THEORIES OF IMMIGRATION LAW

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ABSTRACT

Legal scholarship lacks a comprehensive account of the theoretical underpinnings of immigration law. This Article attempts to fill that void by identifying four theories to explain various aspects of immigration law and the arguments advanced in support of such law: (1) individual rights theory, which turns on the prospective migrant's right of entry into the United States, (2) domestic interest theory, which considers whether and to what degree allowing migrants into the United States will benefit the country as a whole, (3) national values theory, which focuses on whether the admission of migrants promotes the fundamental values of the country, and (4) global welfare theory, which considers how immigration decisions at the domestic level affect the political, social, and economic makeup of the global community. This Article argues that the universe of theoretical arguments must be employed to evaluate immigration policy proposals. This conceptual approach: (1) untangles the range of justifications that support immigration proposals, (2) explains why political actors with disparate practical and ideological interests may coalesce around a particular policy prescription, and (3) clarifies how a law can achieve greater traction by either engaging the dominant theoretical perspective or utilizing multiple theoretical underpinnings. Ultimately, this Article creates a new means for

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analyzing immigration law—one that will help scholars, politicians, and the public to evaluate immigration reform efforts.

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INTRODUCTION

Ronald Dworkin has said "it is profitable to study our most heated political controversies at a more philosophical level—to help begin a process that might later reinvigorate the argumentative dimensions of our politics."[1] This Article aims to do just that by providing a new framework for approaching immigration debate.

Former U.S. Secretary of State Madeline Albright immigrated to the United States from Czechoslovakia in 1948 and became a U.S. citizen eleven years later. In a 2008 interview with *Time* magazine, Albright described herself as a "beneficiary of the American people's generosity."[2]

Albright's statement highlights a significant question: Why is it that any given law singles out certain individuals to be the beneficiaries of American immigration policy—or to deny them admission altogether? Legislators, pundits, and lobbyists answer this question in varying ways. Yet their answers ultimately draw from four basic theories of what it is that immigration law should accomplish. This Article identifies those four theories and, in so doing, seeks to provide a means of categorizing the argument that surrounds immigration law and policy.

I begin, in Part I, by setting out four theories of immigration law: (1) individual rights, (2) domestic interest, (3) national values, and (4) global welfare. It may be surprising to some readers that U.S. immigration policy can be justified in terms anything other than domestic interest. Yet it can. Indeed, much of the policy focus of U.S. immigration law primarily concerns the welfare of individuals beyond our borders.

In Part II, I explore these theories in depth, providing examples, drawing comparisons, exploring philosophical groundings, and considering limitations. This exercise demonstrates that any given immigration policy might be supported by arguments grounded in just one theory of immigration law or multiple theories.

In Part III, I explore two areas of immigration law that are uniquely supported by arguments sounding in all four theories: family-based migration and the diversity visa. Using the four-theory framework provides a fresh perspective on these laws, both of which have been subject to recent

1. RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 8 (2006).

2. *10 Questions for Madeline Albright*, TIME (Jan. 10, 2008), http://www.time.com/time/magazine/article/0,9171,1702358,00.html#ixzz2JaVkbPJv; *cf.* Maura Dolan, *Justice Joyce Kennard retiring from state high court*, L.A. TIMES (Feb. 11, 2014), http://articles.latimes.com/2014/feb/11/local/la-me-joyce-kennard-retires-20140212 (quoting former Associate Justice Joyce L. Kennard of the California Supreme Court: "I am indebted to America for letting me in.").

challenge.[3]

Finally, in Part IV, I discuss the constituencies that seek support from each of the four theories of immigration law and which theories, at the end of the day, carry more weight in what circles.

I. THE FOUR-THEORY FRAMEWORK

Immigration law is fundamentally about membership in a political state.[4] It attempts to identify and circumscribe the present and future populations of our country.[5] For one thing, many more people would like to live in the United States than the country as a whole is comfortable allowing. A 2012 Gallup poll found that some 150 million adults worldwide would like to move to the United States.[6] If every one of those individuals were allowed into the United States, our population would increase by fifty percent.[7] In the absence of a desire for such a radical population shift, who gets to join our membership roster and why?

In asking these questions, I do not tread into the discussion of whether the United States as a sovereign nation has the right to make laws about immigration. The power to control immigration is the subject of controversy

3. *See, e.g.*, Representative Lamar Smith, *Visas for Top Graduates: A View From Capitol Hill*, N.Y. TIMES, Oct. 2, 2012, at A30 ("[T]he STEM Jobs Act eliminates the fraud-ridden diversity visa program and reallocates these visas to those who could help make us more competitive in the global economy."); Ashley Parker, *Gender Bias Seen in Visas for Skilled Workers*, N.Y. TIMES, (Mar. 19, 2013), http://www.nytimes.com/2013/03/19/us/politics/gender-bias-seen-in-visas-for-skilled-workers.html?pagewanted=all&_r=0 (discussing proposals to eliminate certain family-based migration).

4. *See* MICHAEL WALZER, SPHERES OF JUSTICE 31–63 (1983); *see also* PETER C. MEILAENDER, TOWARD A THEORY OF IMMIGRATION 32–33 (2001) (discussing Peter Brimelow's position regarding "an existing people's democratic right to determine its membership and identity" (citing PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995))).

5. WALZER, *supra* note 4, at 31.

6. *Table of Migrants by Country*, GALLUP, http://www.gallup.com/poll/153992/150-million-adults-worldwide-migrate.aspx (last visited Sept. 23, 2014). To put that figure in perspective, there are some 318 million people living in the United States at present. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, http://www.census.gov/popclock/ (last visited Sept. 23, 2014).

7. U.S. CENSUS BUREAU, *supra* note 6.

among philosophers,[8] political scientists,[9] and immigration scholars.[10] But that particular controversy is beyond the scope of this Article.

Instead, this Article starts with the position of eighteenth-century philosopher Immanuel Kant, who believed (as Madeline Albright echoed more than 200 years later)[11], that it is the "prerogative of the republican sovereign" to grant membership and that such a grant involves an act of "beneficence."[12] Yet Kant distinguished between the grant of full membership into and grant of temporary sojourn within a nation.[13] And it is here that I depart from Kant, by taking a broader view of "membership" in the context of this paper. I examine membership not only in terms of when the United States exercises its beneficence to allow individuals a path towards eventual citizenship in the United States (immigrant entry) but also when it allows individuals temporary sojourn in the nation (nonimmigrant entry), denies entry (exclusion), and repeals a prior act of beneficence (removal).

The focus of this Article is U.S. immigration law, whether enacted or proposed, historical or future. More specifically, this Article examines the *why* behind those laws. *Why* is it that the United States is choosing to grant or deny membership to certain prospective migrants? It is through canvassing all possible responses to this question that four theories of immigration law emerge: (1) individual rights, (2) domestic interest, (3) national values, and (4) global welfare.

In brief, the four theories can be understood as follows:

- The individual rights theory of immigration law focuses on the rights of the prospective migrant and that migrant's right of entry into the United States.

- The domestic interest theory of immigration law examines whether

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8. *See, e.g.*, PHILLIP COLE, PHILOSOPHIES OF EXCLUSION xii (2000) ("The question addressed here begins at a more fundamental level, asking how anybody, regardless of their circumstances, can legitimately be excluded from our political community.").

9. *See, e.g.*, Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 251 (1987) (challenging the "obvious" position that "[e]very state has the legal and moral right to exercise [the power to admit or exclude aliens] in pursuit of its own national interest").

10. *See, e.g.*, Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 205–14 (2003); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 85 (1984) ("[I]n a truly liberal polity, it would be difficult to justify a restrictive immigration law or perhaps any immigration law at all.").

11. *See 10 Questions for Madeline Albright*, *supra* note 2, and accompanying text.

12. SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS 65 (2004).

13. *Id.*; *see also* IMMANUEL KANT, TO PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795), *available at* https://www.mtholyoke.edu/acad/intrel/kant/kant1.htm.

and to what degree allowing migrants into the United States will benefit the country as a whole.

