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Title

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Permalink

<https://escholarship.org/uc/item/18p2w4rp>

Journal

Journal of Scholarly Perspectives, 5(01)

Author

UCLA, Law School

Publication Date

2009

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SCHOLARLY PERSPECTIVES

UCLA | SCHOOL OF LAW

UCLA | SCHOOL OF LAW

Fall 2009

Vol. V, No. 1

SCHOLARLY PERSPECTIVES

UCLA | SCHOOL OF LAW

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Devon Carbado currently serves as vice dean for faculty and research. He was elected Professor of the Year by the UCLA School of Law Classes of 2000 and 2006, is the 2003 recipient of the Rutter Award for Excellence in Teaching and was recently awarded the University Distinguished Teaching Award, The Eby Award for the Art of Teaching. He is a recipient of the Fletcher Foundation Fellowship, which, modeled on the Guggenheims, is awarded to scholars whose work furthers the goals of Brown v. Board of Education.

Professor Carbado writes in the areas of critical race theory, employment discrimination, criminal procedure, constitutional law and identity. He is editor of *Race Law Stories* (Foundation Press) (with Rachel Moran) and is working on a book on employment discrimination tentatively titled "Acting White" (Oxford University Press) (with Mitu Gulati). He is a former director of the Critical Race Studies Program at UCLA Law, a faculty associate of the Ralph J. Bunche Center for African American Studies, a board member of the African American Policy Forum and a James Town Fellow.



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Cheryl I. Harris is professor of law at UCLA School of Law where she teaches Constitutional Law, Civil Rights, Employment Discrimination, Critical Race Theory and Race Conscious Remedies.

A graduate of Wellesley College and Northwestern School of Law, Professor Harris began her teaching career in 1990 after working for one of Chicago's leading criminal defense firms and later serving as a senior legal advisor in the City Attorney's office as part of the reform administration of Mayor Harold Washington of Chicago. The interconnections between racial theory, civil rights practice, politics and human rights have been important to her work. She was a key organizer of several major conferences that helped establish a dialogue between U.S. legal scholars and South African lawyers during the development of South Africa's first democratic constitution.

Professor Harris is the author of groundbreaking scholarship in the field of Critical Race Theory, including the influential article, "Whiteness as Property" (*Harvard Law Review*). Her scholarship has also engaged the issue of how racial frames shape our understanding and interpretation of significant events like Hurricane Katrina. Most recently she has undertaken an examination of how race functions in officially colorblind terrain—a topic that inspired her most recent article, "The New Racial Preferences" (with Devon Carbado) (*California Law Review*).

Professor Harris has been active in leadership in the American Studies Association and the ACLU of Southern California and has served as a consultant to the MacArthur Foundation. She has been widely recognized as a groundbreaking teacher in the area of civil rights education.

THE NEW RACIAL PREFERENCES^[a]

Devon W. Carbado

Cheryl I. Harris^[b]

Introduction

Michigan's Proposal 2 and California's Proposition 209 both prohibit their state governments from discriminating or granting "preferential treatment ... on the basis of race." Both initiatives were aimed at eliminating state promulgated race-based affirmative action programs because for advocates of Proposal 2 and Proposition 209, affirmative action is the quintessential example of a preference on the basis of race; the policy benefits blacks and Latinos while burdening whites and, in some formulations, Asian Americans.

More generally, proponents of these initiatives argued that state policy should not be based on race at all but rather should embody the principles of colorblindness and race neutrality, concepts they deployed interchangeably to mean the non-utilization of race. This racial logic made both ballot initiatives the heirs of *Brown* and affirmative action policies the heirs of *Plessy*.

Drawing from our recent article in the *California Law Review* of the same title, this essay neither defends affirmative action—though we support the policy—nor critiques anti-affirmative action initiatives—though we oppose such measures. Instead, our project is to take Proposition 209 and Proposal 2 seriously by engaging in something of a thought experiment: What concretely does it mean to make institutional processes colorblind or race neutral? We explore this question in the context of school admissions policies, where selection procedures have been highly scrutinized and debated.

In addition to an evaluation of "objective" measures of academic achievement, such as standardized test scores and grade point averages, college and university admission requirements also include an assessment of letters of recommendation and personal statements. We are most interested in the personal statement, which plays a particularly important role in an applicant's file. Admissions officers read these statements to ascertain whether applicants can distinguish themselves and demonstrate that their potential contributions to the school extend beyond the applicants' numerical scores. Applicants, for their part, employ the personal statement as a way to quite literally inscribe themselves into and personalize the application. Because personal statements play such a critical role, it is important to consider: what do "anti-preference" mandates require with respect to personal statements?

Focusing on the personal statement, we will demonstrate that excising race from admissions is far from simple. Indeed, so long as the personal statement is part of the admissions process, implementing the colorblind imperative of Proposition 209 and Proposal 2 might not even be possible. There are at least three reasons to explain why. First, an applicant's file can contain not only direct or explicit racial

signifiers (e.g., “As a young Latina...”), they can also contain indirect or implicit racial signifiers (e.g., “My name is Maria Hernandez and I lived all my life in East Los Angeles...”). Because race can be embedded in an applicant’s name, geographical connections, and other non-race specific references, eliminating explicit and direct references to racial categories or racial group membership is not the same thing as eliminating race altogether.

Second, the fact that an admissions officer understands that she is not supposed to take race into account, does not mean that she is in a cognitive position to comply with that command. Studies in social psychology suggest that, notwithstanding efforts to ignore race, race will remain salient—an elephant in the mind. How this will impact her reading of any given file, is hard to know. The broader point is that preventing the explicit consideration of race is not the same thing as preventing any consideration of race.

Third, even assuming that an admissions file contains no racial markers whatsoever (i.e., no implicit or explicit racial signifiers), at least one line of research in social psychology provides a basis for concluding that an admissions officer’s default presumption will be that the applicant is white. To the extent that this is the case, race remains a part of the admissions process.

Significantly, our claim that likely race cannot be excised from the admissions process—and that elimination of the express consideration of race is not *the* elimination of race *tout court*—is only half of the story. As we will show, again drawing on the personal statement, the other crucial half of the story is that prohibiting explicit references to race in the context of admissions does not make admissions processes race neutral. On the contrary, this racial prohibition installs what we call a “new racial preference.” Taking the standard definition of “preferential” treatment to mean the “giving of priority or advantage to one person over ... others,” efforts to excise race from admissions processes can do just that. Consider first the applicant’s experience.

Colorblind admissions regimes that require applicants to exclude references to race in order to preclude institutions from considering them on the basis of race create an incentive for applicants to suppress their racial identity and to adopt the position that race does not matter in their lives. This incentive structure is likely to be particularly costly to applicants for whom race is a central part of their social experience and sense of identity. The life story of many people—particularly with regard to describing disadvantage—simply does not make sense without reference to race. Their lives may become unintelligible to admissions officials and unrecognizable to themselves.

Of course, how one presents oneself in the context of any admissions process is ultimately a question of choice: applicants can ultimately choose whether to make their racial identity essential or inessential, salient or insignificant. Our point is simply that a formally colorblind admissions process exerts significant pressures and incentives that constrain that choice and inhibit the very self-expression that the personal statement is intended to encourage. This is at least one sense in which,

in a colorblind admission process, applicants are neither similarly situated nor competing on a level field. The dissimilarity among applicants and the unevenness of the field is a function of the racial preference colorblind admissions regimes produce. This racial preference benefits applicants who (a) view their racial identity as irrelevant or inessential and (b) make no express mention of it in the application process. These applicants are advantaged *vis-à-vis* applicants for whom race is a fundamental part of their sense of self.

The racial preference of colorblind admission regimes is also discernible from the institutional side of the application process. Should an applicant describe herself in explicitly racial terms because her racial identity and experiences are an important part of who she is, she is disadvantaged in a colorblind admissions process in two ways. First, readers of admissions files who encounter a personal statement from an applicant who asserts her racial identity confront the dilemma of whether they can legitimately consider the statement as it stands, whether doing so would constitute “cheating,” or whether the statement can or should be racially cleansed. Whichever option is pursued, the reader must wrestle with whether and how this racial information can be processed. Because of uncertainty about the way racially marked information should be managed, the file risks being classified as problematic; files without explicit racial references do not pose such difficulties.

Secondly, to read the file in a “colorblind” way, the admissions officer would likely have to ignore highly relevant information, without which the applicant’s personal statement might literally not make sense. Candidates whose personal statements avoid references to race do not face these same risks. This is another sense in which colorblind admissions processes are tilted to prefer applicants who subordinate or suppress their race.

As should already be apparent, the new racial preference that formally race-free admissions processes create is not a preference for a racial category *per se*. Nor is this preference “on the basis of skin color,” which is how opponents of affirmative action characterize the policy. The new racial preference gives a priority or advantage to applicants who choose (or are perceived) to suppress their racial identity over those who do not (or are not perceived to) so choose.

One might think of this preference as a kind of racial viewpoint discrimination, analogous to the viewpoint distinction or preference that the First Amendment prohibits. Race is the “content” and colorblindness and racial consciousness are competing “viewpoints.” Just as the government’s regulation of speech must be content neutral and cannot be based upon the viewpoint expressed, a university’s regulation of admissions should be content neutral and should not burden or prefer applicants based upon the racial viewpoint their personal statements express.

To be clear, we are not employing “content” and “viewpoint” in their strict First Amendment sense. We employ them here as heuristics to make the point that racial viewpoints are expressed not only at the level of explicitly articulated ideas, but at the level of identity. In this respect, it bears mentioning that most people believe that race exists as a social relation, but they differ as to its meaning, its

social and legal significance, as well as how it should be expressed and embodied. They would agree that race has “content” (at least in the minimalist sense of racial categorization), but disagree about the “viewpoint” race should express.

Note that in the context of any given admissions pool, black students could be in the category of students for whom race is not an essential part of their identity and white students could be among the students for whom race is central to their self-definition. This is not to say that whites and non-whites are likely to be equally represented in both categories. The effects of the colorblind racial preference may well be racially disproportionate; that is, as an empirical matter, it could be that a greater proportion of racial minorities as compared to whites consider race to be a salient and constitutive part of who they are.¹ While this disparate impact issue is important, it is not the central focus of this Article. Our primary objective is to highlight the role the personal statement plays in the context of admissions to demonstrate that Proposition 209 and Proposal 2 neither eliminate race from admissions nor make admissions processes racially neutral. Both initiatives produce a new racial preference that has gone largely unnoticed.

To develop these arguments more fully we draw on the life experiences of two public figures as relayed in their autobiographies: Barack Obama, President of the United States and Clarence Thomas, a Supreme Court Justice.²

In Part I, we draw on these accounts to construct “personal statements” as if each subject were a hypothetical candidate to a selective college, university, or graduate program. Despite the profound differences in political alignments between these men, even regarding their views on the salience of race, it is clear that race plays an important role in each of their stories. We explore whether and to what extent these personal statements could be re-written without reference to race and remain intelligible as well as the burdens imposed in trying to do so. We also consider whether excising race in fact renders personal statements colorblind or race neutral. Part II examines these statements from the university’s perspective. Here we ask: can an admissions committee read race out of the personal statement and what are the consequences of doing so? Together, Parts I and II demonstrate the persistence of race even in formally race-free admissions regimes such as those that are implemented in response to Proposition 209 and Proposal 2. The question then becomes: Why do these regimes continue to have standing as colorblind and race-neutral processes? The full article from which this redacted version is drawn answers that question by describing and critiquing the theoretical foundation of the claim that “anti-preference” initiatives produce colorblindness and race neutrality. We note that a central problem lies in the conflation of the assertion that “race should not matter”—the normative, with the assertion that “race does not matter”—the empirical. We point out that there are myriad ways in which race continues to matter, even with respect to those like Clarence Thomas, who are strong proponents of colorblindness. Indeed, the fact of his racial identity and experiences is enlisted by him as well as others to legitimate the call for colorblindness. We also, in that article, endeavor to clarify the debate by introducing a new racial vocabulary to shift the terms upon which race-based policies are conceptualized and adjudicated. We then apply that new racial understanding to the admissions context. This essay does

not include those analyses. It focuses on the problems of attempting to excise race from the personal statement.

While the specific question can differ from school to school, the personal statement generally calls upon applicants to provide some personal narrative in which they state something unique about themselves. Others call on applicants to provide information regarding “disadvantage overcome.”

I. THE APPLICANT: Constructing the Personal Statement

In this section, we take autobiographical statements from President Barack Obama to construct a hypothetical personal statement. We do so for three principal reasons: (1) to identify the burdens imposed on applicants by “anti-preference initiatives” like Proposal 2 and Proposition 209 that are interpreted to require that applicants not include references to race in their personal statements, (2) to explain why racial erasure does not make the application process racially neutral, and (3) to illustrate some of the subtle but significant ways in which racial advantages and disadvantages can persist in formally race-free admissions environments. We begin with a “personal statement” based on Barack Obama’s *Dreams from My Father: A Story of Race and Inheritance*.

That my father looked nothing like the people around me—that he was black as pitch, my mother white as milk—barely registered in my mind.

A. *Dreams from My Father: Pieces of a Story of Race and Inheritance*

In fact, I can recall only one story that dealt explicitly with the subject of race According to the story, after long hours of study, my father had joined my grandfather and several other friends at a local Waikiki bar. Everyone was in a festive mood, eating and drinking to the sounds of a slack-key guitar, when a white man abruptly announced to the bartender, loudly for everyone to hear, that he shouldn’t have to drink good liquor “next to a nigger.” The room fell quiet and people turned to my father, expecting a fight. Instead, my father stood up, walked over to the man, smiled, and proceeded to lecture him about the folly of bigotry, the promise of the American dream, and the universal rights of man. “This fella felt so bad when Barack was finished,” Gramps would say, “that he reached into his pocket and gave Barack a hundred dollars on the spot.”

1) *The Personal Statement*

[Multiracial.] *“I am not black,” Joyce said. “I’m multiracial It’s not white people who are making me choose [one part of my identity]. Maybe it used to be that way, but now they are willing to treat me like a person. No—it’s black people who always have to make everything racial. They’re the ones making me choose.”*

They, they, they. That was the problem with people like Joyce. They talked about the richness of their multicultural heritage and it sounded real good, until you noticed that they avoided black people. It wasn’t a matter of conscious choice, necessarily, just a matter of gravitational pull, the way integration always worked, a one-way street. The minority assimilated into the dominant culture, not the other way around. Only white culture could be neutral and objective. Only white culture could be nonracial, willing to adopt the occasional exotic

into its ranks. Only white culture had individuals. And we, the half-breeds and the college-degreed, take a survey of the situation and think to ourselves, Why should we get lumped in with the losers if we don't have to? We become so grateful to lose ourselves in the crowd, America's happy, faceless marketplace; and we're never so outraged as when a cabbie drives past us or the woman in the elevator clutches her purse, not so much because we're bothered by the fact that such indignities are what less fortunate coloreds have to put up with every single day of their lives—although that's what we tell ourselves—but because we're wearing a Brooks Brothers suit and speak impeccable English and yet have somehow been mistaken for an ordinary nigger.

[Community organizing] In 1983, I decided to become a community organizer.... That's what I'll do. I'll organize black folks. At the grass roots. For change.... Wrote to every civil rights organization I could think of, to any black elected official in the country with a progressive agenda, to neighborhood councils and tenant rights groups. When no one wrote back, I wasn't discouraged. I decided to find more conventional work for a year, to pay off my student loans and maybe even save a little bit.

Eventually a consulting house to multinational corporations agreed to hire me as a research assistant.... As far as I could tell, I was the only black man in the company, a source of shame for me but a source of considerable pride for some of the company's secretarial pool. They treated me like a son, those black ladies; they told me how they expected me to run the company one day... [A]s the months passed, I felt the idea of becoming a community organizer slipping from me.... I turned in my resignation at the consulting firm and began looking in earnest for an organizing job... In six months I was broke, unemployed, eating soup from a can.

[Divided Soul?] When people don't know me well, black or white, discover my background (and it's usually a discovery, for I ceased to advertise my mother's race at the age of twelve or thirteen, when I began to suspect that by doing so I was ingratiating myself to whites), I see the spilt-second adjustments they have to make, the searching of my eyes for some telltale sign. They no longer know who I am. Privately, they guess at my troubled heart, I suppose—the mixed blood, the divided soul, the ghostly image of the tragic mulatto trapped between two worlds. And if I were to explain that no, the tragedy is not mine, at least not mine alone, it is yours, sons and daughters of Plymouth Rock and Ellis Island, it is yours ... well, I suspect that I sound incurably naive Or worse, I sound like I'm trying to hide from myself.

2) Does this Statement Violate the Mandate for Colorblindness?

Let's imagine that Barack Obama sat down and wrote the foregoing account as his personal statement for the law school application process. Assume that he believes that the above narrative best captures who he is as an individual and his normative commitments about family, community and nation.

Assume that Obama is interested in the University of California, Berkeley, School of Law as his second choice. He believes that the history of student activism at Berkeley suggests that the law school will be a good fit for a person who is interested in community organizing. However, he is concerned about Proposition 209 because since its implementation, the number of black law students at the law school has diminished. Indeed, in 1997, the very first year that Proposition 209 took effect, Berkeley Law enrolled only one black student. Although numbers at Berkeley Law have improved since then, they are not nearly as high as they were in the pre-209 days.³

Nor is Obama's concern just about how the demographics of a law school's student body might impact that school's institutional culture and environment, though this is certainly on his mind. Indeed, he has read Claude Steele's work on stereotype threat and its impact on groups like black students that are subject to negative societal stereotypes: According to Steele, black students tend to under-perform on academic assessments like high stakes tests because of a concern that their performance might confirm negative stereotypes about black intellectual inferiority. Obama queries whether this "threat in the air"⁴ might actually be heightened as a function of small black enrollments. But, again, his worries do not end here. He is deeply concerned about the application itself. His questions, specifically, are these: Does the fact that his personal statement is explicitly racialized violate Proposition 209? Should he strike all references of race from his personal statement? Would any reference to race in his background violate the norm of colorblindness that Proposition 209 purportedly instantiates?

Obama searches Berkeley Law's admissions materials for an answer to this question. The admissions policies state simply that "[r]ace ... [is] not used as a criterion for admission." On the other hand, there is no clear direction in the admissions material that prohibits any mention of race. Indeed, the school invites applicants to relate how they may have overcome disadvantage including "a personal or family history of cultural, educational, or socioeconomic disadvantage." Shouldn't this include racial disadvantage? Or would even these racial references be impermissible?

There are a number of options available to Obama. He could decide not to apply to Berkeley Law. He could believe that doing so would require him to suppress an important sense of himself: his racial identity and experiences. But let's suppose that Obama decides to apply. He queries: "What if I simply removed all references of race from my personal statement? Presumably that would satisfy Proposition 209's investment in colorblindness." He then proceeds to do precisely that, producing the personal statement below.

That my father looked nothing like the people around me ~~that he was black as~~ pitch, my mother white as milk barely registered in my mind.

REDACTED
STATEMENT

In fact, I can recall only one story that dealt explicitly with the subject of race ... According to the story, after long hours of study, my father had joined my grandfather and several other friends at a local Waikiki bar. Everyone was in a festive mood, eating and drinking to the sounds of a slack-key guitar, when a

white man abruptly announced to the bartender, loudly for everyone to hear, that he shouldn't have to drink good liquor "~~next to a nigger.~~" next to my father. The room fell quiet and people turned to my father, expecting a fight. Instead, my father stood up, walked over to the man, smiled, and proceeded to lecture him about ~~the folly of bigotry,~~ the promise of the American dream, and the universal rights of man. "This fella felt so bad when Barack was finished," Gramps would say, "that he reached into his pocket and gave Barack a hundred dollars on the spot."

[Multiracial.] "I am not black," Joyce said. "I'm multiracial It's not white people who are making me choose [one part of my identity]. Maybe it used to be that way, but now they are willing to treat me like a person. No it's black people who always have to make everything racial. They're the ones making me choose."

They, they, they. That was the problem with people like Joyce. They talked about the richness of their multicultural heritage and it sounded real good, until you noticed that they avoided black people. It wasn't a matter of conscious choice, necessarily, just a matter of gravitational pull, the way integration always worked, a one-way street. ~~The minority assimilated into the dominant culture, not the other way around. Only white culture could be neutral and objective. Only white culture could be nonracial, willing to adopt the occasional exotic into its ranks. Only white culture had individuals.~~ And we, the half-breeds and the college-degreed, take a survey of the situation and think to ourselves, Why should we get lumped in with the losers if we don't have to? We become so grateful to lose ourselves in the crowd, America's happy, faceless marketplace; and we're never so outraged as when a cabbie drives past us or the woman in the elevator clutches her purse, not so much because we're bothered by the fact that such indignities are what less fortunate people ~~coloreds~~ have to put up with every single day of their lives—although that's what we tell ourselves—but because we're wearing a Brooks Brothers suit and speak impeccable English and yet have somehow been mistaken for an ordinary person ~~nigger~~.

[Community organizing] In 1983, I decided to become a community organizer.... That's what I'll do. I'll organize ~~black folks~~ people. At the grass roots. For change. ... Wrote to every civil rights organization I could think of, to any ~~black~~ elected official in the country with a progressive agenda, to neighborhood councils and tenant rights groups. When no one wrote back, I wasn't discouraged. I decided to find more conventional work for a year, to pay off my student loans and maybe even save a little bit.

Eventually a consulting house to multinational corporations agreed to hire me as a research assistant.... As far as I could tell, I was the only ~~black~~ man in the company, a source of shame for me but a source of considerable pride for some of the company's secretarial pool. They treated me like a son, those ~~black~~ ladies; they told me how they expected me to run the company one day.... [A]s the months passed, I felt the idea of becoming a community organizer slipping from me ... I turned in my resignation at the consulting firm and began looking in earnest for an organizing job.... In six months I was broke, unemployed, eating soup from a can.

