURRENT POLICY DEBATE 13 (2010), *available at* <http://www.migrationpolicy.org/pubs/legalization-historical.pdf>.

93. *Id.* at 5-6.

94. *Id.* at 5.

enforcement regulation, and an opportunity for about three million illegal immigrants to gain permanent legal residence and eventual citizenship.⁹⁵

Because legalization procedures worked to legalize millions of people, while border enforcement and workplace enforcement miserably failed to stem the flow of illegal immigration, many in Congress perceived IRCA, and comprehensive immigration reform in general, to be a failure.⁹⁶ Many in Congress, especially in the Republican Party, believe that no legalization can occur until the border is demonstrably sealed.⁹⁷ The failure of IRCA thus renders any legalization plan irrational to a significant number of lawmakers and thus works against the cognitive entrenchment of legalization statutes.

Legalization is also obviously far from morally entrenched. There is considerable debate about mass legalization for illegal immigrants. Even IRCA, Congress's only mass-legalization statute, restricted the access of legalized immigrants to welfare.⁹⁸ Focus group studies and polling directed by reformers in the Democratic Party found that Americans tend to see legalization as a giveaway and resist referring to this group as "undocumented immigrants"; instead, they should always be referred to as illegal.⁹⁹

Simply put, President Obama and other advocates for legalization have had difficulty finding constitutional or other legitimate discourses to justify mass legalization or amnesty for noncitizens. On the other side, since illegal immigrants are lawbreaking noncitizens, American law strongly casts immigrants as threats. Since legalization is not a regular part of immigration law, it has been easy for opponents, now better organized and more powerful than during the first amnesty in 1986, to find discourses to oppose legalization. Moreover, demonstrators for legalization sometimes played into the hands of antilegalization forces when they waved Mexican flags during rallies, in effect highlighting the strong national security and sovereignty meanings of border control.¹⁰⁰

95. TICHENOR, *supra* note 6, at 261-62; Schuck, *supra* note 72, at 46-47.

96. Daniel J. Tichenor, *Navigating an American Minefield: The Politics of Illegal Immigration*, 7 FORUM 7, 18 (2009).

97. Skrentny, *supra* note 3 (manuscript at 9).

98. 8 U.S.C. § 1255a(h)(1) (2006).

99. Carrie Budoff Brown, *Dems' Tough New Immigration Pitch*, POLITICO (June 10, 2010, 4:36 AM), <http://www.politico.com/news/stories/0610/38342.html>.

100. Lisa M. Martinez, *Mobilizing Marchers in the Mile-High City: The Role of Community-Based Organizations*, in RALLYING FOR IMMIGRANT RIGHTS, *supra* note 60 (manuscript at 207, 225).

CONCLUSION

We have argued that statutory entrenchment is a complex process similar to what social scientists have called institutionalization. It can happen in degrees, and it can have different dimensions, including cognitive and moral. The struggles of Barack Obama to reform immigration with a multi-component, “grand bargain” statute model, as with George W. Bush’s struggles before him, reveal this complexity.

Border enforcement, including physical barriers and technologically reinforced patrols of the border with Mexico, is built on immigration-control statutes that go back to 1875. Despite obvious failure, Presidents of both major parties have supported the border build-up, and Congresses controlled by both major parties have easily passed these statutes and sent them to the Oval Office. Advocates for open borders exist, and some of these arguments are quite popular on the far Left and the far Right. Inside the halls of Congress, however, border enforcement is cognitively and morally entrenched, and the entrenchment is deep. Though perhaps lacking a “superstatute,” it is difficult to imagine anyone suggesting repeal of border control, or even a modest rollback. To do so would be politically risky and invite electoral reprisals in all but the most liberal congressional districts or states. The perceived moral entrenchment and imperative of border enforcement (by both lawmakers and much of the public) may be diminishing the perception of the reality of its failure.

Workplace enforcement is a different story. Lawmakers of both parties see it as rational, and failed reform bills or proposals under both Presidents Bush and Obama have contained large components to strengthen controls on employers. But the strongest workplace enforcement proposals, such as those involving biometric ID cards, face strong opposition from immigrant rights advocates, employers’ associations, and privacy advocates. The public itself, which benefits from cheap labor, may also be conflicted. Moreover, it works against the Civil Rights Act of 1964’s superstatutory discrimination prohibitions because it requires discrimination. It is at this time only cognitively entrenched, and that entrenchment is not strong.

Finally, legalization is not entrenched at all. The dearth of statutory precedents for mass, categorical legalization of economic migrants, and the perceived failure of IRCA (the only mass legalization statute), ensure that there is no broad understanding of legalization as a rational or moral approach to immigration lawmaking. President Obama faces his greatest opposition on this component of his reform promise and has few discursive resources to promote the cause.

Besides illustrating both the degrees and dimensions of statutory entrenchment, we also note that the case of immigration reform shows that legal models can be entrenched despite demonstrable failure to achieve their goals. Ironically, the current legal model of border control is entrenched despite massive, obvious, and demonstrable failure, while legalization remains unentrenched despite its relative simplicity and historical precedents.

The practical failure of border enforcement, as well as the political failure of comprehensive reform, may point the way to possible solutions. Mass categorical legalization that results in permanent residence and citizenship for illegal immigrants may be a political impossibility in the 2000s. Patrick Weil has suggested an alternative statutory model, one that has precedent in Europe that provides a permanent statutory legalization process on an individual rather than categorical basis. It is, however, tilted toward those with the longest duration in or the most family ties to the United States. Weil also suggests the creation of a seasonal worker visa that would allow circular migration for a number of years.¹⁰¹ Even with these innovations, however, it is difficult to imagine significant retrenchment of the statutory model of border enforcement without some strategy to reframe immigration as something akin to commerce, as the Supreme Court did in the 1889 *Head Money Cases*, rather than as a challenge to sovereignty.

As Eskridge and Ferejohn have helpfully reminded us, the American state is quite capable of legislating and governing despite a barebones Constitution due to the advancement of statutes. The case of immigration reform suggests a comparative study of statutory entrenchment should assess the depth and dimensions of entrenchment—in short, the politics of entrenchment. A full accounting for legal development and the dynamics of entrenchment in the United States will take into account both the constitutional foundations for lawmaking and the power struggles and discursive battles that are part of everyday lawmaking.

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101. WEIL, *supra* note 86, at 6.

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