- The national values theory of immigration law considers whether the admission of migrants promotes the fundamental values of the country as a whole.[14]
- The global welfare theory of immigration law considers the welfare of humanity as a whole, and thus views the United States as one member of an interconnected global community, such that immigration decisions at the U.S. level affect the political, social, and economic makeup of the global community.

The four theories can also be thought of as the various combinations of choices along a consequentialist/deontological divide and a country/non-country focus.

	Country-focused	Non-country-focused
Deontological	National Values	Individual Rights
Consequentialist	Domestic Interest	Global Welfare

The theories do not aim to provide answers about the soundness of any given law. They are, in this way, not deterministic. That is, identifying the

14. Colleagues have pointed out that the phrase "national values" is jingoistic. While I note that view, I use the phrase "national values" as a term of art to reference a category of argumentation. This label is a good one because it is explicitly used by politicians themselves. *See, e.g.*, Remarks by the President on Comprehensive Immigration Reform (July 1, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform ("Our task then is to make our national laws actually work—to shape a system that reflects our values as a nation of laws and a nation of immigrants."). I am not making a normative argument concerning the validity of the term or concept.

fact that arguments concerning a particular legal proposal most closely implicate one theory over another does not lead to a conclusion about whether that proposal should become law.

Moreover, these four theoretical categories are not intended to be value-based. This Article examines why particular laws or proposals suggest that individuals or groups should be entitled to membership and entry into the United States or denied the same. Why *does* is a question distinct from the related inquiries of why *should* or why *ought*, which have been the subject of other scholarly works.[15] The four theories offered in this paper form a means of categorization and analysis, not valuation.

One might ask where race fits within this four-theory framework. After all, scholars often critique immigration law as largely derived from a racist motive.[16] Acknowledging that critique without entering the debate, this Article does not tackle the issue of race because race is rarely *invoked* by politicians as justification for or against immigration policy proposals.[17] This paper seeks to categorize the arguments explicitly made, not sub-textual ones.

In asking why a particular law favors or disfavors certain immigrants, I focus principally on the "law on the books" as distinguished from the "law in

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15. *See, e.g.*, Carens, *supra* note 9, at 268 ("the question is why it should be so . . . the question is what *our* society (or one with the same basic values) ought to do"); JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY 3–51 (2010) (discussing the moral obligations liberal democracies owe to irregular immigrants).

16. Numerous scholars have considered this point. *See, e.g.*, HIROSHI MOTOMURA, AMERICANS IN WAITING 168–88 (2006) (noting "the long history of racial and ethnic discrimination in U.S. immigration and citizenship"); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1119 (1998) ("Racism, along with nativism, economic, and other social forces, has unquestionably influenced the evolution of immigration law and policy in the United States."); Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 761 (2000) (arguing that the country caps are an example of the "implicit and explicit racial biases [that] still pervade all four major avenues of legal immigration").

17. This is not to say that race has never been invoked by politicians. One need look no further than the Chinese Exclusion Act, 22 Stat. 58 (1882), for an example of explicitly race-based immigration law. But this Article aims to shed light on the current immigration debate. And while immigration debate may have racial overtones—see, e.g., John Parkinson, *Steve King Defends 'Cantaloupes' Comments About Drug-'Hauling' DREAMers*, ABC NEWS (July 25, 2013), http://abcnews.go.com/blogs/politics/2013/07/steve-king-defends-controversial-cantaloupes-comments-about-drug-hauling-dreamers (quoting Congressman Steve King of Iowa's comments on young undocumented immigrants: "For everyone who's a valedictorian, there's another hundred out there who weigh a hundred and thirty pounds—and they've got calves the size of cantaloupes because they're hauling seventy-five pounds of marijuana across the desert," a statement DREAMer activist Maricela Aguilar described as "spiteful, and hateful and racist")—it is extremely rare for politicians today to explicitly ground their arguments for or against immigration policy on the basis of race.

action" or what Peter Schuck calls the "law in their minds."[18] That is, I focus on the law as written. I do not delve into the law in practice, whether that practice entails following the letter and not the spirit of the law or whether that practice entails ignoring a law altogether. I also do not examine "cherished myths" about immigration law that may fly in the face of "contradictory facts we are reluctant to recognize."[19] As Shuck puts it so eloquently: "[W]e may prefer to think that we have certain goals and have failed to achieve them than to acknowledge the possibility that these are not really our goals or, worse still, that the goals were not worth striving for in the first place."[20]

These alternative viewpoints would move the focus in a new direction: namely, from why the law was proposed or enacted to an examination of the contradictions between why the law was proposed or enacted and how it is enforced or currently perceived. Such analysis might be a fruitful vein for future research.

II. THE FOUR THEORIES

In the sections that follow, I explain in detail each of the four theories of immigration law including their philosophical forebears. I provide examples of arguments concerning immigration laws that illustrate each theory in practice. I also address the limitations of each theory and draw comparisons between the theories.

A. Individual Rights

1. The Theory

Many legal scholars and political philosophers ground their discussion of immigration law in individual rights.[21] The focus in such a perspective is not on groups of people, countries or nations, but rather on the individual, generally viewed in terms of the migrant—the one seeking entry to or membership in the United States. Examples of the individual rights theory in practice include the arguments surrounding: (1) open borders, (2) medical

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18. Peter H. Schuck, *Law and the Study of Migration*, *in* MIGRATION THEORY: TALKING ACROSS DISCIPLINES 239, 242 (Caroline B. Brettell & James F. Hollifield eds., 2d ed. 2008).

19. *Id.* at 249.

20. *Id.*

21. *Id.*; Carens, *supra* note 9.

tourism visas, and (3) family-based immigration.[22]

The concept of "individual rights" is pedigreed. Its roots stretch back to ancient Greece and Aristotle's positing of "natural law."[23] But it was more than a century and a half later that William of Ockham first integrated the moral concept of natural law with the legal concept of property to develop a modern conception of rights.[24]

In the seventeenth century, Thomas Hobbes discussed "The Right Of Nature" in terms of "the Liberty each man hath . . . for the preservation of his own Nature."[25] Yet the focus of Hobbes' discussion of rights was that man should give up these natural rights by forming a social contract with an absolute sovereign; for, in the absence of a strong sovereign, Hobbes argued that man would exist in nothing more than a state of war.[26] Even within this society formed by social contract, however, Hobbes believed that natural rights remained.

> [S]eeing every man, not onely by Right, but also by necessity of Nature, is supposed to endeavour all he can, to obtain that which is necessary for his conservation; He that shall oppose himself against it, for things superfluous, is guilty of the warre that thereupon is to follow . . . .[27]

Society should, Hobbes argued, "cast out" individuals who "strive to retain those things which to himselfe are superfluous" because they are "cumbersome" to Society.[28]

John Locke built upon the work of Hobbes and similarly strived to use an understanding of natural rights "to explain the grounds and limits of political obligation."[29] Locke wrote:

> The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions . . .

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22. Open borders and medical tourism visas are discussed in detail in this section, *infra*. The connection between the individual rights theory and family-based migration is explored, *infra*, at Part III.A.

23. *See* NORMAN E. BOWIE & ROBERT L. SIMON, THE INDIVIDUAL AND THE POLITICAL ORDER: AN INTRODUCTION TO SOCIAL AND POLITICAL PHILOSOPHY 51 (2d ed. 1986); Max Salomon Shellens, *Aristotle on Natural Law*, 4 NAT. L.F. 72, 72 (1959).

24. 8 ENCYCLOPEDIA OF PHILOSOPHY 468 (Donald M. Borchert ed., 2006).

25. THOMAS HOBBES, LEVIATHAN 189 (C.B. Macpherson ed., 1985).

26. *See id.* at 189–201; José Jorge Mendoza, *Neither a State of Nature nor a State of Exception: Law, Sovereignty, and Immigration*, 14 RADICAL PHIL. REV. 187, 188 (2011).

27. HOBBES, *supra* note 25, at 209–10.

28. *Id.* at 209.

29. ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 24.

.[30]

In other words, every person is "free and equal"[31] with their own, unassailable set of rights—among them being the right to liberty.

In the eighteenth century, Immanuel Kant articulated a limited individual right of immigration, which he called "hospitality."