[Divided Soul?] *When people don't know me well, ~~black or white~~, discover my background (and it's usually a discovery, for I ceased to advertise my mother's identity ~~race~~ at the age of twelve or thirteen, when I began to suspect that by doing so I was ingratiating myself to whites), I see the spilt-second adjustments they have to make, the searching of my eyes for some telltale sign. They no longer know who I am. Privately, they guess at my troubled heart, I suppose ~~the mixed blood~~, the divided soul, the ghostly image of the tragic ~~mulatto~~ person trapped between two worlds. And if I were to explain that no, the tragedy is not mine, at least not mine alone, it is yours, sons and daughters of Plymouth Rock and Ellis Island, it is yours ... well, I suspect that I sound incurably naive Or worse, I sound like I'm trying to hide from myself.*

Upon examining the statement, Obama notes that even if he endeavors to eliminate only explicit references to race, the statement sounds completely unlike his actual experience. Simply excising specific references to his race or the race of his parents renders his life story unintelligible. For example, deleting explicit references to race changes the statement “As far as I could tell, I was the only black man in the company” to “As far as I could tell, I was the only man in the company,” which is simply inaccurate. The story about his father sounds like just another barroom brawl; the references to interracial marriage are incomprehensible. In the absence of any reference to Obama’s race, his reluctance to speak about his mother to others and his sense that people speculate about his tragically divided soul read like symptoms of mental imbalance or paranoia. Obama could of course eliminate these passages and substitute others. But this alternative also presents problems. Exactly what constitutes a racial reference? Subtle references to knowledge about particular practices (like multiracial identity) also betray a racial basis of knowledge that can be a proxy for a person’s racial identity.

Obama decides to revisit the question of whether he can transcribe his life in non-racial terms, not by editing what he has already written or by substituting race with some other social category, but by starting again from scratch. After extending several hours on this project, he can’t seem to come up with a meaningful account of his life without referencing race. In a state of identity fatigue, he decides, at least for the moment, to suspend his application to Berkeley Law.

The foregoing hypothetical suggests that applicants who wish to make race salient—what we call “race-positive applicants”—face a number of burdens. First, [e]ven after learning that the admissions policies provide that race cannot be considered in the process, it is not altogether clear precisely what that means. Does this prohibit any mention of race, or simply that race *qua* race cannot be taken into account as a plus on behalf of the applicant? The uncertainty about the racial restrictions that anti-preference regimes impose on applicants could compel the expenditure of extra time and ultimately extra effort. Applicants for whom race is not a salient aspect of their identity, “race-negative applicants,” do not have to perform this extra work.⁵ Second, race-positive applicants have to struggle with whether they can represent themselves without reference to their race, or even if they elect to include race-specific information, to evaluate how much information will be seen as “going too far,” and hence become counter-productive. Just thinking about this is work,

3) *The Costs of Restricting Race*

particularly in the context of a broader concern about making oneself competitive in an extremely competitive process. Time and energy spent thinking about how to present one's racial identity could be re-allocated to other parts of the application process, which even absent these questions is demanding.

Third, should race positive applicants believe that too many references to race will be seen as an inappropriate effort to solicit prohibited racial consideration, there is the work of actually rewriting the personal statement. In a world where there are both affirmative action and non-affirmative action law schools, race-positive prospective law students likely will be applying to both. This may require that an applicant rewrite his personal statement to satisfy what he perceives to be the dictates of Proposition 209. Assuming an applicant believes he can do this, it entails serious intellectual and emotional work—work that colorblind admissions processes do not require of race-negative applicants.

Fourth, if a race-positive applicant determines that he is not able to re-imagine himself in colorblind terms, and therefore decides not to apply to a non-affirmative action law school, (a) his access to legal education (and quite possibly his options in the legal profession) has been diminished, and (b) he must accept the notion that there is something about his racial experiences and sense of identity that is negative. More than that, he must accept that within anti-preference and ostensibly colorblind institutional settings, his race conscious identity is quasi-illegal—something that must remain undocumented.

Fifth, if the race-positive applicant finds that he is able to re-inscribe himself in race-neutral terms, and is ultimately accepted to a law school that does not practice affirmative action, he will likely wonder whether that law school will expect him to embody his race-neutrality in his everyday interactions and overall identity as a law student. Moreover, he might worry that, at such a law school, most if not all of the non-white law students will be race-neutral, which would diminish his ability to form at least some identity-specific communities.

Any one of the foregoing costs is meaningful. Cumulatively, they are substantial. While we are not making an empirical argument, there is at least strong theoretical basis for thinking that the costs we enumerate above are real. Although these costs are likely to disproportionately affect people of color, there are race-positive white people who would experience these costs as well. To make this point more concrete, our un-redacted article constructs a personal statement for Dalton Conley based on his book, *Honky*.⁶

II. THE
INSTITUTION:
*Reading the
Personal
Statement*

Thus far, we have focused on how applicants might respond to the requirement of colorblindness in Proposition 209 and Proposal 2. We now shift the discussion from individuals to institutions. Here, we ask: How do non-affirmative action colleges and universities operationalize the mandate of anti-preference initiatives? What, concretely, does it mean to not take race into account when deciding which applicants to admit? To answer this question we draw on the life and jurisprudence of Supreme Court Justice Clarence Thomas. Our aim is to show that

while Thomas has extolled the value of colorblindness, his own life story reveals why, in the context of admissions, compelling a colorblind approach is both impracticable and normatively unsatisfying.

Justice Thomas has been a vocal critic of [race-conscious] remedies on the ground that they violate the legal and moral mandate of colorblindness.⁷ What distinguishes his opinions from those of other justices who share his views, such as Justice Antonin Scalia, is that Justice Thomas frequently invokes black cultural references or adopts a specifically black subject position.⁸

*A. Against Race?
Justice Thomas's
Affirmative Action
Jurisprudence*

In his concurring opinions his citations to Frederick Douglass and W.E.B. DuBois,⁹ along with other specific claims about the importance of historically black colleges and universities—indeed, the reference to black schools as “our schools”¹⁰—unequivocally mark him as black. It is from this racially specific position that he argues that the Constitution compels colorblindness.

While Thomas vehemently eschews government policies like affirmative action that rely upon or take cognizance of race, even if those policies seek to enhance equality, his autobiography explicitly articulates the role race played in shaping his life experiences and achievements. Of course, to say that one is opposed to the state engaging in practices that rely upon race and yet assert a specific racial identity as an individual is not inherently contradictory. Yet in Thomas, the repeated assertion of racial identity belies any notion that he sees himself as a person for whom race was irrelevant, despite his conservative commitments. In his autobiography, *My Grandfather's Son*, he relates the story of his beginnings in rural Georgia in the late 1940s and his experience as one of only a handful of blacks attending schools with whites in the early days of desegregation. It is a story of poverty, perseverance—and race.

Imagine that Clarence Thomas has applied to the University of Michigan Law School and that he offers the personal statement below in support of his candidacy.

*B. Pieces of
My Life as My
Grandfather's Son*

I am descended from the West African slaves who lived on the barrier islands and in the low country of Georgia, South Carolina, and coastal northern Florida. In Georgia my people were called Geechees, in South Carolina, Gullahs. They were isolated from the rest of the population, black and white alike, and so maintained their distinctive dialect and culture well into the twentieth century. What little remains of Geechee life is now celebrated by scholars of black folklore, but when I was a boy, “Geechee” was a derogatory term for Georgians who had profoundly Negroid features and spoke with a foreign-sounding accent similar to the dialects heard on certain Caribbean islands ... Pinpoint [where I was born] is a heavily wooded twenty-five acre peninsula on Shipyard Creek, a tidal salt creek ten miles southeast of Savannah. A shady quiet enclave full of pines, palms, live oaks, and low-hanging Spanish moss, it feels cut off from the rest of the world and it was even more isolated in the fifties than it is today. Then as now, Pinpoint

*1) The Personal
Statement*

was too small to properly be called a town. No more than a hundred people lived there, most of whom were related to me in one way or another. Their lives were a daily struggle for the barest of essentials, food, clothing and shelter. Doctors were few and far between, so when you got sick, you stayed that way, and often you died of it. The house in which I was born was a shanty with no bathroom and no electricity except for a single light in the living room. Kerosene lamps lit the rest of the house.

[After I began school, the house where my family and I lived was destroyed in a fire started accidentally by my cousins.] After that [my mother] took my brother and me to Savannah, where she was keeping house for a man who drove a potato-chip delivery truck. We moved into her one-room apartment on the second floor of a tenement on the west side of town.... Overnight I moved from the comparative safety and cleanliness of rural poverty to the foulest kind of urban squalor. The only running water in our building was downstairs in the kitchen ... The toilet was outdoors in the muddy backyard.... I'll never forget the sickening stench of the raw sewage that seeped and sometimes poured from the broken sewer line.

[After that winter, my mother decided to send my brother and me to live with our grandparents.] The main reason must have been that she simply couldn't take care of two energetic young boys while holding down a full-time job that paid only ten dollars a week.... Since she refused to go on welfare, she needed some kind of help, and I suspect that my grandfather told her that we would either live with him permanently or not at all.

The family farm and our unheated oil truck became my most important classrooms, the schools in which Daddy passed on the wisdom he had acquired in the course of a long life as an ill-educated, modestly successful black man in the Deep South. Despite the hardships he had faced, there was no bitterness or self-pity in his heart. As for bad luck, he didn't believe in it. Instead he put his faith in his own unaided effort—the one factor in his life he could control—and he taught Myers and me to do the same. Unable to do anything about the racial bigotry and lack of education that had narrowed his own horizons, he put his hope for the future in “my two boys,” as he always called us. We were his second chance to live, to take part in America's opportunities, and he was willing to sacrifice his own comfort so that they would be fully open to us.

2) What's Race Got to Do With It?

Imagine that a dean of admissions at the University of Michigan Law School, Michelle Philips, picks up Thomas's file as one of many that she will read as part of the admissions process. She instantly encounters the way in which race is prominently noted in Thomas's personal statement and worries that this might create a problem in light of Proposal 2. Given that Proposal 2 is a very recent legal mandate, she has virtually no institutional memory to draw upon. After reading Thomas's file several times, she explores four approaches, none of which is satisfying.

*a) Literally
Removing All
References to Race*

Philips could begin by striking all references of race from the personal statement. Imagine that she endeavors to do just that. There is no question in Philips's mind about whether the terms "black" and "white" should be stricken; thus, she is comfortable removing both. However, she is not at all clear about whether non-consideration of race requires her to strike a number of other terms, among them: "Caribbean," "slave," "Geechees," and "segregation." She worries that race might be embedded in each term, even as none of them explicitly signifies a particular racial identity. Moreover, somewhat familiar with recent studies in social psychology, she knows that striking this information from the file will not erase Thomas's racial identity from her mind or the minds of other reviewers.¹² Her efforts to suppress what she already knows—that Thomas is black—likely will be ineffective.

Philips then considers excising references to race from Thomas's statement and then passing his file on to another reader. Perhaps another reader—one without her personal knowledge of Thomas's original racially infused statement—would be able to read Thomas's file in a "race-free" manner. However, she worries that her editing will not prevent another reader from reading race into Thomas's statement because it is likely that in the absence of explicit non-white racial references, her colleagues will presume that Thomas is white. This presumption is not illogical since empirically, the majority of applicants to graduate school are white. But even beyond that fact, a line of research in social psychology suggests that in the absence of an indication that a person is not white, the default presumption is that the person is white.¹³ Philips is troubled by this. She is now not at all sure that Thomas's file can be race neutrally read. She comes to realize that, if Thomas's statement is considered as written, he is racially marked as black, while if it is successfully purged, he is presumptively white. Under neither condition is the process truly race free. In both scenarios Thomas is explicitly or implicitly racially marked. Stumped by this, Philips decides to adopt another approach.

*b) Imagining That
Clarence Thomas
is White*

Philips is aware that, in the context of admissions, colorblindness is sometimes formulated in terms of whether whites and non-whites are treated the same. To ensure that no unfair consideration is given to Thomas because he is black, one might ask the counterfactual question: would the applicant have been admitted if she were white? Philips tries to operationalize this standard with respect to Thomas's personal statement. To do so, she treats the statement as if a white person had written it. Upon doing so, she quickly realizes two things. First, significant parts of Thomas's story are incomprehensible from the racial subjectivity of a white person. Consider Thomas's statement of his origins: "I am descended from the West African slaves who lived on the barrier islands and in the low country of Georgia, South Carolina, and coastal northern Florida." Here, the statement makes little sense if Philips imagines Thomas as a white person: Indeed, it renders much of the statement unintelligible.

Philips's other reaction to this identity-switching approach is that it might not be race-neutral or colorblind at all. Reading Thomas's statement as though he were white simply substitutes one racial identity frame (white) for another (black).

c) *Evaluate the Quality of the Writing—Not the Experience*

Another way Philips might try to process Thomas's personal statement is to read his story for its prose, not its content—for its form, not its substance. But there are several problems with this approach.

First, to the extent that Philips is not evaluating other personal statements in this way, she is treating Thomas differently; for some, that alone might be cause for concern, particularly if the difference in treatment is framed as a process failure. Second, this different treatment substantively disadvantages Thomas. This is because personal statements are read primarily as a window on the applicant's character, experiences and aspirations. They are read primarily (though not entirely) for substance, not form. Third, such an approach would systematically disadvantage race-positive applicants. Because it is reasonable to assume that non-whites are more likely to have a race-positive sense of identity than whites, reading personal statements for prose could have a disparate impact that would be far from race neutral.¹⁴

d) *No Race-Neutral Way Out: Risk, Anger, or Indecision*

Because of the difficulties of each of the foregoing approaches, Philips ends up feeling rather flustered about Thomas's file. What exactly is she to do? On the one hand, she could argue that there is an important difference between considering race as a plus factor in making a decision about whether to admit Thomas—that is, considering Thomas's black racial identity—and considering Thomas's life under pervasive racial segregation—that is, considering Thomas's black racial experiences. Proposal 2 arguably only prohibits the former, not the latter.¹⁵ However, she notes that advocates of Proposal 2, like Ward Connerly, contend that any mention of race anywhere in the application invites a violation of the law, and that applicants whose files reflect any racial information should be denied admission.¹⁶ While empathic to Thomas's application, Philips may worry that any decision on his behalf will be subject to particular scrutiny and may invite litigation.

She may even feel angry about the fact that Thomas has put her in this position. Surely, given the language of the application for admissions, he knows that Proposal 2 forbids the school from taking race into account in the context of admissions? Why, then, would he write a statement that is so explicitly racially infused? Is he hoping that the school will cheat or put more bluntly, violate the law? Is he providing a means by which the school might do so? Was he simply too lazy to spend the time to write a race-neutral application?¹⁷ Or is he too racially invested to conceive of himself outside of race?¹⁸

Assuming that Philips is not angered or annoyed by Thomas's application, Philips might be inclined to categorize this file as a "hold"—a file that is difficult to process—leading Philips to take no decision as she tries to sort through whether or how to consider Thomas's statement. Thomas's file has now been placed in an ambiguous status and possibly in a negative light all because race is salient to his self-perception. Thomas's file would not raise any of these questions if race did not figure explicitly in his personal statement.

Many schools invite applicants to relate aspects of their background including a personal or family history or cultural, educational or socioeconomic disadvantage. In Thomas's case, that history of disadvantage is also racial. Without reference to race, Thomas's story would be both incomplete and incomprehensible. The difficult position Thomas finds himself in here exposes the problem of formally removing race from an admissions process against a social backdrop in which race both matters and is cognizable.

Our project in this essay was to reveal how the ideology of colorblindness obscures the racial consciousness of “anti-preference” initiatives like Proposition 209 and Proposal 2.

CONCLUSION

One explanation for this obfuscation is the presumed alignment between colorblindness and race neutrality on the one hand, and race and color consciousness and racial preference on the other. In the full article we expose and challenge this alignment by arguing, among other things, that, with respect to admissions, “anti-preference regimes” produce racial preferences whereas race consciousness—which includes but is not exhaustive by affirmative action—can get us closer to race neutrality by leveling the admissions playing field.

In terms of the personal statement, not formally removing race from an applicant's narrative preserves the individual's prerogative to assert (or not assert) what meaning race holds in her life. This is not a preference but rather a fair and open process that permits colleges and universities to take account of something that has been constitutive of an applicant's life and experiences: race. Applicants remain free to racially inscribe themselves in any way they see fit—or not at all.

Both Thomas's and Obama's narrative—in their rich *racial* detail—is an important window on the lives and accomplishments of both men. Their respective narratives suggest that each individual would make a vital contribution to colleges or universities, which, after all, are venues for diverse ideas, perspectives and experiences.¹⁹ These benefits, and the stories themselves, are potentially lost if Proposition 209 and Proposal 2 are read to preclude the articulation and consideration of race in the admissions process. And new burdens are “gained.”

Proponents of Proposition 209 and Proposal 2 would likely agree with the claim that the state should not force the individual to racially define herself in any particular way. They would also likely agree with the idea that people should have the right to freedom of racial expression, and that the state should not coerce people into occupying particular racial subject positions. Yet “anti-preference” initiatives are being interpreted to do just that—that is, to force individuals to be silent about their racial identity and experiences, a silence that implicitly expresses the idea that race does not matter. Applicants who break that silence and explicitly inscribe themselves and their experiences in racial terms are disadvantaged.

We think that the implications for this insight potentially extend beyond the structure and consideration of the personal statement. For example, one can easily

apply the analysis to the context of the workplace. In that domain as well, the colorblind imperative coerces individuals to downplay if not completely suppress their racial identity.²⁰ And certainly our analysis is applicable to the political arena, as demonstrated by the discussions that raised the question of whether Barack Obama could afford to be “too black” from the perspective of white people.

Both of the foregoing examples make clear that racial identity can be expressed in different ways and that some expressions are more racially palatable than others. While Barack Obama cannot express himself “out of” the social category of blackness, he can express himself as less racially black. Some voters expected him to do just that. Proponents of Proposition 209 and Proposal 2 would have him do more—to not express himself as black at all, and to racially cleanse himself in the context of his personal statement. Imposing this new racial preference is tantamount to asking Barack Obama to “pass.” The state should not be permitted to do so—and certainly not under the legitimizing guise and false pretense of colorblindness and race neutrality.

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[b] Professors of Law, UCLA School of Law. For discussions about or feedback on this Article, we thank Kimberlé Crenshaw, Carole Goldberg, Jerry Kang, Mitu Gulati, Luke Harris, Russell Robinson, and Michael Schill. Laura Wirth, Emily Wood, Jordan Blair Woods, Nina Farnia, and Hentyle Yapp provided invaluable research assistance. We are indebted to as always to the research staff of the law library, including Cheryl Kelly Fischer. For their insight into the *Cantrell* litigation, we thank Mark Rosenbaum and Catherine Lhamon from the ACLU of Southern California, and Anurima Bhargawa of the NAACP-LDF. We also thank Angela Onwuachi-Willig for inviting us to participate in this symposium. Finally, we thank the editors of the *California Law Review* for their patience and for the care with which they engaged our ideas.

¹ See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1127 (2008) (“While many whites view race-consciousness as an evil that must be strenuously avoided, blacks tend to see race-consciousness as critical to their survival in white-dominated realms.”); *id.* at 1124 (“Whites tend to think about race less often than blacks because they have fewer incentives to be race-conscious”); see also, Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness & the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 953 (“Advocating race consciousness is unthinkable for most white liberals. We define our position on the continuum of racism by the degree of our commitment to colorblindness; the more certain we are that race is never relevant to any assessment of an individual’s abilities or achievements, the more certain we are that we have overcome racism as we conceive of it.”).

This is sometimes supported via questionnaires in which people are asked to self describe; typically, people of color mention race very early in their self-definition. Whites, as a general matter, do not. See Ray Friedman & Martin N. Davidson, *The Black-White Gap in Perceptions of Discrimination: Its Causes and Consequences*, in RESEARCH ON NEGOTIATION IN ORGANIZATIONS 203, 213 (R. Bies et al. eds., 1999) (discussing surveys showing that blacks are more likely than whites to cite race as a key aspect of personal identity).

² The full article also includes constructed personal statements based on autobiographical accounts written by Dalton Conley, a white male sociologist, and Margaret Montoya, a Chicana law professor.

³ A similar pattern emerged at UCLA School of Law. In the entering class in 1999 there were two black students; the following year there were five. Like Berkeley the number of black students has risen slightly, ranging between eight and fifteen in recent years. See Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. Rev. 1215, 1236 app.A (2002).

⁴ See Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997).

⁵ Note that race-positive does not mean that the applicant has a positive view about race. It simply means that race shapes that applicant's sense of herself. Likewise, race-negative does not mean that the applicant has negative views about race. It simply means that the applicant does not believe that race figures meaningfully in her life.

⁶ Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1164-68 nn.79-96 and accompanying text (2008) (citing DALTON CONLEY, HONKY (2000)).

⁷ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (Thomas, J., concurring in part and dissenting in part) (“[T]hat these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.”).

⁸ One of the authors has been exploring the extent to which Thomas’s jurisprudence draws upon and invokes black cultural, historical and political references. See Cheryl I. Harris, *Doubting Thomas and the Anti-Identity Identity* (draft manuscript on file with authors); see also Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005); Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113 (2005).

⁹ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 349-50 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting Frederick Douglass’s speech that was delivered to a group of abolitionists); *United States v. Fordice*, 505 U.S. 717, 745 (1992) (Thomas, J., concurring) (quoting W.E.B. DuBois’s work).

¹⁰ See *Fordice*, 505 U.S. at 745 (Thomas, J., concurring) (quoting W.E.B. DuBois).

¹¹ In so doing Phillips might be emulating the efforts of Ward Connerly in California to erase the box indicating race from the application in order to avoid using the information in making admissions decisions. See JOHN AUBREY DOUGLASS, *THE CONDITIONS FOR ADMISSION: ACCESS, EQUITY AND THE SOCIAL CONTRACT OF PUBLIC UNIVERSITIES* 205 (2007) (noting university administrators’ resistance to Connerly’s proposal on the grounds that it eliminated needed data on the effects of admissions changes, and ultimate compromise in which the data was electronically erased from the applications before they were read by admissions staff).

¹² See Daniel M. Wegner, David J. Schneider, Samuel R. Carter III, & Teri L. White, *Paradoxical Effects of Thought Suppression*, 53 J. PERSONALITY & SOC. PSYCHOL. 5, 6 (1987) (“Whether people are instructed to ignore the information before they encounter it ... or are told to disregard it afterwards ..., they tend to incorporate it into subsequent judgments nonetheless.”); Anthony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 211 n.286

(2005) (citing Wegner for the proposition that “it is notoriously difficult for people to consciously avoid thoughts”).

¹³ This presumption derives from the fact that white identity is normative, or put another way, whiteness “goes without saying.” See Felicia Pratto et al., *When Race and Gender Go Without Saying*, 25 SOC. COGNITION 221, 223 (2007) (“White Americans generally presume that being White and male is normative.”); see also Steven Stroessner, *Social Categorization by Race or Sex: Effects of Perceived Non-Normalcy on Response Times*, 14 SOC. COGNITION 247, 248-249 (1996) (noting that particular category memberships such as white in American society are perceived as more “normal” than being Black due to the prominence of whites in media representations, the historical dominance of whites over Blacks, and the fewer number of Blacks than whites). Thus, when a racial identity is unspecified the “cultural expectation” is that the person is white. See Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 449 (2005) (“In Western cultures, White racial identity and male gender are treated as cultural expectations. Evidence for this ‘White male norm’ hypothesis comes from experiments showing that membership in nonnormative groups receives greater attention than membership in normative groups because of its incongruence.”).

¹⁴ See *supra* note 1 and accompanying text (discussing research supporting the idea that blacks more so than whites see race as a central part of their identity). It is precisely the notion that a policy that is neutral on its face but that disparately impacts a particular group is not race neutral that helps to explain the broad literature criticizing the intent standard articulated in *Washington v. Davis*, 426 U.S. 229 (1976). See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection; Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); see also Alan David Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (explaining the perpetrator perspective similarly criticizing intent).

¹⁵ The question of whether there is a difference between considering race and considering racial experience surfaced recently in *Coalition To Defend Affirmative Action v. Regents of the University of Michigan*, 539 F. Supp. 2d 924 (E.D. Mich. 2008), where plaintiffs challenged Proposal 2 as unconstitutional. The plaintiffs argued that because race is an important part of how minority students choose to define themselves, state universities cannot delete race and selectively deny applicants the opportunity to have central aspects of their identity considered; this creates an impermissible distinction based on race in violation of the Fourteenth Amendment. See Memorandum of Law in Support of the Cantrell Plaintiffs’ Motion for Summary Judgment, *Coal. To Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924 (E.D. Mich. 2008) (Nos. 06-15024, 06-15637), 2007 WL 4595210. In response, supporters of Proposal 2 countered that while there might be a distinction “between considering race as a per se plus factor in allocating admissions and financial aid” which would be proscribed by Proposal 2 and permitting consideration of “an applicants’ unique experiences that might have racial overtones,” “any such distinction whether valid or not in principle, as highly tenuous in practice, and therefore does not dispute the Cantrell Plaintiffs’ implied assumption that

Proposal 2's prohibition of 'preferential treatment' on the basis of race prevents the Universities from deliberately providing a forum, in their application process, for applicants ... to highlight their 'racial identity' to sympathetic reviewers." See Defendant-Intervenor Eric Russell's Memorandum in Opposition to the Cantrell Plaintiffs' Motion for Summary Judgment at *7 n.3, *Coal. To Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924 (E.D. Mich. 2008) (Nos. 06-15024, 06-15637), 2008 WL 2155059. The advocates for Proposal 2 contend that the University of Michigan has in fact improperly provided such a forum in that the University of Michigan's Application for Undergraduate Admission:

"def[ies] Proposal 2 and direct[s] all undergraduate applicants to '[c]omment on how your personal experiences and achievements would contribute to the diversity of the University of Michigan.' In light of [the President's] speech, it is difficult to view this mandatory essay without cynicism, indeed, as a calculated ploy to encourage minority applicants to publish racial information, otherwise forbidden by law, to a sympathetic admissions committee."

The Cantrell plaintiff's claims were ultimately rejected and the case was dismissed. *Coalition To Defend Affirmative Action*, 539 F. Supp. 2d at 960.

¹⁶ See Seema Mehta, *UCLA Accused of Illegal Admissions Practices*, L.A. TIMES, Aug. 30, 2008, at B1, available at <http://www.latimes.com/news/local/la-me-ucla30-2008aug30,0,6489043.story> (quoting Connerly to the effect that any applicant who mentions race in their personal statement should be rejected.) In the context of Proposition 209 similar allegations have been made regarding admissions to California's state law schools. See Richard Sander, *Colleges Will Just Disguise Quotas*, L.A. TIMES, June 30, 2003 (asserting that Berkeley Law evaded the law in the wake of Proposition 209 and that UCLA School of Law was engaged in different but equally problematic "rigging of their admissions systems").

¹⁷ Philips could form this conclusion because of stereotypes about blacks as having a poor work ethic. See, e.g., Timothy Brezina & Kenisha Winder, *Economic Disadvantage, Status Generalization, and Negative Racial Stereotyping by White Americans*, 66 SOC. PSYCH. Q. 402 (2003); Kathryn M. Neckerman & Joleen Kirschenman, *Hiring Strategies, Racial Bias, and Inner-City Workers*, 38 SOC. PROBS. 433, 440 (1991) ("Employers were especially likely to say that inner-city blacks lacked the work ethic, had a bad attitude toward work, and were unreliable; they also expected them to lack skills, especially basic skills. About half said that these workers had a poor work ethic."). This is not to say that Philips would be consciously thinking that blacks are lazy. Instead, she could be drawing on implicit biases. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1494 (2005) ("[R]esearch demonstrates that most of us have implicit biases in the form of negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities. These implicit biases, however, are not well reflected in explicit self-reported measures. This dissociation arises not solely because we try to sound more politically correct. Even when we are honest, we simply lack introspective insight."); see also Robinson, *supra* note 1.

¹⁸ Some suggest that blacks are overly focused on race. *See, e.g.*, FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 295 (1996) (“[W]hites complain that blacks are too race conscious”); *see also* Robinson, *supra* note 1 at 1117-1126 (discussing the differences between attentiveness to race and the disparity of incentives to attend to and perceive racial discrimination between blacks and whites); GEORGE YANCEY, WHO IS WHITE? LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE 100-04, 182-86 & tbl.A (in response to questions whether there was too much talk about race, very few black respondents agreed while most whites thought it was true). Sometimes, this idea is expressed via the claim that blacks all too often “play the race card.” *See, e.g.*, Kimberle Crenshaw, *Playing Race Cards: Constructing a Pro-active Defense of Affirmative Action*, 16 NAT’L BLACK L.J. 196 (1999); *see also* Robinson, *supra* note 1, at 1101.

¹⁹ *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (“ In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: ‘The freedom of a university to make its own judgments as to education includes the selection of its student body.’ From this premise, Justice Powell reasoned that by claiming ‘the right to select those students who will contribute the most to the “robust exchange of ideas,”’ a university ‘seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission.’ Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that ‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’”) (citations omitted).

²⁰ *See generally* Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645 (2004).



Hiroshi Motomura

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Hiroshi Motomura is an influential scholar and teacher of immigration and citizenship law. He is a co-author of two immigration-related casebooks: *Immigration and Citizenship: Process and Policy* (now in its sixth edition), and *Forced Migration: Law and Policy*, published in 2007. His book, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States*, published in 2006 by Oxford University Press, won the Professional and Scholarly Publishing Award from the Association of American Publishers as the year's best book in Law and Legal Studies, and was chosen by the U.S. Department of State for its Suggested Reading List for Foreign Service Officers. In addition, Professor Motomura has published many significant articles and essays on immigration and citizenship. He has testified as an immigration expert in the U.S. Congress, has served as co-counsel or a volunteer consultant in several cases in the U.S. Supreme Court and the federal appeals courts, has been a member of the American Bar Association's Commission on Immigration and is a co-founder and current director of the Rocky Mountain Immigrant Advocacy Network (RMIAN). In the fall of 2008, he was appointed as an advisor to the Obama-Biden Transition Team's Working Group on Immigration Policy.

IMMIGRATION OUTSIDE THE LAW*

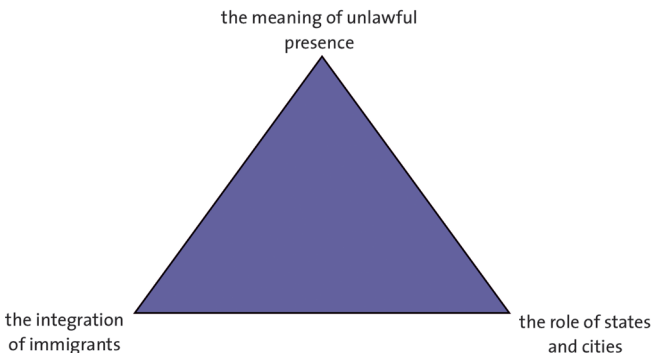
Hiroshi Motomura**

How do we think about immigration outside the law? Why are some disagreements so deep and some voices so vehement, while many reasonable minds remain ambivalent and uncertain? What will durable, politically viable solutions require? I offer answers to these questions by drawing a conceptual roadmap of this terrain. As a framework for constructive disagreement, accurate topography is the essential first step.

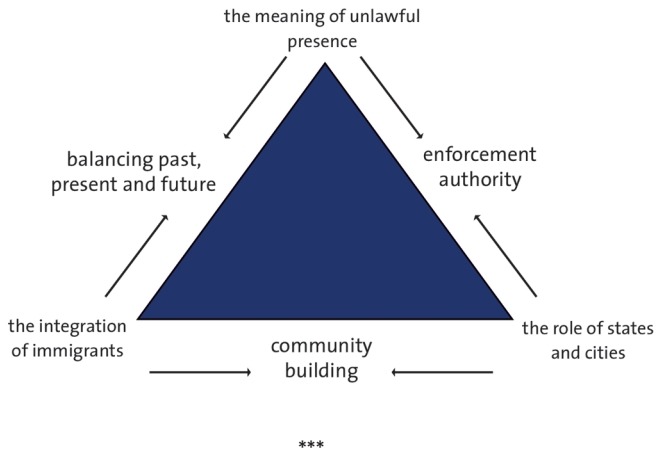
I. THREE THEMES IN *PLYLER*

I start with *Plyler v. Doe*,¹ a 1982 U.S. Supreme Court decision. In 1975, Texas allowed its public schools to bar any children not “legally admitted” to the United States.² Writing for a majority of five, Justice William Brennan reasoned that “the discrimination . . . can hardly be considered rational unless it furthers some substantial goal of the State.”³ The Texas statute served no such goal and therefore violated equal protection.⁴ A state may not rely on immigration status to bar a child from public elementary and secondary schools. Chief Justice Burger wrote a dissent, arguing that the unlawfully present are not a suspect class triggering strict scrutiny,⁵ and education is not a fundamental right.⁶ According to Burger, the Texas statute had a rational basis and was therefore constitutional, even if it was profoundly unwise.⁷

Why did *Plyler* strike down the statute? The answer lies in the majority’s approach to three themes. First, the children’s unlawful presence was not dispositive, since they might never be deported.⁸ The dissent objected that their illegal presence precluded any serious constitutional challenge.⁹ Second, the majority limited state authority to treat citizens and noncitizens differently.¹⁰ The dissent countered with deference to Texas’ objectives.¹¹ Third, the majority emphasized the link between education and the integration of immigrants.¹² The dissent dismissed such policy matters as inappropriate for judicial consideration.¹³ For the visually inclined, here is a diagram of the three themes that separated the majority from the dissent:



Constructive public debate about immigration outside the law requires not only analyzing the *Plyler* themes but also seeing how they combine to raise deeper questions. The meaning of unlawful presence and the role of states and cities jointly illuminate the question of enforcement authority. The role of states and cities and immigrant integration merge to elucidate the building of communities that include citizens and noncitizens. The meaning of unlawful presence and the integration of immigrants together clarify how to balance lessons from the past, present, and future. This diagram captures the contours that parts II, III, and IV will explore:



The dissent in *Plyler* emphasized that the Texas school children were illegal aliens.¹⁴ More starkly, some advocates start—and end—their arguments by pointing out that some noncitizens are illegals. *New York Times* editorial writer Lawrence Downes put it (ironically): “[W]hat part of ‘illegal’ don’t you understand?”¹⁵ But others counter by pointing to “undocumented” immigrants’ contributions to U.S. society and to their ties acquired with government acquiescence. The *Plyler* majority generally adopted the undocumented view, observing “there is no assurance that a child subject to deportation will ever be deported.”¹⁶ It noted that unlawful presence may be unclear because federal law offers many avenues to lawful status.¹⁷

II. ENFORCEMENT AUTHORITY

A. The Meaning of Unlawful Presence

The majority also observed that even those whose presence is clearly unlawful might not be deported.¹⁸ Indeed, heavily influenced by racial perceptions of Mexicans as subordinate, expendable, and nonassimilable workers,¹⁹ economically driven fluctuations led to a de facto policy of discretionary enforcement and partial tolerance of unlawful immigration that emerged in the early twentieth century and continues today.²⁰ Congress enacted employer sanctions in 1986,²¹ but employers can minimize their risk of liability with a cursory document check and paperwork.²² Some employers may prefer unauthorized workers with only limited workplace protections.²³

Starting in late 2006, worksite enforcement has surged upward,²⁴ but the U.S. economy still employs over seven million unauthorized workers.²⁵ It remains true today, as the *Plyler* majority said, that “the confluence of Government policies has

resulted in ‘the existence of a large number of employed illegal aliens . . . whose presence is tolerated, whose employment is perhaps even welcomed.’”²⁶ In contrast to the dissent, the majority refused to have unlawful presence be determinative, especially when parents had made the crucial choices. Much debate today reflects these contrasting views of unlawful presence. But when considered with the role of states and cities, the meaning of unlawful presence has deeper implications for the more fundamental issue of immigration enforcement authority.

B. The Role of States and Cities

PLYLER SEEMED TO LEAVE LITTLE ROOM for subfederal responses to immigration outside the law,²⁷ but the Court’s holding was based on equal protection, not federal preemption.²⁸ This leaves open the question of federal v. subfederal authority in the context of preemption challenges to state and local law. In such cases, courts ask if the subfederal law regulates immigration or otherwise conflicts with federal law.²⁹ In turn, defining “conflict” requires returning to the meaning of unlawful presence.

An ordinance in Farmers Branch, Texas, required renters to have “evidence of citizenship or eligible immigration status.”³⁰ A federal district court invalidated the law as preempted because it relied on eligibility for federal housing subsidies.³¹ The court reasoned that not all noncitizens who are lawfully in the United States are eligible for housing subsidies, so the local law conflicted with federal law.³² Similar analysis appears in *Equal Access Education v. Merten*, which concerned whether Virginia could bar unlawful immigrants from public colleges and universities.³³ The district court reasoned that deviating from federal immigration standards leads to preemption, whereas using federal standards avoids preemption.³⁴ Likewise, a federal court of appeals upheld an Arizona law that required employers to use a federal database to check work authorization.³⁵

Contrast *Garrett v. City of Escondido*,³⁶ which involved a local penalty for landlords who rent to unauthorized immigrants.³⁷ Though the city ordinance adopted federal immigration standards, the district court held that it was preempted “as a burden or obstacle to federal law” *because* it would use a federal database to check unlawful presence.³⁸ Looking at enforcement in practice, the court found that having local and federal enforcement rely on the same database put them into competition for resources and thus into conflict.

If *City of Escondido* sought not to impede federal enforcement, then *Lozano v. City of Hazleton* reflected concern that a locality might assist federal enforcement *too much*.³⁹ A city ordinance barred hiring unlawful immigrants and required renters to prove lawful residence or citizenship.⁴⁰ It adopted federal immigration categories, but the district court found preemption because federal law struck a different “balance between finding and removing undocumented immigrants without accidentally removing immigrants and legal citizens, all without imposing too much of a burden on employers and workers.”⁴¹ Echoing the *Plyler* view of unlawful presence, the district court cautioned against assuming that “the federal government seeks the removal of all aliens who lack legal status.”⁴²

These cases show how subfederal immigration authority can only be defined in light of the meaning of unlawful presence. The resistance to an enforcement role for states and cities in *City of Escondido* and *City of Hazleton* reflects the view that unlawful presence is just the start of inquiry because enforcement in practice is not automatic but highly discretionary. In contrast, *City of Farmers Branch* and *Equal Access Education* endorse a larger subfederal role because finding unlawful presence under federal immigration law is the only inquiry that matters for triggering the further consequences specified by state or local law, such as denial of housing or employment.

As between these two views, the *Escondido-Hazleton* understanding of unlawful presence seems more consistent with de facto U.S. immigration policy. A noncitizen's removal reflects complex choices about systemic enforcement priorities, as well as intricate procedures with multiple opportunities for error. Law enforcement always involves discretion, but it seems unusually important in immigration enforcement. Immigration outside the law enjoys acceptance in many circles, and apprehension rates are extremely low. It is pivotal to ask *who* allocates resources, picks enforcement targets, and balances enforcement against competing concerns like inappropriate reliance on race or ethnicity. Because any decisions by state and local officials conflict with the federal balance of enforcement and tolerance, caution is appropriate before enlarging the group authorized to enforce federal immigration law directly or indirectly.

ONCE WE SEE HOW THE MEANING of unlawful presence and the role of states and cities combine to raise the more basic question of enforcement authority, it becomes apparent that the same deep complexity is inherent even when immigration decisionmaking is entirely federal. If unlawful presence is straightforward and dispositive, then federal judicial review of the government's immigration decisions can be narrow.⁴³ It will seem unjustifiably complex to broaden judicial inquiry, for example through class actions or review of stages in the removal process before it results in a final removal order. But judges should use a wider lens if we allow the exercise of discretion to be challenged, either because unlawful presence or its consequences are unclear, or because racial profiling or other selective enforcement may be at work.⁴⁴

C. Other
Enforcement
Issues

A related question is how firmly a decisionmaker today should be bound by a prior finding of unlawful presence. Under an amendment to the federal immigration statutes that took effect in 1997, a prior removal order may be reinstated without new proceedings against any noncitizen who later reenters the United States unlawfully.⁴⁵ A recent U.S. Supreme Court case construing this amendment shows how the conflicting meanings of unlawful presence lead to conflicting views of enforcement authority.

Humberto Fernandez-Vargas came unlawfully to the United States from Mexico in the 1970s. He was deported but reentered several times, the last time in 1982. The government tried to remove Fernandez-Vargas in 2003 by reinstating the pre-1997 deportation order, but he argued this was impermissibly retroactive. Rejecting this argument, the majority treated the earlier finding of unlawful

presence as the irrevocable basis for later consequences, including reinstatement of the prior removal order.⁴⁶ But the dissenters echoed the reluctance in *Plyler* to have everything turn on unlawful presence. For them, Fernandez-Vargas' twenty years undetected in the United States—where he started a family and a trucking business—were more significant than the earlier finding that he had been here illegally.⁴⁷ Equities generated by nonenforcement can outweigh unlawful presence.

Finally, private actors can magnify variations in the meaning of unlawful presence and broaden the range of enforcement discretion.⁴⁸ For example, federal law requires employers to verify identity and work authorization,⁴⁹ but they can comply with varying diligence. Most employers do what is required to avoid penalties, but others use the law to solidify their power over unauthorized workers, who have only limited work law protections.⁵⁰ As F. Ray Marshall, Secretary of Labor in the Carter Administration, once put it, immigrants who come outside the law work “scared and hard.”⁵¹ Like state and local officials, private actors may have incentives, motives, and priorities in tension with even-handed enforcement.

III. COMMUNITY BUILDING

Some states and cities limit cooperation with federal immigration officials. Such policies connect the role of states and cities with the integration of immigrants. These two *Plyler* themes join to inform the building of communities that include both citizens and noncitizens.

A. The Integration of Immigrants

THE PLYLER MAJORITY RELIED HEAVILY ON viewing unauthorized migrant children as future participants in American society, with education as the key. Quoting *Brown v. Board of Education*,⁵⁴ the majority explained: “[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”⁵⁵ And though the Court’s emphasis on education and integration was particularly apt for innocent children,⁵⁶ the decision’s deeper rationale protects unauthorized adult migrants, too. Fundamentally, the *Plyler* majority looked ahead to the integration of immigrants, whether unlawfully or lawfully here, as Americans in waiting.

Integration remains a hot topic today. Some urge legalization for unauthorized migrants,⁵⁷ but others counter that illegal aliens are intruders who are unworthy of any recognition through legalization or other forms of integration. And if there is legalization, should workers have a path to citizenship as a way of fostering integration into U.S. society? Some maintain that a path to citizenship is unnecessary because migrants maintain close ties to their countries of origin or even return in circular patterns. But others argue all guestworkers must have some sort of path to citizenship, lest barriers to equality lead to the permanent marginalization that *Plyler* rejected.

B. State, Cities and Belonging

PLYLER WAS A SUCCESSFUL EQUAL PROTECTION challenge to a state law that disadvantaged unauthorized migrants. But does it support equal protection claims outside of K-12 public education? A telling sign that the answer is “no” is the litigation strategy in *Equal Access Education v. Merten*⁵⁸ (discussed in Part II), where the plaintiffs relied mainly on preemption,⁵⁹ not equal protection,⁶⁰ to argue that

Virginia could not bar unauthorized students from public colleges and universities. As long as states and localities are not vulnerable to equal protection claims and can avoid preemption by relying on federal immigration law standards, they will have a large role in the integration of unauthorized migrants. By controlling access to higher education, for example, states and localities can relegate young adults who are unlawfully present to economic disadvantage and social marginalization.⁶¹

But other states and cities may want to integrate unauthorized migrants. Sanctuary and noncooperation policies are not just the skeptical or contrary flip side of subfederal enforcement authority. They also try to establish safe zones for integration through public and private initiatives.⁶² State and local support for business in immigrant enclaves can help create vehicles for economic sustainability and for mobility into the larger economy. Private actors can help integrate unauthorized migrants, as when banks attract unlawful immigrants as customers.⁶³

As an expression of state and local attitudes toward the integration of unauthorized migrants, identity documents are important because they provide access to vital spheres of the private sector, such as housing and car insurance.⁶⁴ Driver licenses were significant in this role until new federal requirements tied state licenses to citizenship or lawful immigration status,⁶⁵ and limited access to public and private activities. Instead, the few documents that have become available to unauthorized immigrants are general identification cards such as those now issued by San Francisco and New Haven, Connecticut, so that all residents, regardless of immigration status, can “become active participants in the community.”⁶⁶

In contrast, subfederal restrictions on employment, housing, and driver licenses broaden enforcement beyond its traditional core of apprehension and removal by denying unauthorized migrants access to the private spheres in which they might live. This sends the clear message that unauthorized migrants are not fully part of the community, even if their labor is vital. Some observers characterize certain local ordinances as expressions of hostility announcing that Latino immigrants are not part of “our” community.⁶⁷ If so viewed, the message of exclusion in state and local anti-immigrant laws brings to mind the history of subfederal immigration authority going back at least as far as Chinese exclusion, as well as the association of states’ rights with slavery, Jim Crow, and later with resistance to the civil rights movement. All are part of a deeper story of who belongs.⁶⁸

THE QUESTION WHETHER COMMUNITIES WILL EMBRACE or exclude unauthorized migrants makes clear that the role of states and cities is closely tied to the integration of immigrants. And as *Plyler* emphasized, the key to that integration is education. But our educational system affects citizens as well, shaping the communities into which immigrants integrate. With much attention paid to the effects of immigration on U.S. workers, it is strikingly underappreciated that such effects reflect not just immigration policy, but also what our educational system has done (or not done) for citizens. If the redistributive effects of immigration are felt unevenly,⁶⁹ community building must include measures that improve the educational system, especially for the American poor.⁷⁰

*C. Citizens,
Community and
Immigration
Outside the Law*

Under current immigration law, employers must pay a \$1,500 fee for each H-1B temporary worker,⁷¹ with the funds channeled to job training for U.S. workers and college scholarships for low income students.⁷² In broad perspective, this program does very little to transfer wealth from employers who benefit from immigrant workers to citizens who may be displaced. Indeed, it misses immigration outside the law altogether. But the concept can go beyond transfer payments to drive education investments generally. Here states and localities are crucial, for education is principally a subfederal responsibility.