> Hospitality [*Wirtbarkeit*] means the right of a stranger not to be treated as an enemy when he arrives in the land of another. One may refuse to receive him when this can be done without causing his destruction; but, so long as he peacefully occupies his place, one may not treat him with hostility.[32]

For Kant, hospitality was only a right of "temporary sojourn."[33] State "beneficence" would be needed before such a visitor could be granted a right "to become a fellow inhabitant."[34]

Notable twentieth-century philosopher John Rawls made the hop from Locke's natural right to liberty beyond Kant's concept of hospitality to a broader individual right to migrate. Rawls included freedom of movement in his list of basic liberties.[35]

If the migrant has an individual right to liberty that entails a right to move freely, then nations should not infringe that right by denying entry.[36] Put another way, it can be argued that the right to migrate should be "included in the system of basic liberties for the same reasons that one would insist that the right to religious freedom be included: it might prove essential to one's plan of life."[37]

Imagine if a migrant were fleeing a country in the midst of civil war. Denying entry to such an individual might not only amount to impermissible harm of that migrant's liberty but might also amount to harm of their life, health, or possessions.

In Hobbesian terms, one could argue that the United States should not deny entry to individual migrants who seek to enter the United States as a means of self-preservation if that denial is based on an effort to protect the country's surplusage, such as the ability of its citizens to have not just their

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30. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 5 (Thomas P. Peardon ed., Bobbs-Merrill 1952) (1690).

31. *See* Carens, *supra* note 9, at 256.

32. BENHABIB, *supra* note 12, at 27.

33. KANT, *supra* note 13.

34. *Id.*

35. *See* COLE, *supra* note 8, at 139–40 (citing John Rawls, *Constitutional Liberty and the Concepts of Justice*, JUST.: NOMOS VI (1963)).

36. *Id.* at 140.

37. Carens, *supra* note 9, at 258.

needs but their wants met. For, in Kantian terms, refusal of entry would impermissibly cause the destruction of the migrant.

One example of the individual rights theory in practice can be found in the writings of Joseph Carens and Kevin Johnson and their call for consideration of open borders, meaning the free and unrestricted movement of all migrants across political borders.[38] Both explicitly ground their call for open borders and free migration in the individual rights theory. Carens explores how the writings of Rawls can justify open borders—emphasizing that migration is a basic individual liberty and how free migration is a principle of the "just social order" to which we should aspire.[39] Johnson similarly emphasizes how "[l]iberal theory, with its commitment to the protection of individual rights, finds it difficult to reconcile the rights of noncitizens with closed borders marked by numerous restrictions on entry."[40]

Another example of the individual rights theory at work concerns tourist visas. The law permits migrants to travel to the United States "temporarily for business or temporarily for pleasure."[41] The term "pleasure" has been understood broadly, and includes travel for purposes of "medical treatment."[42]

"Medical tourists" travel to the United States for many different reasons.[43] They may be seeking "cutting-edge" medical care[44] unavailable in their

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38. *See* Carens, *supra* note 9; Johnson, *supra* note 10. Carens and Johnson are not the only advocates of open borders. *See, e.g.*, MICHAEL DUMMETT, ON IMMIGRATION AND REFUGEES 78 (2001) ("[T]he principle of open borders will be . . . the ideal to be attained . . . ."); ROBERT GUEST, BORDERLESS ECONOMICS: CHINESE SEA TURTLES, INDIAN FRIDGES AND THE NEW FRUITS OF GLOBAL CAPITALISM 220 (2011) ("Someday, I would like to see a world where people can move as freely from one country to another as they currently do from one American state to another."); POPE JOHN XXIII, PACEM IN TERRIS 25 (1963), *available at* http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html ("[E]very human being has the right to freedom of movement and of residence within the confines of his own State. When there are just reasons in favor of it, he must be permitted to emigrate to other countries and take up residence there."); Robert L. Bartley, *Thinking Things Over: Liberty's Flame Beckons a Bit Brighter*, WALL ST. J., July 3, 2000, at A13 (discussing the paper's proposal for a constitutional amendment: "There shall be open borders."); Letter from Milton Friedman to Henryk Kowalczyk (Oct. 16, 2006), *available at* http://www.freedomofmigration.com/wp-content/uploads/2012/02/Friedman-20061016.pdf ("There is no doubt that free and open immigration is the right policy in a libertarian state . . . .").

39. Carens, *supra* note 9, at 255–62.

40. Johnson, *supra* note 10, at 205; *see also id*. at 205–13.

41. 8 U.S.C. § 1101(a)(15)(B) (2012).

42. Temporary Visitors Rule, 22 C.F.R. § 41.31(b)(2) (2011).

43. Allison Van Dusen, *U.S. Hospitals Worth The Trip*, FORBES (May 29, 2008), http://www.forbes.com/2008/05/25/health-hospitals-care-forbeslife-cx_avd_outsourcing08_0529healthoutsourcing.html.

44. *See id.*; *see also* H.R. REP. NO. 112-695, at 1 (2012) (a private bill of relief concerning a migrant seeking treatment for a genetic disorder); H.R. REP. NO. 112-619, at 1 (2012) (a private

country of origin.[45] They may be looking for a way around "extended waiting times" for medical treatment in their home country.[46] They may even be seeking U.S. citizenship for their children by giving birth in the United States.[47]

One argument in favor of permitting medical tourism to the United States is that such care can be life-saving[48] or life-altering.[49] It therefore touches upon the "natural rights" of life and health espoused by Locke. One could hold there is an individual right to demand entry to the United States on this basis.[50]

Even for nonemergency medical care, such as routine childbirth, arguments founded in individual rights support such travel. Arguably, it is about the liberty of the mother and her freedom to choose a plan for the improvement of her child. Indeed, the conservative think-tank The Goldwater Institute has argued, albeit in a vastly different context, that "individual rights to medical autonomy and privacy" are "guaranteed by the Fourth, Fifth, and Ninth Amendments."[51]

2. Limitations

One shortcoming of the individual rights theory is its potential limitlessness. If every individual on the planet is "free and equal," with an

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bill of relief concerning a migrant seeking treatment for epilepsy); H.R. REP. NO. 112-618, at 1 (2012) (a private bill of relief concerning a migrant seeking reconstructive surgery); H.R. REP. NO. 106-959, at 1 (2000) (a private bill of relief concerning a migrant seeking treatment for cerebral palsy); H.R. REP. NO. 106-962, at 1 (2000) (a private bill of relief concerning a migrant seeking treatment for bone cancer).

45. DELOITTE CTR. FOR HEALTH SOLUTIONS, MEDICAL TOURISM: CONSUMERS IN SEARCH OF VALUE 19 (2008).

46. *Id.*

47. *Id.* at 20; *see also* Anna Schecter, *Born in the U.S.A.: Birth tourists get instant U.S. citizenship for their newborns*, ROCK CENTER WITH BRIAN WILLIAMS (Mar. 7. 2013, 11:40 AM), http://rockcenter.nbcnews.com/_news/2013/03/07/17225891-born-in-the-usa-birth-tourists-get-instant-us-citizenship-for-their-newborns?lite.

48. *See, e.g.*, Stacy Niles, *Life-Saving Surgeries in Boston Await Iraqi Child*, U.S. DEP'T. OF DEF. (June 19, 2008), http://www.defense.gov/News/NewsArticle.aspx?ID=50257.

49. *See, e.g.*, Saeed Ahmed, Lisa Cohen & Sara Sidner, *From horror to hope: Boy's miracle recovery from brutal attack*, CNN.COM (Dec. 10, 2012, 9:43 AM), http://www.cnn.com/2012/12/06/world/freedom-project-operation-hope.

50. Of course, there is no legal right in the United States "to try to save one's life." *See* Kit Johnson, *Patients Without Borders: Extralegal Deportation by Hospitals*, 78 U. CIN. L. REV. 657, 674 (2009) (discussing such a right to self-preservation grounded in the constitutional right to life (citing Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695 (D.C. Cir. 2007) (en banc) (Rogers, J., dissenting))).