The idea that responses to immigration outside the law should focus less on unauthorized migrants and more on ameliorating any adverse effects on citizens highlights several deeper dimensions of the link between the integration of immigrants and the role of states and cities. First, a local focus on individuals and families may make it easier to have real dialogue—or even to find common ground. Laws that seem reasonable in national or statewide abstraction may have devastating effects next door. Representative Bill McCollum, a sponsor of the 1996 Immigration Act,⁷³ soon thereafter introduced a private bill granting lawful status to a noncitizen who faced deportation under that very law.⁷⁴ Similarly, the negative consequences of anti-immigrant ordinances may prompt reversal more easily when decisionmaking is local.⁷⁵

Second, even if the integration of immigrants occurs in local communities, the conceptual framework of *national* citizenship informs how many U.S. citizens assess the effects of immigration outside the law on them and their communities. After Hurricane Katrina in 2005,⁷⁶ a largely unauthorized workforce hired in rebuilding New Orleans was sometimes seen as displacing African American workers and thus compromising their full rights of national belonging.⁷⁷ Other disadvantaged or underserved communities in the United States have similar perceptions. Other groups—notably the core Lou Dobbs audience—feel victimized by national and global trends that have reduced economic security and opportunities for the American working class. Addressing these concerns as a matter of national citizenship is part of building communities that also integrate immigrants.

As a corollary, it is a hollow achievement if immigrants integrate into communities by replicating social structures—such as oppressive gender hierarchies—that are fundamentally incompatible with the aspirations of national citizenship. Instead, the rights and responsibilities of national belonging should inform local integration. If national citizenship matters less, then these local communities may be shaped by religion, race, class, and other groupings that are not as cosmopolitan or democratic.

IV. BALANCING PAST, PRESENT AND FUTURE

The integration of immigrants is also closely connected to the first *Plyler* theme: the meaning of unlawful presence. They join to ask how we balance past, present, and future. According to one view of time, de facto U.S. government policy against the backdrop of international economic development patterns has produced a disposable, vulnerable, but deeply rooted unauthorized workforce. Relevant here is that concepts of race and ethnicity have historically

permeated immigration and citizenship in the United States. Asian exclusion and the treatment of Mexican immigrants as a disposable labor force show that the past has not been neutral, and some observers see justice in immigration through this historical lens. The argument follows that unlawful presence should be just a transitory status, and that it is essential to integrate unauthorized migrants, starting with legalization. But any such argument prompts objections that no such de facto policy has ever existed or does not exist now, or that in any event the past generates no moral or legal obligations to illegal aliens. Thus emerges the counterargument that future integration is illegitimate and unacceptable.

There are at least two ways to assess claims by unauthorized migrants based on the past. First, we might view these claims as a matter of immigration as a constructive contract⁷⁸ based on expectations that newcomers and their new country have of each other. Of course, terms of the immigration contract are up for debate. If the terms are in immigration statutes, unlawful presence is enough to breach the contract. But if the true contract is the invitation extended by de facto policy, then intensified enforcement upsets the legitimate expectations of unauthorized migrants. A second argument for claims based on the past is that the law should recognize the ties that unlawful migrants have acquired as productive members of U.S. society. I have called this view “immigration as affiliation.”⁷⁹ The response is that these ties are illegitimate and therefore cannot support any equality or membership claims.

This rhetorical duel often speaks in terms of the “rule of law,” but this phrase is quite malleable. Consider how legal doctrine can normalize immigration that started outside the law. We assume that the arrival of refugees and asylees, even if outside the law, is consistent with the rule of law because we perceive their claims to protection as valid.⁸⁰ This recognizes historical experience, especially the failure before and during World War II to protect Jews fleeing Nazi-occupied Europe.⁸¹ Much more recently, the Nicaraguan Adjustment and Central American Relief Act (NACARA) of 1997⁸² allowed some Guatemalans and Salvadorans to become permanent residents, as a way of recognizing that their access to asylum had been very limited, and that they had developed significant ties in the United States during a long period of nonenforcement. NACARA accomplished this without questioning the basic line between lawful and unlawful migrants.⁸³ Likewise, immigration law protects victims of domestic violence, trafficking, and other crimes, even if they lack lawful presence, by imagining them in a category apart from immigration outside the law.⁸⁴ If unauthorized migrants have justifiable expectations based on the past and present, it serves the rule of law to take those claims seriously. But if such expectations are unjustified, it serves the rule of law to enforce immigration law without indulging in undue complexity. Rule of law rhetoric can start productive discussion, but it is rarely a persuasive endpoint.

THE DEVELOPMENT, RELIEF, AND EDUCATION FOR Alien Minors (DREAM) Act further shows how balancing past, present, and future reflects the connection between unlawful presence and the integration of immigrants. Under a version that passed the U.S. Senate in 2006, students unlawfully in the United States could become lawful permanent residents if they first entered before the age of sixteen, were

*A. The DREAM Act
and Other Forms
of Legalization*

physically present for the five years before enactment, and earned a high school diploma or had been admitted to a U.S. college.⁸⁵

Opponents object that giving illegal students lawful status is an unacceptable amnesty that rewards lawbreakers. This emphasis on current illegality supports strict enforcement, including criminal prosecution,⁸⁶ to keep claims to future integration from ripening. DREAM Act supporters counter that in spite of these students' unlawful presence, it is essential to integrate them into American society. Moreover, the rule of law requires discretionary relief to achieve justice in individual cases—either because their ties should be recognized, or because de facto policy reflects the true immigration contract.

The role of discretionary relief in individual cases—which amounts to case-by-case legalization—shows how the rule of law debate reflects contrasting views of unlawful presence and integration. If the rule of law calls simply for enforcement because immigrants entered illegally, then discretionary relief should be limited because it is extraordinary and should remain so.⁸⁷ But if immigration law is not just a matter of enforcing the letter of the statute, limits on discretionary relief may be quite troubling, especially if long-term unlawful residents have a compelling claim to future integration.⁸⁸

The connection between unlawful presence and integration also explains the variety of rhetoric invoked to support legalization. Some argue that integration is a moral imperative because unlawful migrants came to America as an intended consequence of de facto policy. But others argue pragmatically that lawmakers should recognize that unauthorized migrants will remain and must be integrated, even if we think of them as lawbreakers. The *Plyler* majority's understanding of unlawful presence and integration blended pragmatic and moral arguments. Reasoning pragmatically, it called unauthorized migrants “productive and law-abiding” individuals with a “permanent attachment” and “unlikely to be displaced from our territory.”⁸⁹ But the core of *Plyler* was a moral argument based on the history of immigration policy. As I quoted earlier: “the confluence of Government policies has resulted in ‘the existence of a large number of employed illegal aliens . . . whose presence is tolerated, whose employment is perhaps even welcomed.’”⁹⁰ Though the majority emphasized the innocence of children,⁹¹ its view of unlawful presence applies to adults as well.

B. Birthright Citizenship

CURRENT LAW CONFERS CITIZENSHIP ON ANY child (except children of diplomats) born on U.S. soil regardless of the parents' immigration status.⁹² The objections to this rule parallel those against legalization, reflecting similar views of unlawful presence and the integration of immigrants. Combining an emphasis on illegality with opposition to future integration, it is arguably wrong for illegal parents to impose their children unilaterally on future American society through automatic citizenship.⁹³

Supporters of jus soli citizenship typically blend their understanding of unlawful presence with their support for immigrant integration. A moral argument might highlight the innocence of an unlawfully present child, relying on the ideas of

contract (through labor recruitment with government acquiescence) and affiliation (through ties developed by unauthorized migrants). A pragmatic argument might stress that these children will stay indefinitely.⁹⁴ Both moral and pragmatic arguments can emphasize the integration of immigrants through a path to citizenship and other ways to avoid second class status.

Any durable, politically viable responses to immigration outside the law must start with the themes in *Plyler*. Delving into *Plyler* shows that the issues are both global and local, requiring wise attention to three policy areas—international economic development, economic development inside the United States, and domestic educational policy.

V. LOOKING
AHEAD

First, the ambiguities of unlawful presence depend ultimately on international economic development. Emigration to the United States acts as an economic and political safety valve for sending countries, as a substitute for economic development there,⁹⁵ and as a source of essential remittances.⁹⁶ Moreover, emigration is often traceable to the international effects of U.S. economic policies. Flows of capital and goods create social networks that inevitably foster the flow of human beings.⁹⁷ To adapt what the Swiss writer Max Frisch wrote about European guestworkers, “we wanted products, but people came.”⁹⁸

Managing immigration outside the law requires robust economies in sending countries so that people have the choice to stay home. If, however, economic conditions produce flight, demographic and economic pressure will keep the meaning of unlawful presence deeply contested. This complexity, combined with the role of states and cities, fuels controversy about enforcement authority. The same complexity, when combined with the integration of immigrants, animates current debate about how to balance past, present, and future.

This focus on international economic development involves U.S.-Mexico relations more than any other bilateral tie, and thus raises the more fundamental question whether justice in immigration comes from applying universal principles to all sending countries. In 1965, Congress repealed a discriminatory admissions system that had strongly preferred European immigrants,⁹⁹ replacing it with the apparently equal treatment of immigrants regardless of origin.¹⁰⁰ But justice may be undermined by imposing on Mexican immigration the same numerical ceiling as applies to every other country worldwide. Country-specific, politically generated arrangements may seem to jeopardize the hard-won equality of post-1965 immigration law, but they are crucial if immigration policy is to respond to specific historical and economic relationships. So viewed, it is encouraging that country-specific arrangements, including generous admission terms for foreign nationals based on trade or investment treaties,¹⁰¹ are emerging with greater frequency.¹⁰²

Another reason for the ambiguity of unlawful presence is that the labor needs of the U.S. economy are greater than our lawful admissions scheme can meet. The corollary to easing emigration pressures in sending countries is modifying demand

for unauthorized workers here. Only by synchronizing immigration policy with economic development inside the United States can we abate the labor demands that now complicate the meaning of unlawful presence.

On the immigration policy side, one domestic goal should be more employment-based admissions in categories requiring less education and training. Some of these admissions could be temporary, but any temporary worker program should promote integration with a path to citizenship for immigrants who decide to stay in the United States after weighing incentives to go home. And even if we base admissions on economic needs, we still should treat immigrant workers as people with families and aspirations outside the workplace. Admitting their immediate family members is crucial if we are serious about integrating immigrants into U.S. society.¹⁰³

On the domestic economic development side, our decisionmaking will depend on international economic development patterns. If sending countries develop robust economies, then migration to the United States may diminish and become more circular,¹⁰⁴ and many jobs now done by unauthorized workers may go unfilled. As we invest in economic development in sending countries, we should match such efforts by realigning our labor force through restructuring, mechanization, outsourcing, and similar approaches.

Combining integration of immigrants with the role of states and cities points to another crucial area: domestic educational policy, which strongly influences not only how immigrants integrate, but also how immigration outside the law affects U.S. citizens. Without a greater commitment of resources and energy to ameliorating the cycles of poverty among the American poor, and to meeting the economic and educational challenges faced by the American middle class, immigration outside the law will remain an easy target for simple demagogues.

The dramatic increase over the past decade in the number of noncitizens who live and work in the United States without lawful status has led to broad chasms in debate that make the task of a national conversation especially daunting. The three *Plyler* themes—though justifiably prominent on the surface—are better understood as shedding light on the more fundamental issues of enforcement authority, community building, and balancing past, present, and future. Only through this broader and deeper understanding of immigration outside the law can we ever hope to forge a national consensus.

^{*}This article is an abridged version of *Immigration Outside the Law*, 108 COLUM. L. REV. 2037 (2008), downloadable at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323914#, which is intended as the core of a companion volume (in progress) to HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (Oxford 2006). I would like to thank Brian Tanada, UCLA School of Law Class of 2010, and Megan Brewer, Class of 2009, for excellent research and editorial assistance.

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¹ 457 U.S. 202 (1982).

² TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981).

³ Parts of Brennan's analysis seemed to require only a "rational basis," but in the end he blended both rational basis and intermediate scrutiny. *See id.* at 218 n.16, 224.

⁴ *Id.* at 228–30.

⁵ *Id.* at 219 n.19.

⁶ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 27–37 (1973); *see Plyler*, 457 U.S. at 221, 223.

⁷ 457 U.S. at 242–54 (Burger, C.J., dissenting).

⁸ *See id.* at 218–19.

⁹ *Id.* at 244–46 (Burger, C.J., dissenting).

¹⁰ *See id.* at 220, 225. The Court declined to address whether the Texas statute was preempted by federal law. *Id.* at 210 n.8.

¹¹ *Id.* at 245–46 (Burger, C.J., dissenting).

¹² *Id.* at 222–23 (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)).

¹³ *Id.* at 252–53 (Burger, C.J., dissenting).

¹⁴ 457 U.S. at 246 (Burger, C.J., dissenting).

¹⁵ Lawrence Downes, Op-Ed., *What Part of 'Illegal' Don't You Understand?*, N.Y. TIMES, Oct. 28, 2007, at WK11.

¹⁶ *Id.* at 226.

¹⁷ Some, numbering 1 or 1.5 million, have temporary statuses that protect them from removal, *see, e.g.*, Immigration and Nationality Act [INA] § 244, 8 U.S.C. § 1254a. *See* DAVID A. MARTIN, MIGRATION POLICY INST., *TWILIGHT STATUSES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION* 1 (2005). Others are eligible for discretionary relief, *see, e.g.*, INA § 240A(b).

¹⁸ 457 U.S. at 218–19.

¹⁹ See HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 129–30 (2006); Kitty Calavita, *The Immigration Policy Debate: Critical Analysis and Future Options*, in MEXICAN MIGRATION TO THE UNITED STATES: ORIGINS, CONSEQUENCES, AND POLICY OPTIONS 151, 155–59 (Wayne Cornelius & Jorge Bustamante eds., 1989) [hereinafter Calavita, *Immigration Policy Debate*]; MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 52–53 (2005).

²⁰ See Calavita, *Immigration Policy Debate*, *supra* note 19, at 155–59.

²¹ See INA § 274A, 8 U.S.C. § 1324a.

²² See Wayne A. Cornelius, *The U.S. Demand for Mexican Labor*, in CORNELIUS & BUSTAMANTE, *supra* note 19, at 25, 43–44; Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 L. & SOC'Y REV. 1041, 1046–55, 1057, 1060 (1990).

²³ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002); Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 993–94.

²⁴ In fiscal year 2002, the federal government arrested 510 unauthorized workers and employers in workplace raids. Worksite arrests rose to 1,292 in 2005 and then leapt to 4,940 in 2007. U.S. Immigration and Customs Enforcement, *Frequently Asked Questions About Worksite Enforcement*, at <http://www.ice.gov/pi/news/factsheets/worksite.htm> (last updated Aug. 12, 2008).

²⁵ See JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 9–14 (2006). See generally T.A. ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1312–40 (6th ed. 2008).

²⁶ *Plyler v. Doe*, 457 U.S. 202, 219 n.18 (1982) (quoting *Doe v. Plyler*, 458 F. Supp. 569, 585 (E.D. Tex. 1978)).

²⁷ On the upsurge in subfederal activity, see NAT'L CONFERENCE OF STATE LEGISLATURES, OVERVIEW OF STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION, JANUARY–MARCH 2008, at 1, 8 (2008). See generally LISA M. SEGHETTI, STEPHEN R. VINA & KARMA ESTER, CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT (2006); CRISTINA RODRÍGUEZ, MUZAFFAR CHISHTI & KIMBERLY NORTMAN, TESTING THE LIMITS: A FRAMEWORK FOR ASSESSING THE LEGALITY OF STATE AND LOCAL IMMIGRATION MEASURES 8–9, 23–24, 32–43, 47–52 (2007).

²⁸ *Plyler*, 457 U.S. at 225.

²⁹ *De Canas v. Bica*, 424 U.S. 351 (1976); *see also Toll v. Moreno*, 458 U.S. 1, 12–13 & n.18 (1982).

³⁰ *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 762 (N.D. Tex. 2007) (preliminary injunction); *see also Villas at Parkside Partners v. City of Farmers Branch*, No. 3:06-CV-2371-L, 2008 WL 2201980, at *1, *5 (N.D. Tex. May 28, 2008) (permanent injunction). As of January 2008, a new Farmers Branch ordinance requires tenants to have a “residential occupancy license” after the city building inspector checks with the federal government that the renter is “lawfully present” in the United States. *See* 2008 WL 2201978 at *5.

³¹ *Villas at Parkside Partners v. City of Farmers Branch*, No. 3:06-CV-2371-L, 2008 WL 2201980, at *9–*10 (N.D. Tex. May 28, 2008).

³² *City of Farmers Branch*, 496 F. Supp. 2d at 766–69; *see also City of Farmers Branch*, 2008 WL 2201980, at *10 (permanent injunction).

³³ 305 F. Supp. 2d 585, 591 (E.D. Va. 2004).

³⁴ *Id.* at 608. The court allowed the case to proceed to factfinding on this issue but never decided it, instead dismissing the preemption claim for lack of standing. *Equal Access Educ. v. Merten*, 325 F. Supp. 2d 655, 660–72 (E.D. Va. 2004).

³⁵ *See Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 982–86 (9th Cir. 2008); *accord Gray v. City of Valley Park*, No. 4:07CV00881ERW, 2008 WL 294294, at *12–*19 (E.D. Mo. Jan. 31, 2008).

³⁶ 465 F. Supp. 2d 1043 (S.D. Cal. 2006).

³⁷ *Id.* at 1047–48.

³⁸ 465 F. Supp. 2d at 1057. The court blocked enforcement with a temporary restraining order. The city later consented to a permanent injunction and to paying \$90,000 in plaintiffs’ attorney fees. *Garrett v. City of Escondido*, No. 06CV2434JAH (NLS) (S.D. Cal. Dec. 15, 2006).

³⁹ 496 F. Supp. 2d 477 (M.D. Pa. 2007), appeal docketed, No. 07-3531 (3d Cir. Aug. 30, 2007).

⁴⁰ *Id.* at 484–85.

⁴¹ *Id.* at 527–33.

⁴² *Id.* at 530.

⁴³ *See generally* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, IMMIGRATION AND CITIZENSHIP, *supra* note 25, at 1185–89; Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons From Civil Procedure*, 14 GEO. IMMIGR. L.J. 385 (2000).

⁴⁴ See, e.g., *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 489–94 (1991).

⁴⁵ See INA § 241(a)(5), 8 U.S.C. § 1231(a)(5).

⁴⁶ *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33, 42–44 (2006). For a similar divide, see *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 498 (9th Cir. 2007) (en banc).

⁴⁷ 548 U.S. at 51 (Stevens, J., dissenting).

⁴⁸ See generally Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 781 (2008).

⁴⁹ See INA § 274A, 8 U.S.C. § 1324a(b)(1); see also *supra* Part II.A.

⁵⁰ E.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002); see also *supra* note 23 and accompanying text.

⁵¹ F. Ray Marshall, *Economic Factors Influencing the International Migration of Workers*, in *VIEWS ACROSS THE BORDER* 163, 169 (Stanley R. Ross ed., 1978). See also JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 49–50 (2005); Lee, *supra* note 48, at 11–15.

⁵² One local sheriff explained entering into an agreement with the federal government for local enforcement by describing Mexicans: “‘Their values are a lot different—their morals—than what we have here,’ [the sheriff] said. ‘In Mexico, there’s nothing wrong with having sex with a 12-, 13-year-old girl . . . They do a lot of drinking down in Mexico.’” Kristen Collins, *Sheriffs Help Feds Deport Illegal Aliens*, NEWS & OBSERVER (Raleigh), Apr. 22, 2007, at 1A.

⁵³ See Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMU L. REV. 133, 151–54 (2008); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 600–05 (2008).

⁵⁴ *Plyler*, 457 U.S. at 222–23. See also *id.* at 218–19; *id.* at 234 (Blackmun, J., concurring); *id.* at 239 (Powell, J., concurring); MOTOMURA, *AMERICANS IN WAITING*, *supra* note 19, at 160–61.

⁵⁵ *Plyler*, 457 U.S. at 223; see also *id.* at 221.

⁵⁶ See Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1121–23 (1994).

⁵⁷ For an overview, see ALENIKOFF, MARTIN, MOTOMURA & FULLERTON, *IMMIGRATION AND CITIZENSHIP*, *supra* note 25, at 1347–50.

⁵⁸ 305 F. Supp. 2d 585, 591 (E.D. Va. 2004).

⁵⁹ *Id.* at 593–94.

⁶⁰ See *id.* at 598.

⁶¹ See Leisy Abrego, *Legitimacy, Social Identity, and the Mobilization of Law: The Effects of Assembly Bill 540 on Undocumented Students in California*, 33 LAW & SOC. INQUIRY 709, 723–29 (2008) (describing how unlawfully present students acquire a sense of social acceptance in spite of unlawful status when states and localities facilitate access to education).

⁶² See Noah Pickus & Peter Skerry, *Good Neighbors and Good Citizens: Beyond the Legal-Illegal Immigration Debate*, in DEBATING IMMIGRATION 95, 111–13 (Carol Swain ed., 2007); Rodríguez, *Significance of the Local*, *supra* note 53, at 581.

⁶³ See Azam Ahmed & Karoun Demirjian, *Credit Offered to Illegal Residents: Banks Target Workers Without Documents*, CHI. TRIB., Feb. 15, 2007, at 1.

⁶⁴ See Jane Caplan & John Torpey, *Introduction to DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLD* 1, 5 (Jane Caplan & John Torpey eds., 2001).

⁶⁵ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, 311–12 (codified at 49 U.S.C.A. § 30301 (West 2008)); ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *IMMIGRATION AND CITIZENSHIP*, *supra* note 25, at 1403–05.

⁶⁶ City of New Haven, *New Haven's Elm City Resident Cards—Fact Sheet*, available at http://www.cityofnewhaven.com/pdf_whatsnew/municipalidfactsheet.pdf; Jeff Holtz, *This Summer's Surprise Hit: An Elm City ID*, N.Y. TIMES, Sept. 16, 2007, at 6CT; Jesse McKinley, *ID Cards for Residents Pass a Vote in California*, N.Y. TIMES, Nov. 15, 2007, at A20.

⁶⁷ See Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 55.

⁶⁸ See MOTOMURA, *AMERICANS IN WAITING*, *supra* note 19, at 16–17, 23–24.

⁶⁹ NAT'L RES. COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* 135–65 (James P. Smith & Barry Edmonston eds., 1997); Philip Martin & Elizabeth Midgley, *Immigration: Shaping and Reshaping America*, 61 POPULATION BULL. 1, 20 (2006).

⁷⁰ Cf. Howard F. Chang, *The Disadvantages of Immigration Restriction as a Policy to Improve Income Distribution*, 61 SMU L. REV. 23, 25 (2008) (arguing that tax policies and transfer programs protect least skilled native workers more efficiently than immigration restrictions do).

⁷¹ INA § 214(c)(9), 8 U.S.C. § 1184(c)(9). See generally ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *IMMIGRATION AND CITIZENSHIP*, *supra* note 25, at 422–25.

⁷² See INA § 286(s), 8 U.S.C. § 1356(s). Colleges, universities, and nonprofit research institutions are exempt from the fee requirement.

⁷³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

⁷⁴ See H.R. 321, 106th Cong. (1st Sess. 1999); H.R. 4730, 105th Cong. (2d Sess. 1998); Anthony Lewis, *The Quality of Mercy*, N.Y. TIMES, Feb. 27, 1999, at A15.

⁷⁵ See Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1.

⁷⁶ See generally Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 58-64 (2008).

⁷⁷ See Carol M. Swain, *The Congressional Black Caucus and the Impact of Immigration on African American Unemployment*, in DEBATING IMMIGRATION 175, 180-87 (Carol M. Swain ed., 2007); Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2513-14 (2007); Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1173-85 (2008).

⁷⁸ See MOTOMURA, AMERICANS IN WAITING, *supra* note 19, at 15-62 (explaining “immigration as contract”).

⁷⁹ See *id.* at 80-114.

⁸⁰ Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; see also Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; see also DAVID A. MARTIN, T. ALEXANDER ALEINIKOFF, HIROSHI MOTOMURA & MARYELLEN FULLERTON, FORCED MIGRATION: LAW AND POLICY 4 (2007).

⁸¹ MARTIN, ALEINIKOFF, MOTOMURA & FULLERTON, FORCED MIGRATION, *supra* note 80, at 2-4.

⁸² Pub. L. No. 105-100, §§ 201-204, 111 Stat. 2193-201 (1997).

⁸³ See SUSAN BIBLER COUTIN, NATIONS OF EMIGRANTS: SHIFTING BOUNDARIES OF CITIZENSHIP IN EL SALVADOR AND THE UNITED STATES 63-66 (2007).

⁸⁴ See INA § 101(a)(51), 8 U.S.C. § 1101(a)(51); INA § 101(a)(15)(T)-(U), 8 U.S.C. § 1101(a)(15)(T) (U); ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, IMMIGRATION AND CITIZENSHIP, *supra* note 25, at 433-37.

⁸⁵ ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, IMMIGRATION AND CITIZENSHIP, *supra* note 25, at 1383.

⁸⁶ In the 1990s, Congress increased penalties for existing immigration-related crimes and added several new immigration-related crimes. See INA §§ 274(a), 274C(e)-(f), 8 U.S.C. §§ 1324(a), 1324c(e) (f) (harboring or preparing false documents); INA § 276, 8 U.S.C. § 1326; 18 U.S.C. § 1546(a) (document fraud). Immigration-related prosecutions have increased sharply, accounting in February 2008 for the majority

of new federal criminal cases. *See generally* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 379–92 (2006).

⁸⁷ In 1996, Congress limited access discretionary relief. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546; ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, IMMIGRATION AND CITIZENSHIP, *supra* note 25, at 789–812; MOTOMURA, AMERICANS IN WAITING, *supra* note 19, at 54–57, 98–99.

⁸⁸ *See Shortfalls of the 1996 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary*, 110th Cong. 42 (2007) (statement of Hiroshi Motomura, Kenan Distinguished Professor of Law, University of North Carolina-Chapel Hill).

⁸⁹ *Plyler v. Doe*, 457 U.S. 202, 218 n.17 (1982).

⁹⁰ *Id.* at 219 n.18 (1982) (quoting *Doe v. Plyler*, 458 F. Supp. 569, 585 (E.D. Tex. 1978)).

⁹¹ 457 U.S. at 220, 226.

⁹² *See United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898). *See generally* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, IMMIGRATION AND CITIZENSHIP, *supra* note 25, at 15–44; MOTOMURA, AMERICANS IN WAITING, *supra* note 19, at 72–73, 114.

⁹³ *See, e.g.*, PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 94 (1985).

⁹⁴ *See, e.g.*, David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L L. 278, 282–84, 291–94 (1985).

⁹⁵ *See, e.g.*, Louis A. Perez, Jr., Op-Ed., *Consider the Context That Sparks Migration*, NEWS & OBSERVER (Raleigh), May 12, 2008, at 9A.

⁹⁶ *See, e.g.*, Julia Preston, *Fewer Latinos in U.S. Sending Money Home*, N.Y. TIMES, May 1, 2008, at A1; COUTIN, *supra* note 83, at 122–48; *id.* at 7, 11.

⁹⁷ *See* DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 118–21 (2003).

⁹⁸ Max Frisch actually wrote: “We wanted workers, but people came.” MAX FRISCH, *Überfremdung I*, in SCHWEIZ ALS HEIMAT? 219 (1990) (“Man hat Arbeitskräfte gerufen, und es kommen Menschen.”).

⁹⁹ *See* MOTOMURA, AMERICANS IN WAITING, *supra* note 19, at 126–32.

¹⁰⁰ *See id.* at 131–32.

¹⁰¹ See INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E).

¹⁰² See ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, IMMIGRATION AND CITIZENSHIP, *supra* note 25, at 431–32; U.S.-Chile Free Trade Agreement, U.S.-Chile, ch. 14, § 3, June 6, 2003, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_files535_3989.pdf; U.S.-Singapore Free Trade Agreement, U.S.-Sing., ch. 11, § 3, May 6, 2003, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf; North American Free Trade Agreement, U.S.-Can.-Mex., Annex 1603 § C, Dec. 17, 1992, 32 I.L.M. 605 (1993).

¹⁰³ See Hiroshi Motomura, *We Asked for Workers, But Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL'Y & L. 103, 114–18 (2006).

¹⁰⁴ See Pam Belluck, *Healthy Korean Economy Draws Immigrants Home*, N.Y. TIMES, Aug. 22, 1995, at 1; Kevin Cullen, *Going Full Circle: Native Land's New Prosperity Has Many Reversing Their Exodus*, BOSTON GLOBE, Mar. 19, 2007, at A1 (Ireland); Kirk Semple, *A Land of Opportunity Lures Poles Back Home*, N.Y. TIMES, Sept. 21, 2008, at A37.



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TOWARD A POST-KYOTO CLIMATE CHANGE ARCHITECTURE: A POLITICAL ANALYSIS[†]

Kal Raustiala*
Robert O. Keohane**

Reports of the Intergovernmental Panel on Climate Change (IPCC) make it clear that the risks of global climate change are even greater than previously realized.¹ Yet commensurate progress in negotiating a meaningful future agreement remains elusive. Since maintenance of a stable climate is a public good, both theory and history suggest it will be undersupplied. Furthermore, the costs of climate change will largely fall on politically weak developing countries, whereas the costs of emissions reduction will largely fall on industrialized countries. Consequently, agreement on any meaningful international regulatory system has been and will continue to be very difficult. With the 1997 Kyoto Protocol coming to an end in 2012, however, the design of a new regulatory regime is essential.

Any international regime aimed at the mitigation of climate change must solve three problems: 1) secure sufficient participation to be effective; 2) achieve agreement on rules that are meaningful, so that if they were followed, climate change would indeed be mitigated; and 3) ensure compliance with the rules.² That is, it must solve problems of *participation*, *effectiveness*, and *compliance*. Solving all three problems simultaneously is particularly difficult, since these goals are often in tension. The most direct trade-off is between participation and the strictness of the rules, since as rules become stricter, reluctant states become even more reluctant to be bound by them.³ Similarly, as participation becomes wider, agreement may only become possible on lax rules.

These problems require careful institutional design. But they cannot be solved without political commitment by national leaders. In democracies this means that the broader public must share that commitment. Gaining public commitment is a necessary condition for effective action, but it too is not sufficient. Commitment that leads to a poorly designed institutional structure—which fails to provide sufficient incentives to reduce emissions of greenhouse gasses—will not solve the problem. Social scientists cannot create political commitment: climate scientists, NGOs, the media, and politicians have to play the principal roles. But we can think about ways to design institutions that contribute to effectiveness, contingent on the requisite political commitment. The standard that should be applied to an institutional design such as that proposed in this chapter is whether, given a level of political commitment, it will increase the likelihood of a satisfactory solution to the tripartite requirements of an effective regime: participation, sufficiently strict rules, and a robust compliance system.

Our goal in this chapter is to sketch such a design, particularly its compliance system, with careful attention to the realities of world politics. Section I discusses

participation. Without participation by major emitters, no regime will be effective. Section II analyzes the problem of compliance and argues that a system of buyer liability under cap-and-trade is essential. We offer a unique version of buyer liability, in which emissions permits are annual and all permits from a given jurisdiction receive the same value. In Section III we discuss the critical problem of assessing compliance with emissions caps. Finally, Section IV addresses potential weaknesses of our system and provides responses to these criticisms. Throughout, we write from the standpoint of the politics of international cooperation; our policy recommendations for a post-Kyoto system take into account the more technocratic literatures on compliance, liability, and so forth but flow directly and primarily from our political analysis.

Only a cap-and-trade architecture is likely to make it politically possible to secure sufficient participation to get a climate change mitigation regime up and running. Recently, there has been some disillusionment with comprehensive approaches to cap-and-trade on the part of climate analysts attuned to political issues.⁴ Critics of proposals for a comprehensive regime point to many problems, in particular the difficulties of negotiating national emissions quotas, linking domestic regulatory systems coherently, monitoring implementation, avoiding renegotiation, and ensuring compliance with international obligations.

I. THE
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In light of these difficulties, a variety of proposals have been put forward for other architectures, including both carbon taxes and a more eclectic approach that the editors of this volume characterize as “harmonized domestic policies.” These more decentralized architectures avoid the formidable negotiation problems involved in setting up a comprehensive cap-and-trade accord. They also would prevent the need for large financial transfers among countries, which raise political problems in sending countries and possible adverse effects resulting from corruption or economic distortions in recipients. We will briefly consider harmonized policies and then turn to carbon taxes.

In our view, true harmonization of national policies is extremely difficult—as even the experience of the European Union shows—and a non-integrated patchwork of national “policies and measures” will prove insufficient to deal with the climate change problem. Moreover, neither strategy adequately addresses the wide variance among states in political commitment to addressing climate change. That is, neither provides sufficient incentives for governments whose publics are indifferent to the climate problem to contribute to this global public good. In other words, these approaches lack the *institutionalized transmission belts* that we believe are critical to long-term success on a global scale. If only a few countries take effective policies and measures to mitigate climate change, the overall response will surely be inadequate. What is needed is a system that will draw in many states, or at least the most important set of major emitters.

Advocates of harmonized policies and measures typically respond to this objection by proposing some form of project-by-project aid to countries that are reluctant to act. But this raises a second key problem. Each such project will encounter high transaction costs—the costs of negotiating and enforcing agreements—which will

cumulate across projects in a way that will tax the institutional capacity even of wealthy countries. Ultimately, thousands of projects would have to be designed, agreed upon, and ultimately enforced. The existing evidence about implementation gives little reason to believe that this is possible.

Indeed, we have ample experience from foreign aid conditionality to counsel great caution. The dilemma of conditionality is that if the project has high priority for the government, it will do it anyway, so that aid simply makes resources available for other projects. If the project has low priority, it is likely not to devote the high-quality personnel and other inputs, complementary to the foreign aid, to assure that it will work. Compensatory efforts, when engaged in for example by the IMF, have led to a proliferation of conditions without improving compliance.⁵ New conditions generate new efforts to evade them; and as conditions multiply, it becomes more difficult to insist on any one of them as crucial. As a result, transaction costs increase without corresponding improvements in performance. Moreover, determining that the project actually mitigated emissions as compared with “business as usual” is extremely difficult. Such a determination of “additionality” involves constructing a counterfactual baseline: what would have happened in the absence of the aid. Since this baseline is unobservable, it is impossible to determine it with a high degree of confidence: this is what is known as the “fundamental problem of causal inference.”⁶ The complexity of such projects will compound this problem, as will the political inference with such evaluations that is inevitable.

The Clean Development Mechanism (CDM) of the Kyoto system illustrates these problems. The CDM funds projects as part of an emissions credit system: members of the EU-ETS purchase credits in a growing market that even in 2006 was on the order of \$30 billion.⁷ The CDM experience to date supports our pessimism. Host governments seek certification of proposed credits and deal with verifiers who are dependent on the host governments for future business; furthermore, purchasers do not have a stake in assuring that they are genuine, as long as they are certified. Normally, buyers limit the opportunism of sellers because they care about the quality of products or services, but in the case of the CDM, the buyers only care that *someone else* has certified the product they are buying as valid.⁸ The CDM also produces perverse incentives: indeed, it “reduces the incentives of developing country governments to enact policies reducing emissions,” since by doing so they would reduce the credits they could earn from projects that, in a particular situation, correct the results of bad incentives.⁹

To summarize, project-oriented mechanisms for mitigating climate change, which will likely be attached to any harmonization-oriented policy scheme, have three disabilities: they fail to send a comprehensive price signal to investors and governments; they incur very high transaction costs; and they require counterfactual determinations to assess additionality. Cap-and-trade approaches are markedly superior on all three counts. Before moving to abandon them, we should try to make them politically and institutionally feasible.

Global carbon taxes also avoid these varied problems, and there are strong purely economic arguments for them. For this reason many prominent economists favor

carbon taxes.¹⁰ But taxes face major political hurdles. Most significant is the effect on reluctant states. Taxes would impose economic burdens on the industries of developing states without offering the offsetting gains of being able to sell emissions permits, under a cap that made allowances for their much lower historic and *per capita* emissions. It therefore seems unlikely that developing countries, including China and India, would agree to such an arrangement, since these countries have refused to be bound by binding caps even when they would be compensated for doing so. Cap-and-trade has the enormous advantage that permits can be set in excess of future business-as-usual emissions to those reluctant to join the system. In other words, reluctant countries can be given “hot air.”

Although hot air is essential to obtaining the participation of reluctant states, its provision will shift more of the burden of real abatement to committed states. However, as a political matter this cuts both ways. Those who want to see swift and aggressive emissions reductions will resist the granting of hot air; but the enterprises and other entities in the industrialized democracies that will actually be taking on the largest commitments will favor it, as it will reduce the price of permits they will need to buy in a cap-and-trade system. None of this vitiates the major problem with hot air, which is that by definition it does not represent real emissions reductions. We recognize this, but believe that some hot air is essential to jumpstart the trading system. Over time, as we discuss below, it is equally essential that hot air allocations be eliminated. That is, any cap-and-trade system needs to chart a path toward genuinely binding caps on all significant emitters of greenhouse gasses.

Cap-and-trade is also a more likely global approach than carbon taxes because the EU has committed to it after a long period of resistance. Once the EU has gone through the painful process of reaching internal agreement, it is notably averse to change. Moreover, the political system of the United States, the world’s second largest emitter, is famously hostile to new taxes. Indeed, even the relatively trivial BTU tax suggested by the Clinton Administration went nowhere in part because of this tax aversion. For all these reasons we believe that a global carbon tax is less politically feasible than a cap-and-trade regime, and we therefore assume as a basis for our discussion of compliance a cap-and-trade regime such as that discussed in this volume by Jeffrey Frankel.¹¹ We recognize that other policy elements will likely be present in any future regime, such as technology transfer provisions and adaptation measures. At the core, however, will likely be some form of trading.

Despite all these advantages, the task of negotiating a comprehensive cap-and-trade system will be daunting. Incentives for the most reluctant countries—or those that can bluff being most reluctant—to hold out for a better deal would be very great. Although it would in principle be desirable to maintain the existing United Nations process of negotiating a universal treaty, and the legitimacy of the regime would be thereby enhanced, it would be foolish to commit so irrevocably to such an arrangement as to give potential hold-outs veto power. An option of beginning with a smaller “club” of major contributors to global warming plus any other states that chose to join, or of linking various different cap-and-trade systems¹² should be maintained.

Any club-like arrangement should, like the Kyoto Protocol itself, be open to the accession of all countries on generally known terms. A club with attractive incentives to join—for example, the prospect of substantial revenues from permits—would exert a strong magnetic pull. Whatever the ultimate structure, to encourage participation climate institutions must be designed to attract participants—for example, designed such that the 30 largest Indian industrialists are motivated to meet with the Prime Minister and demand that India join the cap-and-trade system so that they can sell into it.¹⁴

In short, we favor cap-and-trade as the basic approach, but do so cognizant of the many problems it faces. We are not confident that such a system will work. However, we think it has the best political prospects of any plausible climate system, and we believe that careful institutional design can help ensure feasibility. For these reasons we view our proposal for cap-and-trade coupled to buyer liability much like Churchill viewed democracy—the worst imaginable system, but for the alternatives.

II. THE POLITICAL LOGIC OF A BUYER LIABILITY SYSTEM

The fundamental problem of compliance in world politics is that it is virtually impossible to enforce international rules against powerful states. Rules that purport to do so therefore lack credibility *ex ante*. Even where sovereignty has been curtailed, as in the EU, it remains very difficult to enforce international rules externally. In 2005 the EU could not even enforce, against France and Germany, its elaborate system of fines against states that exceeded its fiscal deficit limits—despite the fact that Germany had been the principal advocate of the disciplinary system in the first place.¹⁵

Difficulties of enforcement yield two common outcomes with regard to international agreements. One is the negotiation of weak or vague international commitments that largely match existing behavior. This outcome is particularly common in the environmental realm, where agreements have often been struck that exhibit high compliance—because they are carefully tuned to the status quo—yet do little to influence actual change in behavior.¹⁶ An equally undesirable outcome is the negotiation of ambitious (but sometimes vague) rules that are frequently violated. When untethered to any meaningful monitoring and compliance system, ambitious international rules run the risk of substantial non-compliance. This pattern of over-ambition followed by widespread non-compliance has been observed with respect to human rights treaties. Some have argued that such agreements actually make the underlying problem the treaty was intended to address worse.¹⁷

More specifically, there are at least three major political constraints on compliance provisions for a comprehensive cap-and-trade regime. Proposals that ignore these constraints will either not be implemented or will be ineffective if implemented.

- 1) *Post-hoc sanctions on powerful sellers are infeasible.* Non-compliant sellers whose participation in the regime is essential for its efficacy could renegotiate emissions limits in their favor, wielding the threat of exit from the regime. Those non-compliant sellers with other sources of political power could use those sources of power to punish or threaten states that seek to impose sanctions for noncompliance.

2) *Any system that requires interstate negotiations to determine arrangements for compliance will be subject to political strategy and pressure.* The point here is the one that Randall Stone makes about the International Monetary Fund in *Lending Credibility*.¹⁸ The IMF relaxed the rules on powerful states such as Russia under pressure from Russia's supporters, particularly the United States. Another possible result of interstate negotiations is deadlock, so that no rules are agreed.

3) *Any system that can be manipulated, or "gamed," will be.* The stakes are too high for such manipulation to be avoidable.

The Kyoto Protocol nonetheless contains compliance provisions built around the idea of external enforcement. States that violate the caps on emissions can in essence "borrow" emissions from the next commitment period with a 30% penalty. As a response to sudden fluctuations that are beyond the control of states that are genuinely committed to meet their long-term targets, this approach makes some sense. But it does not constitute an effective enforcement mechanism. Since states have yet to negotiate those future limits they can build the "penalty" into their future allocation.¹⁹ Moreover, as in many international treaties the Kyoto Protocol permits any party to exit at will. As a result, the Kyoto arrangements are akin to requiring homeowners who default because they cannot afford their mortgage payments to pay a higher interest rate next year, without any provision for foreclosure but with the opportunity for the borrower, in the future, to reset the terms of the loan or simply walk away largely unscathed. In other words, they open the door to renegotiations and exit threats and introduce a serious problem of moral hazard.

The unrealistic nature of these provisions suggests the futility of external enforcement. Moreover, strict external enforcement, even if it was to work, is not always welcome, for it is likely to reduce participation.²⁰ However, the good news is that compliance need not rest on external enforcement, as we show below. And compliance with a cap-and-trade regime need not be perfect. It merely has to be strong enough to sustain trading in the near term and to make states' commitments to reduce emissions sufficiently credible to create significant price signals over the medium term.

This is because the most significant action to address climate change is more likely to come from innovation than trading per se. Compliance may also be bolstered by interest: in a cap-and-trade system participants who have made investments that are contingent on the system's integrity will have a continuing stake in ensuring compliance with the system. To some degree our sanguinity about compliance depends on expectations about the relevant time period of global cooperation. We have no crystal ball, but we do not foresee international emissions trading last much beyond two or three decades. By that point one of two outcomes are likely: a set of technological breakthroughs, spurred by economic incentives, that enable rapid reductions of greenhouse gases, or runaway and catastrophic climate change that spurs geo-engineering efforts.

To summarize, in designing a cap-and-trade system we must not put great weight on external enforcement systems. Some alternative system of enforcement must exist to ensure that, over time, permits represent real reductions. Below, we advocate buyer liability: a system in which buyers of emissions permits are liable for those emissions should the permits not prove fully valid. We couple that recommendation to two other key features: an annual emissions assessment process and what we call “jurisdiction equality,” meaning that all permits sold from a given jurisdiction (e.g. China) will have the same value.