51. Matthew R. Farley, *Challenging Supremacy: Virginia's Response to the Patient Protection and Affordable Care Act*, 45 U. RICH. L. REV. 37, 62–63 (2010).

entitlement to migrate in order to protect their individual rights, how can any law, other than one that abolishes all immigration laws, truly rest upon the individual rights theory?

Joseph Carens, calling upon John Rawls, addresses this concern with his statement that restrictive immigration laws can be based on individual rights so long as they obey a "public order restriction."[52] That is, if "unrestricted immigration would lead to chaos and the breakdown of order," then immigration can be restricted "for the sake of liberty."[53]

Yet even this opt-out highlights a new and different limitation of the individual rights theory, which is necessarily myopic, focusing as it does on each individual prospective migrant. It does not take into account the effect of admitting multiple individual migrants. Nor does it take into account the existing polity—those currently living in the United States who will be affected by migration. The only concession to the polity is in Carens' concern for "public order."[54]

Regardless, if the individual rights theory allows for some restrictions on immigration, to protect liberty or otherwise, there remains another key limitation to the theory: it does not offer a means for valuing competing claims based upon individual rights. That is, law A might be grounded in individual rights concerning freedom from persecution, while law B might be grounded in individual rights concerning freedom to seek better economic circumstances. The theory does not provide a means for evaluating the laws apart from saying they both implicate individual rights.

Carens, again drawing on Rawls, provides one substantive answer:

> [I]f there are restrictions on immigration for public order reasons, priority should be given to those seeking to immigrate because they have been denied basic liberties over those seeking to immigrate simply for economic opportunities.[55]

He also suggests that liberal democracies could exclude individuals who, if admitted, would threaten the liberal character of the regime by their lack of

52. Carens, *supra* note 9, at 259.

53. *Id*.; *see also* BENHABIB *supra* note 12, at 36 (describing Kant's universal right to hospitality as an imperfect moral duty because "it can permit exceptions, and can be overridden by legitimate grounds of self-preservation"). Carens also writes that states "can justifiably exclude invading armies and subversives on grounds of national security." *See* Cole, *supra* note 8, at 142–43. I do not see this branch of Carens' analysis as relevant to the issue of immigration law. Rather, it is a point that addresses the question explicitly excluded from consideration in this paper: whether a nation state has the power to exclude individuals at all. *See supra* notes 8–10.

54. Carens, *supra* note 9, at 259.

55. *Id*. at 260–61. Seyla Benhabib agrees, arguing for "first-admittance rights for refugees and asylum seekers." BENHABIB, *supra* note 12, at 221.

commitment to liberal institutions and practices.[56] As eighteenth-century philosopher Emer de Vattel argued: "Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury."[57]

B. Domestic Interest

1. The Theory

The second theory that emerges from examining arguments as to why select immigrants are granted or denied membership in the United States is that of domestic interest. The focus of this theory of immigration law is whether and to what degree a given law will benefit the United States. In more lofty terms, the theory can be conceived of as having the goal of achieving the greatest good for the *demos*—those with the "formal privilege of democratic citizenship."[58] Examples of the domestic interest theory in practice can be found in: (1) the Soviet Scientist Immigration Act of 1992,[59] (2) the Anti-Drug Abuse Act of 1988,[60] and (3) the STEM Jobs Act.[61]

The foundation for this domestic interest approach can be found in a consequentialist philosophical paradigm. Consequentialism provides that the morality of an act is tied exclusively to the consequences of that act.[62] Utilitarianism is the most prominent modern ethical system built in the consequentialist mode. Utilitarianism provides that the best outcomes (consequences) are those that provide the greatest happiness to the greatest number of individuals.[63]

Eighteenth-century philosopher Jeremy Bentham is widely considered the

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56. *See* Cole, *supra* note 8, at 143–44.

57. *See* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893). Interestingly, Vattel's argument is grounded in the right of natural liberty held by the nation itself. *Id*.

58. *See* BENHABIB, *supra* note 12, at 210.

59. Pub. L. No. 102-509, 106 Stat. 3316.

60. Pub L. No. 100-690, § 7342, 102 Stat 4469 (1988) (codified as amended at 8 USC §§ 1101(a)(43), 1252(a) (2000)).

61. H.R. 6429, 112th Cong. (2d Sess. 2012); *see also STEM Job Act*, H.R. JUD. COMMITTEE, http://judiciary.house.gov/issues/issues_STEM%20Jobs%20Act.html (last visited Jan. 19, 2013).

62. Walter Sinnott-Armstrong, *Consequentialism*, *in* STAN. ENCYCLOPEDIA OF PHIL., (Edward N. Zalta ed., 2012), *available at* http://plato.stanford.edu/archives/win2012/entries/consequentialism/; 8 MACMILLAN REFERENCE USA, ENCYCLOPEDIA OF PHILOSOPHY 460 (Donald M. Borchert ed., 2d ed. 2006).

63. *See* JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT ¶ 2 (1776), *available at* http://www.constitution.org/jb/frag_gov.htm ("it is the greatest happiness of the greatest number that is the measure of right and wrong").

founding father of utilitarianism.[64] Bentham saw utility in the "greatest happiness of the greatest number,"[65] looking to whether acts produced "benefit, advantage, pleasure, good, or happiness" as opposed to "mischief, pain, evil, or unhappiness."[66] He further believed that utility could be boiled down to measurable issues of fact as opposed to problems of fundamental belief.[67]

Another key founder of utilitarianism is nineteenth-century philosopher John Stuart Mill, a Benthamite who summarized utilitarianism in this way:

> The creed which accepts as the foundation of morals, "Utility," or the "Greatest Happiness Principle," holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.[68]

Unlike Bentham, however, Mill did not believe all pleasures were equal; he emphasized that quality as well as quantity should factor into the utilitarian analysis.[69] Mill also explored liberty, representative government, and laissez-faire capitalism from a utilitarian perspective—examining each with an eye toward maximizing the public good.[70]

Forty years after Mill published his seminal work on utilitarianism,[71] philosopher G.E. Moore tackled the subject.[72] Moore eschewed the hedonistic focus of Bentham and Mill, who had analyzed utilitarianism in terms of pleasure and pain. Instead, Moore noted that "In asserting that the action is *the* best thing to do, we assert that it together with its consequences presents a greater sum of intrinsic value than any possible alternative."[73]

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64. WILLIAM EBENSTEIN, INTRODUCTION TO POLITICAL PHILOSOPHY 171 (1972). That is not to say that Bentham "invent[ed]" utilitarianism. *Id.* at 174. Rather, he built on the work of prior philosophers such as David Hume. *See* GEORGE L. ABERNETHY & THOMAS A. LANGFORD, INTRODUCTION TO WESTERN PHILOSOPHY: PRE-SOCRATICS TO MILL 319 (1970).

65. *See* BENTHAM, *supra* note 63.

66. EBENSTEIN, *supra* note 4, at 173.

67. EBENSTEIN, *supra* note 4, at 174.

68. JOHN STUART MILL, UTILITARIANISM 7 (George Sher ed., 1979).

69. *Id.*, at 8.

70. NORMAN E. BOWIE & ROBERT L. SIMON, THE INDIVIDUAL AND THE POLITICAL ORDER: AN INTRODUCTION TO SOCIAL AND POLITICAL PHILOSOPHY 37–38 (2d ed. 1986).

71. MILL, *supra* note 68.

72. G.E. MOORE, PRINCIPIA ETHICA (1902).

73. *Id.* § I:17; *see also id.* § V:89, *available at* http://fair-use.org/g-e-moore/principia-ethica/chapter-v ("Our 'duty,' therefore, can only be defined as that action, which will cause more good to exist in the Universe than any possible alternative."). Daniel Morales has described utilitarianism as "offer[ing] the promise that we may use the tools of the bookkeeper to solve the most unwieldy social problems: we consider the costs and benefits of any policy or law and adopt

It is easy to see where strains of consequentialism and utilitarianism can be found in the domestic interest theory. This theory asks whether a given law will have the consequence of benefiting the United States, and, in particular, whether immigration proposals will maximize outcomes that are in the country's own interest.