A. The Roles of States and Enterprises

Seven years ago, David Victor proposed that the enforcement system under a cap-and-trade regime should be built on the principle of buyer liability.²¹ He argued for buyer liability on political grounds: “Buyer liability enforces compliance through rule-based markets, whereas seller liability requires weak and politicized international institutions to identify and penalize sellers that have not complied.” Victor’s arguments, though compelling, have not been adequately incorporated into the recent literature on the design of climate institutions or into the provisions for implementing the Kyoto Protocol agreed in the Marrakesh Accords of 2001.²² In this section we revive and amplify his arguments for buyer liability, since we believe that only such a system will be robust to the political constraints that we have just discussed. Technical critiques of this system, while raising important points, are outweighed by the political benefits of a buyer-based system.²³ First we briefly introduce the basic features of our system. Then in later sections we delve into the details of buyers, sellers, incentives and assessment.

Under either a comprehensive cap-and-trade architecture or linked regional cap-and-trade systems, each party creates, or adapts, a national regulatory system to meet its agreed emissions target.²⁴ Many states that expect to find it difficult to meet that target (buyer countries, or “permit-short” countries) will enact legislation authorizing enterprises operating within their jurisdictions to purchase emissions permits from suppliers abroad in countries that are also members of the regime. (We expect there to be trading between enterprises within these permit-short jurisdictions as well). In the near-term the permit-short countries will likely include the United States, members of the EU, Japan, Australia, Canada, Norway, and New Zealand, as well as some others. Enterprises such as power companies or industrial enterprises in these states, or in other states that accept stringent emissions caps, will frequently need to purchase permits from entities abroad in order to meet their domestic emissions obligations.²⁵ We advocate that these permits be annual.

Consistent with most analyses, we anticipate that some parties to any future climate accord will successfully negotiate overall emissions limits that exceed their projected emissions. These seller, or “permit-long” countries, are likely to include China, Russia, India and other developing countries for some period into the future; obtaining hot air will be the *sine qua non* of their participation in the regime. Through their own national processes, states that are permit-long will sell or assign permits to enterprises or other entities within their jurisdiction. If permit prices are cheaper than the buying entity’s internal cost of reductions, purchasing permits will be attractive and markets for emissions trading will emerge. These emissions markets already exist in various, often limited, forms.²⁶

Although the caps on overall emissions will be at the national level, it is important to emphasize that in our scheme actual trading will take place between *enterprises*, whether private or state-controlled. For example, Duke Power in the U.S. might purchase Chinese-denominated permits from Xian Electric Power to cover its anticipated excess emissions in 2010, and it could re-sell these permits if it turned out to have more than it needed. States are nonetheless crucial to our proposal. States will have overall emissions targets and will issue or sell permits to enterprises as they decide. States will also enforce compliance with national caps domestically. Most significantly in this regard, we advocate that all permits from a given jurisdiction be assigned the same value if sold.

In other words, under our system permits trading on the world market would be “*jurisdiction-equal*.” By this we mean that permit validity will be assessed on a national basis and permits will be discounted on a national basis as well. (We discuss assessment at length below). Consequently, the validity of permits sold by entities will depend on the *aggregate* validity of permits sold from a particular national jurisdiction, as decided by the assessment process. Hence all permits emanating from a given jurisdiction in a given year would ultimately be assigned the same validity: i.e., permits issued for the year 2010 by the Xian Electric Power Company and Shanghai Electric Power would have the same value.

Sellers will seek to command the highest price for their permits by ensuring that permits represent true reductions. Buyers will in turn seek the cheapest permits, adjusting for risk. Buyers of emissions permits that turned out to be invalid would be liable to make up the difference in some way. By invalid we mean permits that do not represent the full amount of carbon reduction their face value implies. Buyers who hold insufficient valid permits at the end of the budget period would need to purchase more permits or engage in further internal reductions. Again, it is national governments that would enforce this commitment against private actors.

This system thus rests on the incentives of buyers, which will largely be in industrialized democracies, to comply with domestic emissions controls and the incentives of sellers, largely outside these states, to command and maintain the highest price in the market. It is therefore very important to note, as Victor does, that the likely permit-short countries, in which enterprises will be net buyers of permits, on balance have stronger and less corrupt national legal institutions than the likely permit-long countries. Furthermore, the permit-short countries are overwhelmingly democratic. We therefore rely on *internal* structures and incentives, such as democracy and the rule of law, to ensure that permit-short countries comply with the system. Indeed, the *political asymmetry*—in rule of law and democracy—between buyer and seller countries is central to our advocacy of buyer liability. Another way of expressing this point is to say that incentives for compliance for net buyer countries are exogenous to the institutional system that we propose.

By contrast, our system is designed endogenously to generate incentives for compliance on the part of permit-long, or seller, countries. These governments will gain economically from maintaining a high value for the permits that their enterprises sell, and will therefore seek to act in a way that maintains their

reputations for compliance. This system, unlike many of the most prominent alternatives, provides “institutionalized transmission belts” for compliance to flow from the advanced industrial democracies, who have the strongest commitment to climate change abatement, to the wide range of likely selling jurisdictions, which tend to have weak commitments to abatement. Below we flesh out some of the details of this process.

**B. Buyers and
Incentives for
Prudence**

As in all cap-and-trade systems, under our proposal emissions permits would trade on public markets. Their value would depend on buyers’ *ex ante* estimates of validity. Shortly after the end of the year for which permits were issued, a comprehensive assessment would decide their value. For instance, Indian-jurisdiction permits for the year 2010 might be evaluated by June 30, 2011, when all entities subject to caps on their 2010 emissions would be held accountable for their emissions, taking into account valid permits bought or sold.

Since *ex post* assessment problems are difficult and complex, we devote all of Section III to that topic. Here we focus on the incentives of buyers. In many respects a buyer liability system is broadly akin to the existing international bond market. After being issued by states, bonds trade on international markets, just as emissions permits would trade on such markets. Permits would trade at prices that would reflect market participants’ confidence that, when they came due for redemption, they would be valid. They would likely trade at discounts if their validity was viewed as questionable. Buyers of emissions permits that were invalid, like buyers of bonds whose issuers default, will incur losses at the end of the process; and market prices will reflect prevailing expectations of eventual validity or invalidity. Like buyers of bonds, therefore, buyers of permits will have strong incentives to assess quality *ex ante*, price the permits accordingly, and hedge to some degree by purchasing excess permits.

Market participants would in turn have incentives to create or engage ratings agencies or other entities to evaluate the quality of permits *ex ante*, just as we see bonds rated by existing agencies as a way to express and monetize the risk of default. In a world of perfectly functioning markets, reliable ratings agencies would come into being endogenously, as a result of demand for their services; and to a considerable extent we expect this to happen.²⁷ The recent financial crash, however, illustrates the pitfalls of ratings. Ratings agencies themselves can have perverse incentives and therefore exhibit systematic bias.

One advantage of ratings on greenhouse gas emissions permits as compared to long-term bond ratings is that the feedback would, under our system, be annual: each year the *ex post* assessment system would evaluate permits, which would provide information about the validity of permits for future years from the same issuer. It would probably be necessary also to take some measures preventing highly leveraged large banks and bank-like entities from speculating in permits since, as we have seen in the recent housing crisis, these activities generate risks that governments may be required to socialize if financial collapse occurs. Perhaps a non-profit “watchdog” to evaluate the ratings agencies could be created. The watchdog institution could closely scrutinize a random sample of the ratings of

each ratings agency, and itself provide a rating of their reliability, which investors could use in evaluating these ratings and issuers could use in deciding which ratings agency to employ. We are agnostic about the precise structure of such a system, but we believe it is essential that permit rating work reasonably well.

In the United States cap-and-trade system under Title IV of the Clean Air Act, sellers are liable for the value of their permits, and this liability is legally enforceable. Scott Barrett reports that “the penalty for non-compliance is so severe that in 2006, compliance was 100 percent.”²⁸ But as we have seen, no such enforcement is available at the international level. At this level a major advantage of a system of buyer liability is that buyers face incentives to monitor and assess the behavior of sellers: private markets, therefore, would carry out extensive informational tasks that might otherwise be left to governments.

The keys to permit markets working smoothly are thus accurate assessment and pricing. If assessments *ex ante* are accurate, buyers can simply discount permits appropriately and buy more nominal permits than they require in order to meet emissions limits set by their governments. As in other markets, actors will hedge against risk. Insurance markets may also arise to cover the risk of permit invalidity. We expect that buyers will also police the actions of other buyers, for they will eventually have a large economic stake in the permit system. Those who abide by the rules and accurately assess and pay for quality permits will not want competitors to gain by purchasing cheaper, riskier permits. All these features push toward compliance in the permit-short jurisdiction. However, if riskier permits fail, the buyers of them, now facing a shortfall, may in severe situations seek political renegotiation of their domestic emissions restrictions rather than the purchase of more permits. This is a serious problem—of moral hazard—that we address in Section IV below.

If buyers bear the liability for invalid permits, what incentives do sellers have to ensure that the permits they sell are backed by real emissions reductions at the national level? Permits that lacked full validity would have a reduced value, with the loss borne by buyers that held the permits at that time. How would this give *sellers* incentives to follow the rules?

C. Sellers and Incentives for Validity

Under our proposal (and indeed under nearly all trading systems) emissions trading would be structured to continue for many years. Such an ongoing market creates an economic incentive for sellers to ensure quality. More specifically, if the rate at which states that are net sellers of permits discount future gains is sufficiently low, and the magnitude of expected future sales of permits sufficiently high, they will seek reputations for selling valid permits.²⁹ Michael Tomz has shown that such national-level reputation effects are very strong in international bond markets, and there seems no reason to believe that they would not be equally strong in emissions markets.³⁰

Sellers of fully valid permits would also have an incentive to cooperate with and even support credible monitoring systems, so that their permits would be regarded *ex ante* as valid and could command their full price. That is, the “market for lemons”

logic famously outlined by George Akerlof would prevail.³¹ Indeed, support by sellers for independent monitoring would be a signal of being honest, and therefore valuable in itself. In short, buyer liability makes seller incentives largely *economic* rather than *political*. Seller incentives would not rest on concern about climate change; they would rest on an ongoing desire for profit.

Reputation (for high value permits) is consequently at the center of this self-enforcement mechanism. It is therefore crucial to design the allocation system so that sellers of permits would face the prospect of a substantial stream of revenue many years into the future. If the “shadow of the future” is too short, incentives for compliance will tend to vanish.³² In the long run, of course, the caps will have to “bite” even on those countries who were net sellers of permits when they originally joined. Our expectation is that over time, countries such as China would increasingly recognize their stake in mitigating climate change; that is, at the state level incentives would become political as well as economic, even if entities would continue to be primarily motivated by profit. Having been part of a cap-and-trade system, these governments would also have developed the institutions necessary for effective participation, and acceptance of meaningful caps would therefore create a less uncertain prospect for them. In other words, ideally the period of being large net sellers of permits would be a transition phase, easing their way into full membership.

There are many potential problems with this system, as we discuss below. However, the cardinal virtue of a buyer liability system is that it would not require that an international organization ensure compliance with international commitments—a condition that, as we have seen, cannot be met. This system would instead be self-enforcing.

III. THE PROBLEM OF ASSESSMENT

To be effective, any cap-and-trade regime, whether involving buyer or seller liability, requires an accurate and prompt *ex post* assessment of permit quality. In view of our assumption that any system that can be gamed for strategic advantage will be gamed, any technically complex system of assessment should be examined closely from a political standpoint. As in liability systems, complex technical arrangements can be strategically manipulated in ways that are not transparent. If so, their very complexity may be self-defeating.

Permit assessment rests on the measurement of aggregate emissions in selling jurisdictions. Measuring the use of some globally-traded fuels is relatively straightforward (at the aggregate national level) but other fuels and emissions sources pose greater problems. Most problematic of all are land-use changes, where measurement is fraught by issues such as the relevant time period that a new forest can be said to be sequestering carbon, and what to do in the event of a fire later on. But a cap-and-trade system has the decisive advantage over project-based systems that it does not have to evaluate what would have happened in the absence of a given project. The assessors simply calculate actual emissions and subtract them from the agreed cap, which is public knowledge. They only have to assess a factual situation—actual emissions—rather than both a factual and a counter-factual.

One promising way to simplify this process is to focus on “upstream” emissions—to measure the carbon inputs into the energy system—which enter at relatively few points—rather than emissions from thousands or millions of sources.³³

The most serious problem of measurement, however, is political: as we noted above, any system that can be gamed will be gamed. An international assessment process will be vulnerable to political pressure, and like judges on international courts, participants may feel strong pressures to support the positions of their national government.³⁴ As a result, strenuous efforts must be made to insulate the assessment process from political pressure.

One way to do so would be to employ a structure like the Intergovernmental Panel on Climate Change (IPCC), which is run by scientists whose judgments are not directly subject to override by politicians and diplomats. Another would be for private foundations to endow a nonprofit entity to carry out the assessment process. Neither is foolproof. However, the politics of assessment in a buyer liability system will be fundamentally different from those in a seller liability system, and much more benign. In a seller liability system, sellers have every incentive to obstruct assessment. In the absence of clear proof of cheating they are unlikely to be punished. Obstruction generally will pay. In a buyer liability system, by contrast, the reputation of any seller that obstructed assessment would fall, and the value of the permits that it issued would fall accordingly. Doubt about the validity of permits would have a similar effect: markets hate uncertainty. Sellers would therefore have strong economic incentives to accept and even welcome thorough assessment, to remove such doubts and therefore raise prices.³⁵

As we have seen, the Kyoto CDM faces a serious assessment problem. The key flaw is the lack of a clear counterfactual baseline in developing countries that sell CDM permits.³⁶ The CDM therefore fails to solve the fundamental problem of such emissions markets—that sellers and buyers alike face incentives to collude and claim high reductions even where none exist. This devastating objection does not apply to the system we propose; under our system all states in the system will have emissions caps. Hence the baseline will be established by treaty.

A. Jurisdiction-equality and Assessment

The need for a clear jurisdiction-wide baseline demonstrates the importance of our proposal that permit validity be assessed (and discounted) on a national basis. Our proposal for “jurisdiction equality” ensures that governments of permit-long jurisdictions will seek to assure that the permits their domestic enterprises offer for sale are valid, because if they fail to do so future permits *from any enterprise within their jurisdiction* will be devalued. Discounting all permits from a given jurisdiction at the same rate may appear unfair, since it penalizes those seller entities that scrupulously abate emissions but whose counterpart entities, in the same jurisdiction, fail to meet their obligations. But this unfairness is essentially a national problem, since it could only be the result of lax enforcement at the national level and can best be fixed via national action.

Furthermore, jurisdiction-equality has two very important virtues. First, it avoids creating very thin markets for thousands of permits from often obscure entities

whose permit quality might be impossible to assess by outsiders. Such a system would lead to very high transaction costs and very thin markets. Second, and perhaps most important, unfairness is a political virtue. Enterprises that meet their emissions targets have strong incentives to press their governments to correct internal compliance problems; in other words, to enforce the system against shirkers. Governments themselves will also face incentives to seek low (or zero) discount factors, since aggregate national sales and, relatedly, tax revenue will turn on permit price. The system therefore generates *endogenous* domestic political pressures for measures to assure permit validity. Since the issuing country as a whole would suffer from having devalued permits—permits are, after all, a valuable commodity—the government would have multiple incentives to avoid and correct these problems.

B. Assessment: an Evaluation

It is extremely difficult to insulate any assessment system against political pressures. Indeed, the central thrust of this discussion is not the merits of any particular arrangement, but the necessity of undertaking a careful political analysis that considers strategies that opportunists could follow to manipulate the system.

A well-functioning cap-and-trade system would likely require regular assessments, in-country and on-site inspections (perhaps done randomly), and a “true-up” period for states to work out shortfalls. Our proposal, with annual assessments of permit validity, certainly requires significantly more resources than have been allocated to the Kyoto Protocol review process to date. But the basic structure and approach is complementary. And while direct inspections of major emissions sites by an international organization will surely raise sovereignty concerns among many parties, there is substantial precedent for this model in the Chemical Weapons Convention, which permits inspections on national territory of chemical production sites, including so-called “challenge inspections” by the treaty secretariat.³⁷ The much less intrusive review we envision for a post-Kyoto system thus falls within established norms in international law.

But the most important point is one already made: buyer liability will give sellers incentives to facilitate assessment and show that they have done so. This is not true of other assessment processes involving developing countries that have failed or been heavily resisted, such as IMF surveillance and the WTO Trade Policy Review Mechanism.³⁸

IV. POTENTIAL WEAKNESSES OF BUYER LIABILITY

Any attempt to get around what often appear as insuperable problems of agreement and compliance will have potential weaknesses. So before discussing the weaknesses of a buyer liability system, it is important to emphasize that alternative systems run directly afoul of the political constraints enumerated earlier. Seller liability is unlikely to work because there simply is no credible set of institutions available in world politics to enforce sanctions against even moderately important states.³⁹ Therefore, any effective system cannot be one of pure seller liability.

The only real question is whether it is preferable to have pure buyer liability or a hybrid system. We prefer pure buyer liability because it is the only system that is

robust to state non-compliance—if the shadow of the future is sufficiently long—and that does not require frequent state negotiations. Such negotiations inevitably raise issues of renegotiation, gaming, and non-transparency. Hybrid systems will typically be subject to at least one of these three problems. To prefer a hybrid system over pure buyer liability, it would have to be shown that the net benefits of the hybrid system are superior, not merely that buyer liability raises some potential problems. We doubt this is possible, and hence favor pure buyer liability.

With these fundamental political constraints in mind, we mention three potential weaknesses of our system. For each of the weaknesses that we identify, we make a counter-argument that alternative schemes are less promising.

A common objection to a buyer liability system is that it would create too much risk, and high transaction costs, as a result of insufficient information about the future validity of permits. There is some basis for this concern. Yet from a “markets for lemons” perspective, this informational problem is two sided. On the one hand, Akerlof shows that asymmetrical information can prevent otherwise mutually profitable trades from taking place. Cautious buyers will refrain from purchasing permits in the face of this uncertainty and the market as a result will be very thin. Abatement costs will consequently be higher because foregone trades will require the utilization of more expensive local options. On the other hand, the market for lemons argument suggests that institutions will develop to correct the market failure, if there are financial incentives to do so. In a tradable permit regime, there would be such incentives: buyers can gain enormously by credibly evaluating tradable permits just as they evaluate and rate government bonds. These ratings will help to determine prices in a global carbon market.

*A. Information
and Sudden
Changes in
Expectations*

That said, our buyer liability model rests to some degree on assumptions about the ability of such an incentive system to generate and widely distribute accurate information, and the system will work well only if accurate information about permit validity is widely dispersed. However, if information about validity is not widely dispersed—if it is largely private and/or secret—and if this situation is not widely appreciated, we may see many mistakes by buyers. The ongoing mortgage crisis suggests that even in well-established markets it is surprisingly easy for sophisticated participants to misprice goods. For the system to work, the *ex post* monitoring system will have to be sufficiently reliable, credible, and prompt that adjustments can be made quickly, and fairly smoothly, to failures of permit-settling countries to fulfill emissions requirements. Again, we stress the annual nature of assessment. Such a system provides a steady stream of information, albeit inevitably somewhat imperfect, about emissions and permit validity.

In the end, however, the objection that buyer liability generates too high transaction costs founders on the false premise that seller liability has lower transaction costs. On the contrary, the defense of seller liability on the grounds of lower transaction costs is spurious: it simply “achieves” lower costs by ignoring the problem of compliance. Its efficacy depends on imposing penalties on sellers of bogus permits. But neither internal enforcement under seller liability nor external enforcement is likely to be effective. We cannot count on internal enforcement since many

sellers of climate change permits will be entities in jurisdictions, such as China and Russia, with weak internal regulatory systems and little domestic public pressure for effective action. We cannot count on external enforcement because these same states are strong and sensitive to issues of sovereignty. Hence, as we indicated at the outset, systems of externally enforced legal liability are unlikely to work. For these reasons a seller liability system is far more likely to break down at the compliance stage.

B. Negative Cascades

A second potential problem relates to negative “cascades.” If enterprises in a country that is “permit-short” overvalue permits *ex ante*—buying permits that turn out to be worth less than expected—then the state where the buyers reside could miss its international target. The worst-case result would be a cascade or contagion effect, in which the devaluing of one seller’s permits (say, Russian permits) then triggers noncompliance in other states whose enterprises hold Russian permits. Market expectations would eventually adjust. But in that particular year shortfalls in compliance would occur, if two additional features exist: entities both did not hedge adequately and could not buy sufficient new permits from other sellers.

For several reasons we do not think this scenario is likely. We expect hedging to take place for the reasons given above. There is also reason to think that permits will be available in the event of a shortfall, albeit at higher prices. Third, under our proposed system the cascade problem would be alleviated by the fact that permits that are not fully valid would suffer only percentage reductions, not complete invalidation. Fourth, the problem would also be limited to the year in question. Finally, a work-out period could be arranged so that the full impact of holding partially invalid permits was not immediate for the buyers. Likewise, it might be desirable to have “banking and borrowing” provisions that allow the buying jurisdiction, which suffered from holding invalid permits, to make up the deficit in future years.

Consistent with our argument about the comparable Kyoto provisions above, such measures would make sense as a way to smooth out burdens arising from sudden changes in conditions, but they are not enforcement provisions. However, as Robert Stavins argues with respect to the United States, “credible mechanisms need to be established to ensure that the use of borrowed allowances is offset through future emission reductions.”⁴⁰ For this reason we advocate using such banking measures only cautiously.

C. Moral Hazard & Seller Default

Despite the reputational incentives to maintain the future value of their permits, some sellers may sell permits that turn out to be worth less than their nominal value, either due to opportunism or misjudgment. Buyers of these devalued permits would have to engage in further internal reductions or buy additional permits to reach their nationally-mandated caps. The consequence of seller defaults would therefore be *increases* in the price of carbon as buyers (typically) go into the market to cover shortfalls. This is actually a great advantage of the system, since without such a mechanism, overselling of permits would lead to a lower effective price of carbon by increasing permit supply.

To maintain the incentive of buyers to avoid buying invalid permits, they must not be able to renegotiate their domestic emissions caps, or otherwise receive compensation from their governments, in the event that their purchased portfolio of permits is insufficient to reach their cap. That is, governments of permit-short countries need to protect against “moral hazard,” similar to moral hazard problems of bailing out banks that engage in risky lending practices and later seek government bailouts. This is probably the most serious weakness of our system, though it is a weakness shared by nearly every alternative model as well.