The key to domestic interest is that the individual immigrant is irrelevant. The focus is the U.S. domestic society—at least insofar as that society is comprised of U.S. citizens. Does the country *need* the prospective immigrant?[74] Will the prospective immigrant benefit the country?[75]

The arguments advanced in favor of the Soviet Scientist Immigration Act of 1992[76] provide a wonderful example of domestic interest in practice. In the wake of the break-up of the Soviet Union in 1991, Congress created 750 immigrant visa slots for "nationals of any of the independent states of the former Soviet Union or the Baltic states . . . who are scientists or engineers who have expertise in nuclear, chemical, biological or other high technology . . . defense projects."[77] The House Report on the Act discussed the perceived threat that these scientists posed to the United States, noting fears that unemployed Soviet nuclear scientists might be "tempted to accept offers of employment from countries that are developing a nuclear weapons capability."[78] Congress noted that bringing these "Soviet scientists" to the United States would both "deter the proliferation of expertise in high technology fields associated with military research and development" and "enhance American competitiveness."[79]

Consider too, the role of the domestic interest theory in the Anti-Drug Abuse Act of 1988. The Act created a new concept in immigration law: deportation of noncitizens present in the United States if they commit an

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that which maximizes total utility." Daniel Morales, *Crimes of Migration*, WAKE FOREST L. REV. (forthcoming 2015).

74. *See*, *e.g.*, ROY BECK, THE CASE AGAINST IMMIGRATION 244 (1996) ("Washington should consider basing its immigration policy on how many immigrants the nation actually *needs*.") (emphasis in original).

75. *Compare* PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 157 (1995) (asking "Is immigration actually necessary for economic growth?" in terms of "growth of overall national income," "growth in national income per capita," or "growth of the national income received by native-born Americans"), *and id.* at 259 ("Any immigration must meet a fundamental test: What does it mean for 'the National Question?' Will it help or hurt the ability of the United States to survive as a nation-state . . . ?"), *with* GUEST, *supra* note 38, at 203 ("Thanks to the networks created by immigration, America is richer, more innovative and fare more influential than it would otherwise be.").

76. Pub. L. No. 102-509, 106 Stat. 3316.

77. *Id.*

78. H.R. REP. NO. 102-881, pt.1 (1992).

79. *Id.*

"aggravated felony."[80] It authorized the expulsion of individuals from the United States—a national act of recalling beneficence. Specifically, the Act defined aggravated felonies to include drug trafficking crimes as being on par with murder.[81] Why did Congress do this? It believed drugs were "the greatest domestic problem facing this Nation"[82] and saw deportation of "violent criminal aliens"[83] as a significant tool in the larger "war on drugs."[84] Expelling individuals who trafficked in drugs would, therefore, benefit the United States. In the words of controversial journalist Mike Barnicle, it would protect "the civil right the vast majority have: To live in drug-free neighborhoods."[85]

The domestic interest theory can also illuminate the competing arguments regarding Representative Lamar Smith's 2012 proposal of the STEM Jobs Act, which would have made it easier for foreign graduates from U.S. universities with degrees in science, technology, engineering, and math to remain in the United States.[86] Representative Smith's primary arguments in favor of the legislation drew from the domestic interest theory. He argued that foreign STEM graduates were in "great demand by American employers" and if our immigration laws were not changed to encourage them to stay in the United States, they would work for "our global competitors."[87]

Opponents of the STEM Jobs Act similarly drew upon the domestic interest theory. They argued that the law would work to the detriment of United States citizen graduates from the same U.S. institutions with the same degrees because foreign STEM workers, willing to work for lower wages, would take away jobs from U.S. STEM workers.[88] Opponents of the bill argued that harming these U.S. workers was not in the domestic interest.[89]

This analysis makes clear that understanding that the domestic interest theory plays a role in the STEM debate does not lead to a conclusion about

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80. Pub. L. No. 100-690, § 7342, 102 Stat 4469 (1988); *see also* Jennifer Chacón, *Whose Community Shield?: Examining The Removal of the "Criminal Street Gang Member"*, 2007 U. CHI. LEGAL F. 317, 321.

81. Chacón, *supra* note 80.

82. 134 CONG. REC. H11108-01 (1988).

83. 134 CONG. REC. S3681-01 (1988).

84. *Id.*

85. Mike Barnicle, *Something's Wrong Here*, BOSTON GLOBE, Sept. 20, 1988, at 23.

86. H.R. 6429, 112th Cong. (2d Sess. 2012). Similar language made its way into Senate Bill 744—the Border Security, Economic Opportunity, and Immigration Modernization Act, which was the 2013 brainchild of the bi-partisan "Gang of Eight." *See* S. 744, 113th Cong. § 4104 (1st Sess. 2013), *available at* http://www.govtrack.us/congress/bills/113/s744/text.

87. *Id.*

88. *See*, *e.g.*, Robert Oak, *Congress Betrays the U.S. STEM Worker Once Again*, ECON. POPULIST (Dec. 2, 2012), http://www.economicpopulist.org/content/congress-betrays-us-stem-worker-once-again.

89. *Id.*

how the debate should be resolved. It does, however, help to make sense of the rhetorical moves employed in the debate over the law.

2. Comparing the Theories

a. Individual Rights vs. Domestic Interest

As illustrated by the chart in Part I, the individual rights and domestic interest theories differ along both the deontological/consequentialist divide and the country/non-country focus. The domestic interest approach looks at consequences for the United States as a whole as opposed to the duty of the nation not to interfere with individuals' potentially unlimited right to migrate.

Nonetheless, both theories can be brought to bear in considering arguments about the same law. Consider medical tourism.[90] In Part II.A, I outlined how the individual rights theory can be used to support the law: it protects the "natural rights" of a migrant's life, health, and freedom.

Arguments concerning medical tourism can also draw upon the domestic interest theory. Medical tourists spend billions of dollars in the United States for health services.[91] Indeed, U.S. hospitals have been actively recruiting these lucrative patients, whose high-tech care tends to be both expensive and fully compensable.[92] And these foreign revenues benefit hospitals' bottom lines, even to the point of helping support some hospitals' efforts to provide care to their indigent patients.[93] Thus, the argument can be made that medical tourism promotes the domestic interest.

Interestingly, arguments *against* medical tourism also draw upon the domestic interest theory. For example, in a 2001 cable to all overseas embassies, the State Department cautioned consular officers to be wary of the "unintended consequences" of issuing medical visas.[94] While a U.S. doctor may well be willing to donate time to diagnose a foreign patient and even create a treatment plan, that does not mean that the doctor has any intention of paying for that treatment.[95] Yet because federal law requires hospitals to receive and treat patients regardless of their ability to pay,[96] an individual granted a medical visa might end up in a U.S. hospital after an initial "free"

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90. *See*, *supra*, Part II.A.
91. DELOITTE CTR. FOR HEALTH SOLUTIONS, *supra* note 45, at 19.
92. Van Dusen, *supra* note 43.
93. *Id.*
94. Cable from The Secretary of State to All Diplomatic and Consular Posts, R 192221Z NOV 01, *available at* http://travel.state.gov/visa/laws/telegrams/telegrams_1533.html.
95. *Id.*
96. *Id.*; *see also* Johnson, *supra* note 50, at 662–63 (discussing this law, the Emergency Medical Treatment and Active Labor Act, and its funding limitations).

consultation, with a U.S. hospital footing the resulting care to the tune of hundreds of thousands of dollars and to the detriment of "indigent local patients."[97] Clearly, this cable was motivated by arguments grounded in the domestic interest theory.

These concerns were similarly apparent in the International Patient Act of 2000, which lengthened the period of time individuals could remain in the United States on a medical visa.[98] This change was conditioned upon: (i) "a statement from the health care facility containing an assurance that the alien's treatment is not being paid through any Federal or State public health assistance, that the alien's account has no outstanding balance,"[99] as well as (ii) "evidence of financial ability to support the alien's day-to-day expenses while in the United States."[100]

This example highlights how multiple theories can be brought to bear on the same legal proposal. It also indicates how arguments for or against a proposal can both be grounded in the same theoretical perspective.

3. Limitations

There are two important limitations to the usefulness of the domestic interest theory of immigration law. One concerns its changeability over time, and another concerns value judgments.

First, regarding the theory's changeability, it is arguably a limitation of the domestic interest theory that the country's interests will necessarily change over time. In 1992, the United States was interested in recruiting Soviet nuclear scientists.[101] In 2015, the interest might be in recruiting Iranian nuclear scientists.

Perhaps the fluctuating prescription of the domestic interest theory, however, is a good thing. Michael Walzer embraces a constantly changing immigration law, writing that "[s]ocial meanings are historical in character; and so distributions, and just and unjust distributions, change over time."[102] Membership and entry in the United States are social meanings that do change over time. The United States is going to have a different conception of itself and its interests today than it had in 1800 and that it will have in 2100.

Walzer poses a different challenge to the kinds of arguments grounded in

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97. Cable from The Secretary of State to All Diplomatic and Consular Posts, *supra* note 94.
98. Pub. L. No. 106-406, 114 Stat. 1755 (2000).
99. *Id.*
100. *Id.*
101. *See supra* notes 75–77 and accompanying text.
102. WALZER, *supra* note 4, at 9.

the domestic interest theory when he discusses "tyranny."[103] Walzer, speaking in terms of social goods,[104] argues that it is fundamentally unjust to distribute "social good *x* . . . to men and women who possess some other good *y* merely because they possess *y* and without regard to the meaning of *x*."[105] In other words, Walzer argues that it is unjust to award membership and entry into the United States to men and women who possess a good such as money, without taking into account what it means to be a member of the United States.

Many laws steeped in domestic interest follow exactly this path of "tyranny" identified by Walzer. For example, the EB-5 investor visa is available to immigrants who invest $1,000,000 or more in a "new commercial enterprise" that will benefit the U.S. economy and create full-time work for ten or more lawful U.S. workers.[106] Another example is a proposal put forth by Senators Charles Schumer and Mike Lee in 2011 that would have given residence visas to foreign nationals who purchased a home in the United States for $500,000 or more.[107] The domestic interest arguments in favor of these forms of immigration are manifest: they are explicitly conditioned on bringing new money into the U.S. economy. Yet the "tyranny" identified by Walzer is also apparent: both laws tie admission to the United States to the immigrants' wealth without regard to the meaning of membership in the United States.

In the end, however, Walzer's "tyranny" challenges the value judgments made by laws steeped in the domestic interest theory. The challenge does not call into question the utility of domestic interest as a means of categorizing arguments concerning immigration law.

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103. *See id.* at 17–21.

104. Walzer defines social goods as those which are not and "cannot be idiosyncratically valued," though he is not sure whether there are any goods that are not, in fact, social goods. *Id.* at 7. These are items that are valued and liked "in crowds," as a group. *Id.* at 7–8.

105. *Id.* at 20.

106. 8 U.S.C. § 1153(b)(5)(A) (2011).

107. Nick Timiraos, *Foreigners' Sweetener: Buy House, Get a Visa*, WALL ST. J. (Oct. 20, 2011), http://online.wsj.com/article/SB10001424052970203752604576641421449460968.html. A similar proposal made its way into Senate Bill 744. *See* S. 744, 113th Cong. § 4504 (1st Sess. 2013). I discuss these proposals in detail in Kit Johnson, *Buying the American Dream: Using Immigration Law to Bolster the Housing Market*, 81 TENN. L. REV. 829 (2014).

C. National Values

1. The Theory

In addition to the individual rights and domestic interest theories, there is a third theory invoked in immigration law debate. The national values theory considers whether immigration law promotes the fundamental values of the country as a whole.[108] These national values could include liberty, democracy, free enterprise, or other conceptions. In short, the rhetorical touchstone is "what our nation stands for."[109] Examples of the national values theory in practice include: (1) the Lautenberg Amendment to the 1990 Foreign Operations, Export Financing, & Related Programs Appropriations Act,[110] (2) the Fulbright-Hayes Act,[111] and (3) Deferred Action for Childhood Arrivals.[112]

The particular national values upheld by any particular advocate might be found by reference to the past through writings of the founding fathers.[113] Alternatively, "our national values" may be distilled on an ad-hoc basis by those framing a particular argument.

An example of national values in action can be found in the arguments supporting the Mutual Educational and Cultural Exchange Act of 1961,[114] also called the Fulbright-Hays Act.[115] The Act authorized "educational exchanges" open to "students, trainees, teachers, instructors, and

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108. The concept of "national values" is not uncontroversial. After all, many of our shared "ideas, attitudes, and beliefs" rest on unconscious racism. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1986). Yet such normative challenges to the national values theory are beyond the scope of this article, the goal of which to categorize arguments made by others about immigration law. *See supra* notes 14, 16–17, and accompanying text.

109. Put differently, national values might be "shared ideals, a shared vision of the society it is striving to create." DUMMETT, *supra* note 38, at 7.

110. Pub. L. No. 101-167, §§ 599D, 599E, 103 Stat. 1195, 1261–64 (1989), discussed *infra*.

111. Pub. L. No. 87-256, 75 Stat. 527 (1961), discussed *infra*.

112. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., & John Morton, Dir., U.S. Immigration & Customs Enforcement, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, 1 (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf, discussed *infra* at Part II.C.2.a.

113. For example, the U.S. CONST., THE DECLARATION OF INDEPENDENCE, THE FEDERALIST, ARTICLES OF CONFEDERATION OF 1781, Letter from Congress to the Inhabitants of Canada (May 29, 1775), or THOMAS PAINE, COMMON SENSE (1776).

114. Pub. L. No. 87-256, 75 Stat. 527.

115. Kit Johnson, *The Wonderful World of Disney Visas*, 63 FLA. L. REV. 915, 937 (2011).

professors"[116] as well as "other exchanges . . . promoting studies, research, instruction, and other educational activities of citizens and nationals of foreign countries in American schools, colleges, and universities located in the United States."[117] The Act was pointedly directed at the Cold War fears prevalent at the time of the Act's passage:[118]

> Present-day governments give a high priority to educational and cultural exchanges. While political and economic affairs are the province of a relatively few individuals, educational and cultural programs are by their very nature a people-to-people activity. A lecturer catches young minds. A student gains experiences that shape his mature years. Cultural exchanges as in music or art can reach thousands at a time. In the current struggle for the minds of men, no other instrument of foreign policy has such great potential.[119]

Congress saw in the Act the potential for drawing members of the international community into a pro-American, and thus anti-communist, stance by means of education and cultural exchange.[120] In short, it was consistent with our national values of the time.

Another example of national values in action also stems from the Cold War era: the Lautenberg Amendment to the 1990 Foreign Operations, Export Financing, & Related Programs Appropriations Act.[121] Among other things, the Lautenberg Amendment provided that nationals and residents of the Soviet Union who were Jews or Evangelical Christians would be "deemed" to be "targets of persecution in the Soviet Union on account of race, religion, nationality, membership in a particular social group, or political opinion."[122] This language made it easier for Jews and Evangelical Christians in the Soviet Union to seek asylum in the United States.

One way to understand the Lautenberg Amendment is that it protects individuals who face persecution in contravention of our national value of freedom of religion. After all, the First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of

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116. 22 U.S.C. § 2452(a)(1)(ii) (2006).

117. *Id.* § 2452(b)(10).

118. *See* Naomi Schorr & Stephen Yale-Loehr, *The Odyssey of the J-2: Forty-Three Years of Trying Not to Go Home Again*, 18 GEO. IMMIGR. L.J. 221, 232–33 (2004).

119. H.R. REP. NO. 87-1094, at 2759 (1961); *see also* 107 CONG. REC. 11,401 (1961) (statement of Sen. Fulbright).

120. These goals were very much in line with those of Senator Fulbright himself, who one academic has described as seeking "nothing less than the creation of a pro-American global order, one conceived in the image of our domestic values." EUGENE BROWN, J. WILLIAM FULBRIGHT: ADVICE AND DISSENT 42 (1985).