We cannot guarantee that authorities will not, under pressure, engage in activities that create moral hazard in a climate change permit system. Indeed, in response to the prospect of bank failures set off by the recent financial crisis, the U.S. Federal Reserve System and the Treasury have taken radical measures to prevent bank failures. These measures have raised serious issues of moral hazard.

Explicit legislative provisions to prohibit *post hoc* subsidies and renegotiation will consequently be essential, and the media and non-governmental environmental organizations will have to be alert to the danger; but these measures are unlikely to be sufficient if the invalidity of seller credits threatened a banking crisis in the buyer country. One aid to resistance is likely to be pressure from buyers of valid permits, who will seek to ensure that the value of their investments is not squandered by the state. They will likely constitute a powerful interest group with a stake in the integrity of the system. Another source of resistance to moral hazard lies in the accountability of governments to their publics, and the commitment by those publics to compliance with a meaningful international climate regime. Publics will need to understand that succumbing to pressure to compensate buyers for invalid permits will destroy the climate change mitigation system.

However, neither reliance on competitors nor publics would be likely to suffice if very large banks or bank-like entities were faced with insolvency as a result of having purchased large quantities of invalid permits. Regulation will have to occur *ex ante* to ensure that such a situation does not arise. That is, regulation will have to assure, as noted above, that banks and bank-like entities cannot speculate in emissions permits with highly leveraged debt.

In world politics, strong commitment by states is essential to effective multilateral action. States must prefer participation to non-participation. We therefore began this paper by reviewing reasons why a cap-and-trade regime is the most likely to induce sufficiently widespread participation among significant emitters to create the possibility of effectiveness. Proposals for assistance with projects and policies carry enormous transaction costs and have little prospect of being sufficiently effective; and an international carbon tax is unlikely to be acceptable to both reluctant developing countries and the major industrialized states as well. In the end, a cap-and-trade regime must rest on strong preferences in democratic states to mitigate climate change. These are demanding political conditions, but we see no alternative arrangement that could generate sufficiently effective and

CONCLUSION

timely action. And we observe around the world recent actions that counsel some optimism, in Australia, the EU and even the United States.

Yet any cap-and-trade regime at the international level will encounter pressures toward noncompliance. As with participation, for global regulatory regimes to work well, states must, on the whole, choose compliance over violation. Since there is no external enforcer, arrangements such as that in the Kyoto Protocol for seller liability will not work. Compliance will neither reliably occur *ex post* nor be expected to occur *ex ante*. The severity of the global climate problem does not by itself entail meaningful action under these conditions; for many states the costs of abatement are higher than the benefits of a more stable climate, and for some states climate change itself may even be welcome.

Our proposed system for a post-Kyoto regime rests instead on a model of buyer liability coupled to annual *ex post* assessments and jurisdiction-equal discounting of invalid permits. This system is incentive-compatible for two reasons: buyers have incentives to monitor the system and price permits according to perceived validity, and sellers have incentives, if allocations are correct, to maintain their reputations for reliability. The system will not operate automatically: in particular, institutions will need to be created to assure that *ex post* assessment is reliable and, *ex ante*, that ratings agencies are also reliable. Indeed, one of the major conclusions of this paper is the urgent need for social scientists to think more carefully about assessment institutions that could be effective in a climate change regime with buyer liability.

Some non-compliance in climate change cooperation is inevitable. Yet the system that we propose is the least worst choice, because it is consistent with the fundamental features of world politics we have described. For this reason, it provides at least the outline of a political foundation for a working international system not doomed by enforcement problems. It could therefore contribute to effective regulation of greenhouse gas emissions and, most importantly, help to generate the technological innovation that is widely agreed to be essential if climate change is to be brought under control.

[†] This paper will appear as a chapter in POST-KYOTO INTERNATIONAL CLIMATE POLICY: IMPLEMENTING ARCHITECTURES FOR AGREEMENT (Joseph E. Aldy & Robert N. Stavins eds., forthcoming 2009). The authors are indebted for comments on earlier drafts of this paper to the organizers of this project, Rob Stavins and Joe Aldy, to Deborah Avant, Scott Barrett, Dan Bodansky, Peter Gourevitch, Jeffrey Frankel, Diana Liverman, Michael Oppenheimer, Josh Rigs, David Victor, and Jonathan Wiener. We also thank participants in the Harvard Project on International Climate Agreements Workshop, March 13-14, 2008, particularly Scott Barrett, Daniel Bodansky, Richard N. Cooper, Denny Ellerman, Nathaniel Keohane, William Pizer, and Kenneth Richards; and to helpful commentators in audiences at Cambridge University, Oxford University, UCLA, UC Irvine, and NYU, especially Richard Stewart and Benedict Kingsbury, convenors of the NYU seminar on Global Administrative Law. We appreciate research assistance from Raneer Adipat.

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²⁴ OLIVER TICKELL, KYOTO2: HOW TO MANAGE THE GLOBAL GREENHOUSE (2008) proposes allocating permits directly to individuals rather than states. But the political impediments to agreement and the administrative difficulties to implementation seem debilitating.

²⁵ In most national legislation, including proposed laws in the U.S., trading is limited to a small fraction of the overall entity cap. We anticipate that feature continuing for some time.

²⁶ Examples include the European Union Emissions Trading Scheme and the Chicago Climate Exchange.

²⁷ See TIMOTHY J. SINCLAIR, THE NEW MASTERS OF CAPITAL: AMERICAN BOND RATING AGENCIES AND THE POLITICS OF CREDITWORTHINESS (2005).

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³³ OLIVER TICKELL, KYOTO2: HOW TO MANAGE THE GLOBAL GREENHOUSE 90-92 (2008). A carbon tax would also be relatively simple to administer but founders on likely political resistance from developing countries, who will refuse to join a system that does not offer them credible compensation. Allocating them excess permits on a temporary basis does this; a carbon tax does not.

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³⁷ Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons, *opened for signature* Jan. 13, 1993, S. Treaty Doc No. 103-21, 1974 U.N.T.S. 317, available at <http://www.opcw.org>.

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⁴⁰ Robert N. Stavins, *Addressing Climate Change with a Comprehensive U.S. Cap-and-Trade System* 8 (Environment and Natural Resources Program, Belfer Center for Science and International Affairs, John F. Kennedy School of Government, Discussion Paper No. 2008-02, 2008), available at, http://belfercenter.ksg.harvard.edu/files/Stavins_Climate_Change.pdf.



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THE DECLINE OF GLOBAL TRADE NEGOTIATIONS—AND THE RISE OF JUDICIAL AND REGIONAL ALTERNATIVES*

Richard H. Steinberg**

INTRODUCTION

Even before the beginning of the global financial crisis in late 2008, hopes for a broad multilateral trade deal had faded. Since its creation in 1995, the World Trade Organization¹ (WTO) has been unable to advance an ambitious legislated trade deal among members. Developing countries, often speaking as a bloc, have exacerbated disjuncture in U.S. and European preferences on trade policy. The result has been an impasse at the negotiating table and the slow death of what was once envisioned as an expansive Doha Round of multilateral trade negotiations. The same North-South divisions that have deadlocked multilateral trade negotiations also help explain the increasingly active role being played by the WTO Appellate Body, which has not been subject to an effective check by the divided WTO membership. Moreover, the WTO negotiating deadlock has favored an explosive proliferation of bilateral, plurilateral, and regional trade agreements (known collectively as “preferential trade agreements”- PTAs), which have offered alternative venues for trade negotiations. Taken together, these developments suggest that we are entering a period of regionalization of global trade negotiations and “judicial liberalization,” which has been led by the WTO Appellate Body.

To examine the relationship between multilateral paralysis and alternative venues for trade liberalization, I proceed in three steps. Section I examines the law and politics of successful multilateral trade negotiations in the 1948-95 period. Section II identifies the origins of the contemporary legislative stalemate in the WTO, explaining the collapse of multilateral negotiations and its relationship to the proliferation of PTAs. Section III explains how the WTO dispute settlement system has become an increasingly and unexpectedly important venue for lawmaking with a liberalizing bias, and explains why WTO judicial liberalization persists, arguing that it is favored by developing countries that now join together to block WTO legislative proposals that would diminish the Appellate Body’s independence. I conclude by exploring implications of a world in which liberalization takes place preferentially and in the courtroom.

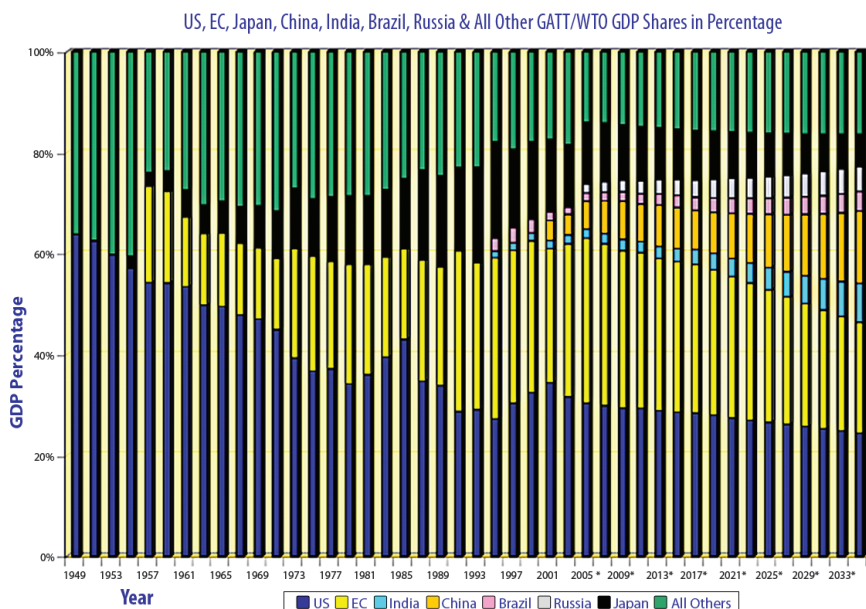
I. Law, Power and the Success of Multilateral Trade Negotiations from 1948 to 1995

The General Agreement on Tariffs and Trade (GATT),² and its successor organization (the WTO), created a rule-based system (GATT/WTO), which facilitated the worldwide lowering of trade barriers and the growth of world commerce.³ The efficacy of the regime, however, rested on a consensus among its largest members. In its earliest years, the GATT reflected U.S. power; as U.S. market share receded, the organization continued to prosper because of a trans-Atlantic bargain between Europe and the United States.

The GATT was created to include both big and small nations, and was built on two norms: most-favored-nation (MFN) treatment and reciprocity. At its inception in 1947, half of the nations that negotiated the GATT were developing countries. These smaller nations benefited from regime participation via the GATT’s MFN provision, which requires GATT parties to accord their most favorable tariff treatment to all GATT parties. At the same time, in most of the first 35 years of the regime, the bigger GATT countries were concerned about reciprocity (i.e., market-opening for imports conditioned on foreign market-opening for exports) with other large countries—but they were not very interested in access to the world’s smaller markets. These larger countries bargained with each other for reciprocal trade liberalization in serial multilateral trade Rounds. Hence, the developing world could deny increased access to its own market, while the MFN provision assured it of new export markets. Some Southern countries did liberalize their markets in the pre-WTO period, either in a multilateral trade Round or in the process of accession, but the majority of these GATT contracting parties eschewed liberalization at home and grew their foreign trade through MFN-garnered export access.

Reliance on a norm, reciprocity (among big countries), and a rule, MFN, to fuel trade liberalization had long-term implications. The reciprocity norm made bargaining power in the GATT/WTO a function of market size and a nation’s willingness to use the threat of market closure (or promise of more openness) as a means to influence others. Figure 1 shows actual market size (measured in Gross Domestic Product—GDP) of the biggest GATT/WTO members from 1949 through 2004, and projected market size from 2005 through 2034, as a percentage of GATT/WTO market size.⁴ In the GATT’s early years, U.S. GDP accounted for about 65% of GATT GDP; the United Kingdom accounted for another 10%. Since then, the relative size of the U.S. market has consistently declined; starting in 1957, that of the European Communities (EC)⁵ has grown.

Figure 1



To predict future growth, I used the projections of the Goldman Sachs Global Economics group. Their model predicts growth as a function of growth in employment, growth in the capital stock, and total factor productivity (TFP) growth. TFP is modeled as a process of catch-up on the developed economies. The Goldman Sachs model forecasts for GDP growth in the next 10 years are similar to IMF estimates of potential growth in the economies evaluated here.⁶

Shifting market share parallels coalition behavior in the GATT/WTO. The early years, 1947 to 1973, were a time of almost complete economic dominance by the United States. While the EC's market share was growing, it only accounted for an average of 15% of GATT GDP during the period. The establishment of the GATT itself best exemplifies U.S. dominance of the negotiating process in these early years. The United States drafted the instrument that became the GATT 1947. It made accommodations to the United Kingdom, enabling the maintenance of colonial preferences, but the General Agreement was fundamentally U.S. designed.⁷

By 1973, the U.S. share of GATT GDP had fallen below 40% and the EC share had grown to more than 20%. Other changes had occurred in the interim. Before 1973, EC institutions were insufficiently developed to enable Brussels to partner with Washington to govern the GATT system. By the mid-1970s, however, the role of the Commission in coordinating Europe's external commercial negotiations, and that of the 113 Committee in overseeing the Commission, were clearly established, enabling the EC to speak with a single voice.⁸ As a result of both shifting market shares and better coordination among EC members, Brussels and Washington began regular bilateral consultations, often followed by an expanded conversation among the "Quad Group," which also included Canada and Japan. Decisions of the "Quad Group" were then often presented as a *fait accompli* to the other GATT contracting parties. By the early 1970s, commentators had begun to suggest that U.S.-EC cooperation was necessary for successful negotiations at the GATT.⁹

The power of this coalition is exemplified by the events surrounding the establishment of the WTO. In 1991, the EC and United States decided to impose the results of the Uruguay Round negotiations on the rest of the world through what they initially referred to as "the power play." Specifically, they agreed that they would withdraw from the GATT 1947 and sign a substantively identical but legally distinct instrument, the GATT 1994.¹⁰ This would disengage Europe and the United States from their GATT 1947 MFN commitments to the rest of the world, and would replace them with new MFN commitments in the GATT 1994. The EC and U.S. negotiators agreed that these new commitments would be conditioned on third countries' acceptance of all the WTO multilateral agreements. The effect of this maneuver was to threaten closure of the world's two largest markets (those of the EC and the United States) to any country that did not accept *all* of the WTO multilateral agreements, including several agreements that most developing countries had previously refused to accept." This transatlantic maneuver, which became known diplomatically as the "Single Undertaking" approach to closing the Uruguay Round, allowed the EC and United States to set the terms of the new organization. Now, reciprocity and all the regime's principles would be applicable to the developing world.

For those favoring rapid and deeper liberalization, the WTO's biggest contemporary problem is an inability to gain consensus on a negotiated outcome. Three developments explain the creation of stalemate in multilateral trade negotiations.

First, as explained above, with the Single Undertaking that closed the Uruguay Round, the norm of reciprocity became generalized across all countries. That event was the culmination of pressures that began in the 1970s and intensified in the 1980s.

Powerful constituencies in the North were demanding deeper liberalization that would discipline behind-the-border measures in such areas as technical barriers to trade, services regulations, and intellectual property protection. And as the U.S. trade balance deteriorated and the Asian Tigers emerged, various groups in the United States began demanding reciprocity on these issues, as well as tariff reductions, from all countries. With the imposition of reciprocity at the conclusion of the Uruguay Round, the developing world began demanding changes in the negotiating agenda, especially for negotiations on a range of goods of their choosing. With developing countries unable or unwilling to offer much in return, negotiations have become attenuated and increasingly difficult.

Second, developing countries have adopted institutional strategies to sustain their coalitional behavior. Trade negotiations have always been difficult, and developing countries have in the past episodically joined together to influence negotiations. But the persistence of contemporary developing country coalitions is unprecedented. Developing countries are continuously acting in concert with each other, sustaining blocs that have successfully vetoed a range of various proposals favored by the EC and United States.

The developing countries are not a unified bloc with identical interests, but they have figured out an institutional solution to remaining more unified and cohesive than ever before. Specifically, they are agreeing to bundle issues together, creating linkages across the interests of varying types of developing countries. When a position is taken on only a single issue by two or more countries, a third country may offer a coalition member a more attractive commercial concession to catalyze withdrawal from the common position. This problem of being split asunder may be solved by agreeing to bundle issues, taking a common position on a host of issues of interest to each country.¹² In the Uruguay Round, the developing countries did not bundle and they were frequently frustrated in efforts to take a common position on individual issues. In the Doha Round, the South seems to have adopted the bundling solution.

As a result, since 1995, the developing world has been more successful than ever at ending Northern hegemony of the GATT/WTO system. Although not able to force the developed world into compliance to their wishes, they have become effective veto-players, a role they have repeatedly played with success in the Doha Round.

Third, beginning in the 1990s, the EC and then the United States began accelerating their conclusion of PTAs, which has had the unintended and unanticipated consequence of diminishing their bargaining power at the WTO. The very idea of a PTA, of course, runs contrary to the GATT MFN principle. GATT Article XXIV has always offered an exception to the MFN rule for PTAs, but the exception was used relatively rarely until the 1990s. Largely in pursuit of a strategy of “competitive liberalization,” the conclusion of PTAs became a cornerstone of EC and U.S. trade policy in the last decade. Frustrated by multilateral stalemate, “competitive liberalization” was adopted as a strategy whereby bilateral PTAs with a hub-and-spoke architecture concluded by the EC, on one hand, and United States, on the other, would pressure excluded third countries (by operation of trade and investment diversion¹³) to also demand PTAs with Washington and Brussels; the idea was that eventually the terms of these PTAs could be multilateralized at the WTO.¹⁴ By 2009, the EC had concluded PTAs covering about 40 countries, with additional negotiations underway to convert the Lome Agreement into a set of reciprocal free trade agreements covering an additional 73 African, Caribbean, and Pacific countries. By the same time, the United States had concluded PTAs with 15 countries, covering nearly one-third of total American trade, and was negotiating to conclude more. Since creation of the WTO, approximately 400 PTAs have been established and remain active; about 200 of these are regional trade agreements.

But neither Washington nor Brussels fully appreciated ways in which the strategy of competitive liberalization could backfire on multilateralism and make progress at the WTO more difficult. It is one thing to conclude a bilateral deal between Washington (or Brussels) and a smaller country; it is quite another to multilateralize its terms with a third country like China. Moreover, the PTA strategy accompanied a new intransigence on the part of the EC and United States in the Doha Round, in part a function of the availability of an alternative to WTO liberalization. Most importantly, however, the conclusion of these PTAs has diminished EC and U.S. bargaining power at the WTO by providing bilateral MFN guarantees to PTA partners. Legally, the proliferation of EC- and U.S.-centered PTAs has fatally constrained the ability of Europe and the United States to behave as hegemonic duopolists. Since each of the PTAs contains an MFN provision, neither Brussels nor Washington can replay the “power play” they used to conclude the Uruguay Round: the third countries with which they have concluded PTAs may rely on the MFN provisions in those PTAs to ensure continued market access to Europe and the United States without regard to whether they continue to enjoy an MFN guarantee through WTO agreements. Proliferation of PTAs therefore poses a significant legal-political constraint on European-U.S. hegemony, a constraint that did not exist a decade ago.

Because of these shifts—the end of non-reciprocity toward the South, sustained developing country coalitions, and U.S.- and EC-centered PTA proliferation—decision-making has become increasingly difficult in the WTO. Nothing symbolizes and illustrates this power shift¹⁵ better than the new “Quad.” In Geneva, “the Quad” no longer refers—as it did for decades—to the EC, Japan, Canada, and the United

States, a group that effectively governed the GATT and shared fundamentally convergent views on the desirability and content of liberalization. Now “the Quad” refers to Brazil, India, the EC, and the United States, a group that has been routinely convened to advance the Doha Round but holds comparatively divergent views about what should be liberalized and who should do it.

The South, now being asked to deliver its markets to international commerce, has become an important demandeur in trade negotiations. What it wants, however, is not easily squared with domestic interests in the North. The agriculture and steel industries in Europe and the United States remain well organized, well financed, and opposed to liberalization. These long-standing protectionist sectors, which have long captured government in the North, have become key obstacles to a successful multilateral negotiation.

At the same time, the South may be unable to deliver in negotiations on key issues. If a broad deal were to be struck at the WTO, it would entail a commitment by the South to address new behind-the-border measures. Credibly committing to such reforms, however, is difficult, given the inefficiencies in state structures in most of the developing world. In Europe and the United States, constituencies now demand that trade negotiations focus on issues such as services, investment, competition policy, labor, environment, and culture. Unlike border measures that invoke a political problem because they lead to factor reallocation, many of these newer issues implicate additional fundamental features of developing countries such as changes in the regulatory structure and capacity of the state, the political structure of society (for example, the power of organized labor), or the industrial structure of the economy. Rules addressing these areas are hard to establish in developing countries, where state capacity and authority structures are simply too poorly developed.

As a result, if there is a proclaimed “successful conclusion” of the Doha Round, the results will be minimalist. Compared to the ambitions of European and U.S. trade policy makers and policy wonks before the Round was launched—for a Round that would zero industrial tariffs, eliminate agricultural subsidies, and address environmental, labor, competition, investment, and transparency issues—the Round failed long ago. But while the ministers of the member nations have been unable to agree on the multilateral trade agenda, they have been able to conclude hundreds of PTAs with each other and the judicial branch of the WTO has begun to address contested policies.

While liberalization through negotiation has become more difficult in the last decade, liberalization (of a different quality, to be sure) has gotten easier through the litigation path. Legislative gridlock and judicial lawmaking are related phenomena in both the domestic and international context.¹⁷ I argue that in the wake of failed multilateral trade negotiations, WTO lawmaking has moved out of the legislative venue of member state negotiations and into the courtroom. Delegation to the judiciary, established with the creation of the WTO, has been unexpectedly accompanied by considerable agent slack.¹⁸ The same divisions that

III. The Rise of Judicial Liberalization¹⁶

have undermined trade talks have made it increasingly difficult for the membership to provide a check on judicial lawmaking. There is more litigation now than in the GATT years; the contemporary dispute settlement system engages in more lawmaking than in the GATT years; and WTO judicial lawmaking has a liberalizing bias.

**A. Explaining
Increased
Litigation:
GATT and WTO
Compared**

The rise of judicial liberalization in the GATT/WTO system, and the WTO's dispute settlement rules and processes, are best understood in the context of the flawed GATT dispute settlement rules and processes. That system of resolving disputes developed over a 40-year period, but by the 1970s its basic form had taken shape. Export-oriented producers that believed their products were being illegally excluded from a foreign market would complain to their government. A GATT contracting party would then ask the GATT to establish a dispute settlement panel, but the establishment of a panel could be blocked by the respondent. Even if established, the respondent could block a consensus to adopt the panel report (i.e., block the act that would make it a legally binding decision). And if the respondent failed to comply with an adopted report, then the respondent could block a decision that would permit retaliation against it for continued contravention. As respondents frequently blocked the process, the weakness of the GATT dispute settlement procedure became increasingly apparent.

During the 1970s and 1980s, in response to frustration with the GATT dispute system and in the face of a growing trade deficit and a perception of unfair trade practices abroad, the U.S. turned to domestic law to deal with its trade problems. Specifically, a “unilateral” approach to addressing trade disputes was enacted by the U.S. Congress in the form of Section 301 of the Trade Act of 1974. Section 301 permits (and in some cases, requires) the President to impose retaliatory trade sanctions on countries engaging in practices that are “unjustifiable, discriminatory, or unfair”—as determined by the United States Trade Representative (USTR). Thus, when a foreign government blocked the GATT dispute settlement process, the U.S. government often found itself in a position of threatening unilateral trade retaliation against that government unless it agreed to change its trade practices in accordance with Washington’s demands.

This American approach to the settlement of trade disputes was not viewed favorably by the rest of the world, which wanted to reform the GATT dispute settlement process so that U.S. measures, including measures taken under Section 301, could be challenged effectively. At the same time, the United States championed a GATT dispute settlement system that would be more effective and automatic, without a country’s right to block the process, because the U.S. government believed it was far more likely than other countries to be in compliance with GATT rules.¹⁹

The resulting WTO Dispute Settlement Understanding (DSU) is far more obligatory, automatic, and apolitical than the GATT rules. Two changes are central. First, the reform led to the creation of a seven-member Appellate Body to which nations could appeal panel reports. Second, judicial action became more automatic. A consensus is now required to *block* the formation of a panel, adoption of a report,

or an authorization of retaliation for continued non-compliance—a reversal of the former rule that required a consensus to move through each of these stages. Of course, petitioners would not agree to block establishment of a panel they are demanding, and prevailing parties would not block the adoption of favorable panel reports.

The automaticity of the new system and the promise that it has held for aggrieved members have led to an increased caseload for the WTO dispute settlement system,²⁰ compared to the GATT dispute settlement system. While 535 dispute settlement complaints were filed in the 46-year period of the GATT system, 269 complaints were filed in the first eight years alone of the WTO system. Moreover, because of automaticity, there were more dispositive reports (that is, adopted panel reports in cases where there was no appeal; adopted Appellate Body reports in all other cases) issued in the first six years of the WTO system than in the last twenty years of the GATT system.²¹ And there are far more parties to WTO disputes than to GATT disputes. In the GATT era, it was rare for a case to feature more than one complainant. In contrast, in the WTO era, in nearly half of all cases there are multiple complainants or interested third parties. Not only have caseloads increased, so has the number of parties involved in each dispute.

Many scholars have suggested that judges may behave strategically and favor increasing their authority,²² yet few Uruguay Round negotiators anticipated or intended the Appellate Body to engage in lawmaking.²³ The switch to automatic, binding dispute resolution and the establishment of the Appellate Body were seen by the United States as an opportunity to foster implementation of and compliance with the deals struck in the legislative process. The dispute settlement process was to fulfill that purpose by offering a neutral judicial process to enforce WTO agreements the substance of which was largely favored by the United States. Most U.S. policy makers at the time expected WTO dispute settlement to enforce the WTO “contract;” they did not expect or accurately anticipate that the Appellate Body would make law.

B. The Emergence of Judicial Lawmaking

As in domestic legal systems, rules and principles guiding the interpretation of public international law permitted the Appellate Body to take a range of interpretive stances: at one extreme, a restrained interpretive stance that is highly deferential to the express consent of states; at the other extreme, an expansive interpretive stance that is less deferential to state consent, favors dynamic interpretation of treaty provisions, and expands upon terms and gaps. Largely in the interests of completeness, coherence, and internal consistency of WTO law, the Appellate Body chose a more expansive stance both on questions of whether to interpret and on the method used for interpretation. The resulting judicial decisions have created an expansive body of new law.

WTO judicial lawmaking has two dimensions: filling gaps and clarifying ambiguities. Gap-filling refers to judicial lawmaking on a question for which there is no legal text directly on point, whereas ambiguity clarification refers to judicial lawmaking on a question for which there is legal text but that text needs clarification.²⁴

Judicial lawmaking at the GATT/WTO has expanded along four dimensions.²⁵ First, the DSU's silence on many procedural questions has been seen by some as an invitation to the Appellate Body to make procedural rules. In some cases, the Appellate Body has created law that fills procedural gaps in WTO agreements, even though the existence of the gap has resulted from sharp disagreement among members about how to fill it.²⁶ Second, the WTO Appellate Body has engaged repeatedly in a form of lawmaking by which it has given specific meaning to ambiguous treaty language. Such clarifications may cause a negative political reaction by members or non-governmental stakeholders that engaged in behavior that was within a range of possible meanings, given the ambiguity.²⁷ Third, in a number of instances, the Appellate Body has given precise and narrow meaning to language that was intentionally left vague by negotiators, either because they could not agree on more specific language, or in order to permit a range of alternative behaviors or national practices.²⁸ Finally, a conflict between GATT/WTO texts (or between text and GATT practice) may create an ambiguity, and in a handful of cases the Appellate Body has read language across GATT/WTO agreements cumulatively in a way that has generated an expansive set of legal obligations.²⁹

C. Liberalization Through WTO Dispute Settlement?

In most cases, Appellate Body interpretations have favored more trade openness. In all cases, complainants advance interpretations of WTO agreements that challenge a respondent's trade barrier, and respondents argue for interpretations that would permit maintenance of the barrier. For WTO cases initiated before 2001, 89% of the 152 dispositive reports held that at least one of the national measures at issue was WTO-inconsistent.³⁰ Qualitative assessments of Appellate Body decisions, such as those by Dan Tarullo, have also shown a liberalizing bias.³¹ I do not argue that the Appellate Body always favors liberalization, but its decisions do seem biased toward liberalization³² and its opinions tend to suggest a view of the WTO more as an instrument of liberalization than a reflection of a contractual balance between liberalization and protection captured by the concept of embedded liberalism.³³

D. Why Judicial Liberalization Persists

The use of judicial action to open markets, and the acquiescence of the United States to Appellate Body decisions, does not imply that the United States favors the extent of judicial liberalization currently taking place at the WTO. As argued above, there is little evidence in the negotiating history of the DSU that suggests that the move to legalization of GATT/WTO dispute resolution was intended or expected to lead to expansive judicial liberalization. Then why hasn't judicial liberalization been checked?

The expansive interpretive stance by the Appellate Body has faced *some* limits. For example, the EC and the United States have exercised a *de facto* veto over the appointment of some proposed Appellate Body members. Similarly, members have not been shy about complaining when the Appellate Body engages in lawmaking they dislike, and proposals by powerful members to rewrite parts of the DSU in the Doha Round may have had a sobering effect on the Appellate Body. To some extent, agent slack has been limited.

Nonetheless, developing countries have not joined efforts to curb judicial liberalization at the WTO. While many developing country representatives have complained about judicial “activism” by the Appellate Body, their bigger complaint appears to focus on their relative lack of resources to fully avail themselves of the dispute settlement system.³⁴ Moreover, some developing countries, such as Brazil and India, have not been shy about taking developed countries, such as the EC and United States, to dispute settlement. In so far as more sophisticated developing countries that may be on the edge of development choose to litigate, they may act as proxies for the developing world, knocking down protectionism in the North.

Perhaps that is why the developing countries have blocked U.S. efforts to rein in WTO judicial lawmaking. In the Doha Round, the United States has proposed several judicial reforms that are intended to curb Appellate Body lawmaking. The central U.S. proposal in this regard would permit the parties to a dispute to agree to excise from draft Appellate Body decisions language they find objectionable. Such a rule would (and is intended to) enable the parties to a dispute to have greater control over the content of Appellate Body opinions. It is also obvious that under that rule a powerful respondent (such as the United States) could offer a petitioner a side-payment (or compliant behavior) in order to eliminate disagreeable acts of Appellate Body lawmaking. Despite their own complaints about Appellate Body activism, the developing countries have blocked progress on this proposal and others on the ground that they would diminish the Appellate Body’s independence.

More broadly, a lack of consensus on all aspects of ministerial decision-making helps explain the lack of oversight of the judiciary. Legislative deadlock in the WTO has diminished the ability to check the Appellate Body.³⁵

No one at the time of signing the WTO agreements predicted that the organization would suffer from legislative gridlock, that the Appellate Body would be a force for economic liberalization, or that regional venues would emerge as a focus of negotiated trade liberalization. All three developments were the result of fundamentally unanticipated institutional and political developments. The Northern demand of Southern reciprocity catalyzed sustained developing nation coalitions, which have led to a lack of consensus among WTO negotiators, an absence of oversight of their judicial agent, and a turn to regional outlets for negotiated liberalization.

These shifts are likely to persist. In the WTO, the capacity to legislate is diminishing. The Doha Round negotiations have repeatedly collapsed, and although the Round may have been formally revived (again), little progress has been achieved. Trade policy interests among the members have diverged, and the GATT/WTO system has evolved from a hegemonic structure, to a hegemonic duopoly, to tri-polarity (the United States, EU, and developing countries) today. Over the next few decades, it seems headed for multi-polarity with a divergence of interests of key members. In the foreseeable future, legislating trade policy at the WTO will be difficult,

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suggesting increasing agent slack for the WTO's judicial system, the persistence of judicial liberalization, and success negotiating expansive liberalization only in regional, bilateral, and plurilateral contexts.

The consequences of these shifts are concerning. Judicial liberalization is not a perfect substitute for negotiated liberalization. Judicial liberalization is limited in its pace; it liberalizes one product or sub-sector at a time. It is limited in its depth; for example, litigation usually cannot reduce tariffs. And it is limited in its breadth; it is hard to see how the Appellate Body could comprehensively address the newer issues of integration—environment, labor, competition law, and investment—that many from the United States and Europe would like to see on the WTO's legislative agenda. Legal language in WTO instruments offers little discursive basis for the Appellate Body's establishment of new, comprehensive rules on these topics.

The same diffusion of power and interests that has catalyzed judicial liberalization at the WTO has fed the proliferation of PTAs, which is having a problematic and uncertain effect on global trade. Lines and circles diagramming the preferential relationships of countries across PTAs are so chaotic and complicated that they resemble a bowl of spaghetti. From the perspective of a government trade lawyer, the Spaghetti Bowl is so complex that even Bismarck would find it difficult to keep track of all the rules and relationships. From the perspective of a private lawyer, the legal transaction costs associated with international commerce have increased radically: consider the tariff and regulatory questions raised in the cross-national production network of a computer made from components in ten countries, each a party to five or ten PTAs—or more. And while trade creation may have increased from this proliferation of PTAs, so has trade diversion. In fact, no one really knows the full impact of this complexity on world trade or on the prospects for further liberalization.

* Parts of this argument have been adapted from Judith Goldstein & Richard H. Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO*, in THE POLITICS OF GLOBAL REGULATION (Walter Mattli & Ngaire Woods eds., 2009) and Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (April 2004). I thank Judith Goldstein for her partnership on this project, as well as Karen Alter, Curtis Bradley, Mark Busch, Christina Davis, Joanne Gowa, Oona Hathaway, Larry Helfer, Miles Kahler, Judith Kelly, Robert Keohane, Giovanni Maggi, Walter Mattli, Helen Milner, Andrew Moravcsik, Kalypso Nicolaides, Douglas Rivers, Duncan Snidal, Ngaire Woods, and workshop participants at Duke, Oxford, and Princeton for useful comments on earlier drafts.

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¹ See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144.

² In this context, the “GATT” refers to the organization that facilitated operation of the 1947 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

³ Judith L. Goldstein et al., *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT'L ORG. 37 (2007).

⁴ National GDP figures for 1949–2004 are from the World Bank; they were converted into U.S. dollars at the annual average prevailing exchange rate, using IMF data. WORLD BANK, WORLD DEVELOPMENT INDICATORS (2005). Projected figures for 2005–2035 assume rates of national GDP growth for the largest WTO members that are similar to those used by the Global Economics group at Goldman Sachs. DOMINIC WILSON & ROOPA PURUSHOTHAMAN, GOLDMAN SACHS, GLOBAL ECON. PAPER NO. 99, DREAMING WITH BRICS: THE PATH TO 2050 (2003). Its projections are also close to those using the Levine and Renelt econometric model that explains average 30-year GDP growth as a function of initial per capita income, investment rates, population growth, and secondary school enrollments. Ross Levine & David Renelt, *A Sensitivity Analysis of Cross-Country Growth Regressions*, 82 AM. ECON. REV. 942 (1992). For China, I assumed two shocks, one in 2010 (that would reduce growth from around 8% to 0% for that year, 3% in 2011, and 7% in 2012) and a large political shock in 2015 (resulting in -5% growth that year, returning to projected levels by 2019). For Russia, I assumed only the former shock.

⁵ European Communities is used herein to refer to the European Community, the European Communities, or the European Economic Community. The European Economic Community was “seated” at GATT meetings from about 1960. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 102 (1969). The European Communities became a member of the WTO at its inception.

⁶ See INTERNATIONAL MONETARY FUND, INT'L FIN. STAT. Y.B. (2005).

⁷ JOHN H. BARTON ET AL., THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW AND ECONOMICS OF THE GATT AND THE WTO (2006).

⁸ Richard H. Steinberg, *The Transformation of European Trading States*, in *THE STATE AFTER STATISM: NEW STATE ACTIVITIES IN THE AGE OF LIBERALIZATION* 340 (Jonah D. Levy ed., 2006).

⁹ Gerard Curzon & Victoria Curzon, *GATT: Trader's Club*, in *THE ANATOMY OF INFLUENCE: DECISION-MAKING IN INTERNATIONAL ORGANIZATION* (Robert W. Cox & Harold K. Jacobson eds., 1973).

¹⁰ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

¹¹ Richard H. Steinberg, *In the Shadow of Law or Power?: Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002).

¹² In game theory, this is known as a "divide the dollar" problem, the standard solutions to which are bundling or sequencing. See Richard H. Steinberg, *The Prospects for Partnership: Overcoming Obstacles to Transatlantic Trade Policy Cooperation in Asia*, in *PARTNERS OR COMPETITORS?: THE PROSPECTS FOR U.S.-EUROPEAN COOPERATION ON ASIAN TRADE* (Richard H. Steinberg & Bruce Stokes eds., 1999).

¹³ For the classic definition of trade diversion, see JACOB VINER, *THE CUSTOMS UNION ISSUE* (1950).

¹⁴ C. Fred Bergsten, *Globalizing Free Trade: The Ascent of Regionalism*, 75 FOREIGN AFF., May/June 1996, at 105; Robert B. Zoellick, *Campaign 2000: A Republican Foreign Policy*, 79 FOREIGN AFF. Jan./Feb. 2000, at 63; Raj Bhala, *Competitive Liberalization, Competitive Imperialism, and Intellectual Property*, 28 LIVERPOOL L. REV. 77 (2007).

¹⁵ These changes in Geneva and the ensuing stalemate do not reflect a fundamental shift in *market* power of WTO members. Some have claimed that the expanded number of developing countries in the WTO, combined with the spectacular economic growth of China and India, are shifting material bargaining power to the South. The data does not support this claim. China and India are growing, and the number of developing country members is increasing, but their markets are still comparatively small. Nonetheless, we can assume that over the next thirty years, material power at the WTO is likely to shift as Figure 1 illustrates. While predicted GDP from 2009–2035 is highly speculative, Figure 1 suggests some interesting developments: material power at the WTO will diffuse, moving toward a five or six-power system over the next thirty years, with the United States and EC still important, but in decline, and China and India clearly rising in prominence.

¹⁶ In the interest of brevity, the argument in this section is presented with less elaboration and depth than in the version appearing in Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004).

¹⁷ GEORGE TSEBELIS, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* (2002); George Tsebelis & Geoffrey Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, 55 INT'L ORG.

357 (2001); Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993).

¹⁸ “Agent slack” refers to a principal-agent relationship in which the principal is able to exert only imperfect control over the actions of its agent. “[T]he principal-agent model is an analytic expression of the agency relationship, in which one party, the principal, considers entering into a contractual relationship with another, the agent, in the expectation that the agent will subsequently choose actions that produce the outcomes desired by the principal.” Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756 (1984). I assume that the relationship between the GATT/WTO and its principals, nations or customs territories, always held some degree of a principal-agent relationship, although the membership exerted far more oversight over the agents (the secretariat or the dispute settlement panels) than is common with other international agencies.

¹⁹ For more details on this argument, see Judith Goldstein & Joanne Gowa, *US National Power and the Post-War Trading Regime*, 1 WORLD TRADE REV. 153 (2002).

²⁰ Data for the 1995–2003 period is from Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995–2003: A Statistical Analysis*, 7 J. INT'L ECON. L. 169 (2004). Data from the 1948–1995 period is from Marc L. Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 457, 473 (Daniel L. M. Kennedy & James D. Southwick eds., 2002). These include complaints that ended prior to a panel decision and those that went on to be decided by a panel and adopted by the members.

²¹ Marc L. Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719, 724 (2003); Steinberg, *supra* note 11.

²² Burley & Mattli, *supra* note 17; John Ferejohn & Barry Weingast, *The Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L. J. 565 (1992); Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669 (2007).

²³ Interview with A. Jane Bradley, former chief U.S. dispute settlement negotiator and Assistant USTR for Monitoring and Enforcement, Washington, D.C. (March 2007), and interview with Kenneth Freiberg, USTR Deputy General Counsel, Washington, D.C. (March 2007), support this conclusion. A handful of lawyers in the USTR General Counsel's office were concerned about judicial lawmaking, but those at the political level in both Washington and Brussels were persuaded by the clarity of the WTO agreements and the WTO Dispute Settlement Understanding (DSU) Art. 3.2 and 19.2 mandates that neither panels nor the Appellate Body could “add to nor diminish the rights and obligations provided in the covered agreements.” Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). U.S. Senator Bob Dole was concerned enough about judicial lawmaking that he proposed establishment of a commission to review the decisions and behavior of the Appellate Body, but only twelve co-sponsors joined him in support of the

proposal and it never passed the Senate. See generally WTO Dispute Settlement Review Commission Act, S. 16, 104th Cong. (1995).

²⁴ Ultimately, the distinction between gap-filling and ambiguity clarification may be fragile, but the distinction is respected here out of convention. See generally H. L. A. HART, *THE CONCEPT OF LAW* (1961).

²⁵ While there is no doubt that the WTO Appellate Body is making law, I do not claim that it has, on balance, been irresponsibly “activist.” All courts make law to varying degrees. The Appellate Body has not shied away from lawmaking, but it has at times restrained itself, demonstrating some sensitivity to politics. For example, it has sometimes invoked the doctrine of “judicial economy” to limit the extent to which it interprets WTO agreements in any particular case. See, e.g., Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, ¶ 135 (July 23, 1998); Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, § VI (April 25, 1997).

²⁶ See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle*] (without clear guidance from WTO agreements, the Appellate Body decided that dispute settlement panels could consider *amicus curiae* briefs submitted by non-state actors); Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997) (Appellate Body established that private lawyers may represent Members in its oral proceedings, despite EC and U.S. opposition on grounds that the practice from the earliest years of the GATT was to permit presentations in dispute settlement proceedings exclusively by government lawyers or government trade experts).

²⁷ See, e.g., *Shrimp-Turtle*, *supra* note 26 (Appellate Body offered a dynamic interpretation of the conditions under which the GATT Article XX(g) exception for conservation of exhaustible natural resources could be invoked, stating that it must be read “in light of contemporary concerns of the community of nations about the protection and conservation of the environment” and establishing at least three specific factors that had no textual lineage but that apply in considering whether a measure contravenes the chapeau to GATT Article XX).

²⁸ For example, in three decisions, Appellate Body Report, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R (May 1, 2001) [hereinafter *Lamb Meat*], Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (Dec. 20, 2000), and Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (Mar. 8, 2002), the Appellate Body fleshed out the causation analysis to be used in safeguards cases, which Uruguay Round negotiators intentionally left ambiguous.

²⁹ Perhaps most controversially, in *Lamb Meat*, *supra* note 28, and Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R

(Dec. 14, 1999), the Appellate Body ruled that national authorities imposing a safeguards measure must demonstrate the existence of “unforeseen developments.”

³⁰ Busch & Reinhardt, *supra* note 21, at 724.

³¹ Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL’Y INT’L BUS. 109 (2002).

³² Some might hypothesize that the Appellate Body nonetheless favors protectionist interpretations in cases involving measures putatively adopted for reasons related to consumer or environmental protection. But several decisions run contrary to that claim: for example, in the *EC—Beef Hormones* case, and in the more recent *EC—GMO* case, the WTO Appellate Body has shown little tolerance for interpretations favoring closure, even though those cases raised politically sensitive social concerns. See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998); Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006). Even in cases where the Appellate Body has ultimately permitted social measures to serve as a barrier to trade, it has made law that restricts the conditions under which such measures may be maintained or applied, as in the *Shrimp-Turtle* case, *supra* note 26.

³³ Ernst B. Haas, *Words Can Hurt You; Or, Who Said What to Whom About Regimes*, 36 INT’L ORG. 207 (1982).

³⁴ Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT’L ECON. L. 861 (2005); Andrew T. Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J. LEGAL STUD. 557 (2005).

³⁵ WTO judicial liberalization is reminiscent of the crucial liberalizing role played by the European Court of Justice (ECJ) in the 1960’s through the late 1980s—until the Single European Act. In that period, the Council was paralyzed by the Luxemburg Compromise, which effectively required unanimity for any important action. The ECJ’s exercise in “negative liberalization,” striking down national protectionist measures in such famous cases as the *Reinheitsgebot* and *Cassis de Dijon* cases, is credited with being the main engine of internal market liberalization in the period. Burley & Mattli, *supra* note 17; Geoffrey Garrett, R. Daniel Kelemen, & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT’L ORG. 149 (1998); Karen J. Alter, *The European Union’s Legal System and Domestic Policy: Spillover or Backlash?*, 54 INT’L ORG. 489 (2000).



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