121. Pub. L. No. 101-167, §§ 599D, 599E, 103 Stat. 1195, 1261–64 (1989).

122. *Id.* §§ 599D(b)(2)(A), 559D(b)(1)(A).

religion, or prohibiting the free exercise thereof . . . ."[123]

The Lautenberg Amendment can also be seen as protecting the Judeo-Christian values of the United States. Cold War rhetoric often distinguished the United States (as Judeo-Christian) from the Soviet Union (as atheist) on religious grounds.[124] For example, in 1952, President Eisenhower, in discussing his communications with Soviet officials, remarked that

> our Government has no sense unless it is founded in a deeply felt religious faith and I don't care what it is. With us of course it is the Judo-Christian concept, but it must be a religion that all men are created equal.[125]

2. Comparing the Theories

a. *Individual Rights vs. National Values*

The national values theory may overlap with the individual rights theory. After all, Thomas Jefferson situated the issue of immigration within an individual rights context, writing of the "right which nature has given to all men of departing from the country in which chance, not choice has placed them."[126]

Individual rights may be "what our nation stands for." However, under the national values approach, one would argue that we must uphold individual rights on the basis that doing so is fundamentally American, whereas under the individual rights approach, one would argue that we must uphold individual rights on the basis that doing so follows from a fundamental concept of humanity.

Consider the arguments surrounding President Obama's Deferred Action for Childhood Arrivals (DACA). DACA is not a law as such. It is, rather, a specific act of prosecutorial discretion memorialized in a 2012 memorandum written by Secretary of the Department of Homeland Security Janet Napolitano.[127] It works as follows: the executive branch of our government is in charge of enforcing immigration laws and removing individuals from the

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123. U.S. CONST. amend. I.

124. *See, e.g.*, Andrew Preston, *A very young Judeo-Christian tradition*, BOS. GLOBE (July 1, 2012), http://www.bostonglobe.com/ideas/2012/06/30/very-young-judeo-christian-tradition/smZoWrkrSLeMZpLou1ZGNL/story.html.

125. Patrick Henry, *"And I Don't Care What It Is": The Tradition-History of a Civil Religion Proof-Text*, 49 J. AM. ACAD. RELIGION 35, 38 (1981).

126. BENHABIB, *supra* note 12, at 136.

127. Memorandum from Janet Napolitano, *supra* note 112.

country who are not in compliance with those laws.[128] Under DACA, individuals who would normally be subject to the removal process may petition the government to exercise its discretion and to choose a different path—one that would give the individual a two-year[129] grace period (though not lawful status)[130] as well as work authorization during that period.[131] DACA is available to young people who came to the United States before they were sixteen, have lived here continuously for at least five years, have a clean criminal record, and who are current or former high school students or have honorably served in the armed forces.[132]

At the core of DACA is a belief that migrants who came to the United States as children have rights that need to be honored.[133] Special treatment has been earned because of age (entry as a minor) and time (duration of stay in the United States).[134] But what is the theoretical basis for these rights?

From an individual rights perspective, DACA recipients may be said to have an individual right to remain in the United States simply on the basis of their broader right to migrate. As for the national values perspective, Joseph Carens argues that there are close ties between individual rights and moral rights. Carens argues that the passage of time strengthens a moral claim to

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128. HIROSHI MOTOMURA, THE PRESIDENT'S DISCRETION, IMMIGRATION ENFORCEMENT, AND THE RULE OF LAW 1, 3 (2014), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/the_presidents_discretion_immigration_enforcement_and_the_rule_of_law_final_1.pdf.

129. On November 20, 2014, Secretary of Homeland Security Jeh Johnson issued a new memo expanding DACA authorization to three years. *See* Memorandum from Jeh Charles Johnson, Secretary, Dep't of Homeland Sec., to León Rodríguez, Director, U.S. Citizenship & Immigration Servs. (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

130. In this way, DACA specifically excludes applicants from the membership roster of the United States. Beneficiaries of the programs are not granted lawful status in the United States, but rather a temporary reprieve from removal.

131. Memorandum from Janet Napolitano, *supra* note 112, at 2–3.

132. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca#guidelines (last visited Sept. 12, 2014).

133. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 5–6 (2014).

134. This focus on time can also be found in the law governing cancellation of removal. Undocumented migrants who are put into removal proceedings, formerly known as deportation proceedings, can petition for a form of relief known as cancellation of removal. 8 U.S.C. § 1229b(b) (2008). Relief is available to individuals who have been physically present in the United States for at least the last ten years, are of good moral character, have not been convicted of certain crimes, and who can establish that their expulsion from the United States would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." *Id.* § 1229b(b)(1). As with DACA, cancellation of removal acknowledges that some migrants, even if not lawfully admitted to the United States, have an individual right to stay based upon time spent in the country and ties to it.

stay and that factors such as childhood arrival can "accelerate or strengthen" the claims to stay.[135] These moral rights derive from our national values, which see age at migration and duration of stay as a basis for immigration decision-making.

b. Domestic Interest vs. National Values

The domestic interest and national values theories likewise have similarities, but the national values approach may result in laws that are decidedly against our domestic interest. For example, in 1990, the Immigration and Naturalization Service issued interim regulations, providing that individuals "fleeing coerced population control policies of forced abortions or sterilization" were automatically eligible for asylum.[136] A national values understanding of this law could be grounded in the Declaration of Independence and its statement of "unalienable Rights . . . Life, Liberty, and the Pursuit of Happiness."[137] The law could be understood as reaching out to protect those who have been deprived of all three of these rights. Yet there is no way to understand this law in the context of domestic interest—it would yield large numbers of asylees[138] without any net benefit to the United States.

3. Limitations

As with the domestic interest theory, an interesting limitation of the national values theory is that values can and do change over time. Let us return to the example of the Lautenberg Amendment to the 1990 Foreign Operations, Export Financing, & Related Programs Appropriations Act,[139] which provided additional protections for Jews and Evangelical Christians seeking asylum from the Soviet Union on the basis of religious persecution.[140]

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135. CARENS, *supra* note 15, at 6. Ayelet Shachar discusses these issues in terms of "rootedness." *See* Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110 (2011).

136. Refugee Status, Withholding of Deportation, and Asylum, 55 Fed. Reg. 2803, 2803–05 (Jan. 29, 1990). The interim regulations also rendered such individuals automatically eligible for a different form of relief called withholding of deportation. *Id*. These regulations were codified in 1996 at 8 U.S.C. § 1101(a)(42).

137. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

138. The United States initially dealt with the demand for this form of asylum by limiting its availability to 1,000 individuals a year. *See* 8 U.S.C. § 1157(a)(5) (2004) (amended 2005). By 2005, the backlog of individuals waiting to obtain asylum on this basis was 9,000 deep. 10 BENDER'S IMMIGR. BULL. 100 (Feb. 1, 2005).

139. Pub. L. No. 101-167, §§ 599D, 599E, 103 Stat. 1195, 1261–64 (1989).

140. *See supra* Part II.C.1.

As stated earlier, it is possible to understand the amendment as protecting the "Judeo-Christian values" of the United States.[141] The phrase "Judeo-Christian values" is heard often in our country today as a means of characterizing our national history.[142] Yet it is a phrase that has been in use for only about seventy-five years and, as a concept, mainly gained ascendancy in response to Nazism, and later, communism—two distinctly twentieth-century phenomena.[143]

David Miller, in his discussion of national identity, addresses issues similar to this limitation of the national values theory. Miller argues that when people find themselves tied together in a political state:

> it is helpful for them to conceive of themselves as forming a community with its own distinct national character, traditions, and so forth. There is an incentive both to produce and consume literature that defines such a common identity. But we have no reason to think that the identity so defined corresponds to anything real in the world; that is to say, there is nothing that marks off this group of people from those around them other than their *wish* to think of themselves as forming a distinct community. National identities are, in a strong and destructive sense, mythical.[144]

Despite the use of the word "destructive," Miller notes that national identities play a valuable role by:

> provid[ing] reassurance that the national community of which one now forms part is solidly based in history, that it embodies a real continuity between generations; . . . perform[ing] a moralizing role, by holding up before us the virtues of our ancestors and encouraging us to live up to them.[145]

And if nations are ethical communities, then "it seems very likely that their

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141. *See id.*

142. *See, e.g.*, *Ryan on Reelecting Obama: It's a path that compromises Judeo-Christian values*, WASH. POST, Nov. 12, 2012; Daniel Burke, *Romney Appeals to Evangelicals Through 'Judeo-Christian' Values*, HUFFINGTON POST, Sept. 29, 2012; David Nakemura et al., *Obama, Romney set aside campaign rhetoric to mourn shooting victims*, WASH. POST, July 20, 2012 (quoting U.S. Congressman Gohmert as stating that: "America's move away from its 'Judeo-Christian beliefs' had caused God to withdraw 'his protective hand' from the country"); Jeremy W. Peters, *Two Hours Later, the Audience Is Won Over*, N.Y. TIMES (Jan. 3, 2012), http://www.nytimes.com/2012/01/04/us/politics/rick-santorum-on-the-stump.html?module=Search&mabReward=relbias%3As%2C%7B%221%22%3A%22RI%3A5%22%7D&_r=0# (quoting presidential hopeful Rick Santorum: "Our country was founded on the Judeo-Christian ethic.").

143. *See, e.g.*, Preston, *supra* note 124.

144. DAVID MILLER, ON NATIONALITY 32–33 (1997).

145. *Id.* at 36.

ethical character will be strengthened by the acceptance of such myths."[146]

Thus, the "truth" of a national value—its longevity, ties to history, perceived immutability—is in essence irrelevant. What makes a national value "legitimate" is the fact that the country has "internalized it, made it their own."[147] What matters is the perception that the country as a whole holds certain values. And, "a collective belief that something is essential to national identity comes very close to making it so."[148]

D. Global Welfare

1. The Theory

The fourth and final theory relating to immigration law is that of global welfare. The focus of this perspective is on the role of the nation as a member of the global community—a community that is interconnected economically, socially, and politically. This approach is similar to the domestic interest perspective but with an expanded base that includes the entire world. Examples of the global welfare theory in practice can be found in: (1) refugee law, (2) the foreign residency requirement for foreign medical students, and (3) exclusion of migrants engaged in human trafficking.[149]

The philosophical underpinnings of the global welfare theory tie most directly to the utilitarian ethics perspective. As discussed previously, utilitarianism evaluates the morality of a given act by whether it will maximize the overall good for everyone.[150] It rests on the assumption that everyone "will count for one and no one for more than one" in an examination of utility.[151] That is, the gains and losses of each member of the global community would count just as much as those of U.S. citizens.[152] This theory is, therefore, distinguishable from the other three in taking a significantly broader perspective—one that goes beyond the individual (individual rights), the polity (domestic interest), and even our nation (national values).

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146. *Id.*

147. Joseph H. Carens, *Democracy and Respect for Difference: The Case of Fiji*, 25 U. MICH. J.L. REFORM 547, 605 (1992) (discussing policies designed to preserve the traditional culture of native Fijians).

148. MILLER, *supra* note 143, at 100–01.

149. *See* discussion *infra*.

150. *See supra* notes 62–70 and accompanying text; *see also* 9 ENCYCLOPEDIA OF PHILOSOPHY 603 (Donald M. Borchert ed., 2006); Carens, *supra* note 9, at 263; Julia Driver, *The History of Utilitarianism*, STAN. ENCYCLOPEDIA OF PHIL. (Mar. 27, 2009), http://plato.stanford.edu/archives/sum2009/entries/utilitarianism-history/.

151. Carens, *supra* note 9, at 263.

152. *Id.*

Global welfare also draws on Kant's theory of "cosmopolitan right" (*jus cosmopoliticum*), which starts with the premise that "all moral persons" are "members of a world society in which they could potentially interact with one another."[153] "'[I]f the actions of one can affect the actions of another,' then we have an obligation to regulate our actions under a common law of freedom which respects our equality as moral agents."[154]

At its most idealistic, the global welfare theory imagines a world-wide community committed to dividing, exchanging, and sharing physical and social goods among all people.[155] It could be conceived of in broadly left-liberal egalitarian terms as aiming to "neutralize or mitigate unchosen inequalities in prospects" that arise from the moral arbitrariness of birth in a particular nation.[156] It could also be viewed more narrowly as an effort to address global concerns or needs in some way, however small, while still recognizing the primacy of national interests.

Perhaps the most obvious example of the global welfare theory in practice is refugee law. The United States defines a refugee as an individual who is:

> outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[157]

Annually, the President of the United States designates the number of refugees that the country will accept.[158] The admissions can be "allocated among refugees of special humanitarian concern to the United States,"[159] typically accomplished by specifying the specific geographical areas of the world from which the United States will accept refugees.[160]

Refugees are admitted on an individual as opposed to group basis. Nonetheless, the individual rights theory does not adequately explain the *why*

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153. *See* BENHABIB, *supra* note 12, at 75.

154. *See id.* at 104.

155. Michael Walzer uses the concept of goods distribution but limits his discussion to distribution within a political community, arguing that it would be impossible to conceive of global distribution. WALZER, *supra* note 4, at 28–31. Kant similarly eschewed the concept of a "world government," which he argued would result in "soulless despotism." BENHABIB, *supra* note 12, at 39.

156. *See* Andrea Sangiovanni, *Global Justice and the Moral Arbitrariness of Birth*, 94 MONIST 571, 571–72 (2001); *see also* DUMMETT, *supra* note 38, at 23 ("For the egalitarian, it is the duty of the state to correct for inherited inequalities . . . .").

157. 8 U.S.C. § 1101(a)(42)(A) (2012).

158. *Id.* § 1157(a)(1)–(2).

159. *Id.* § 1157(a)(3).

160. RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 96 (2d ed. 2012).

of their admission to the United States. If it did, refugees would be admitted to the country *en masse* instead of with numerical restrictions.

Refugee law is best explained by the global welfare theory because it reflects global burden-sharing.[161] The United States is but one country in the world that accepts refugees, and it attempts to accept its fair share in comparison to other global players. Of course, many disagree as to whether the United States or any developed countries are truly taking on a "fair share" or if they are instead accepting only a limited burden[162] while tacitly approving the existence of massive refugee camps in poorer nations.[163] Regardless, the key factor is that the United States sees itself as operating in a global milieu, taking on a portion of individuals who need to be resettled somewhere.

Another example of an argument drawing upon the global welfare theory involves the foreign residency restrictions that the United States places on foreigners who come to the United States to receive graduate medical education or training.[164] International medical students studying or training in the United States are required to return to their country of nationality or last residence for at least two years following their departure from the United States before they can become eligible to return to the United States.[165]

The stated purpose behind the enactment of this foreign residency requirement is to allow the country of origin of the international medical student to benefit from the training and experience received in the United States.[166] In modern parlance, it works to avoid "brain drain," meaning the large-scale emigration of highly skilled workers from other nations.[167]

The argument in favor of the residency requirement evidences the global welfare theory because the immediate beneficiaries of the program do not include the United States. It is the foreign country of origin that will reap the benefit of the individual immigrant's advanced education.

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161. *See, e.g.*, Michael Kagan, *The UN "Surrogate State" and the Foundation of Refugee Policy in the Middle East*, 18 U. CAL. DAVIS J. INT'L L. & POL'Y 307, 311 (2012).

162. Between 2000 and 2009, the United States accepted, on average, 52,673 refugees annually. *Refugees: A Fact Sheet*, AM. IMMIGRATION COUNCIL (Oct. 21, 2010), http://www.immigrationpolicy.org/just-facts/refugees-fact-sheet. To put that figure in perspective, there are an estimated 13 million refugees worldwide. *Id.*

163. *See, e.g.*, Mariano-Florentino Cuellar, *Refugee Security and the Organizational Logic of Legal Mandates*, 37 GEO. J. INT'L L. 583, 622–32 (2006).

164. 8 U.S.C. § 1182(e)(iii).

165. *Id.*

166. Schorr & Yale-Loehr, *supra* note 118, at 227 (quoting President Eisenhower's concern that without the two year residency requirement "countries from which our exchange visitors come will realize little or no benefit from the training and experience received in the United States").

167. *Id.* at 252–53.

Finally, the exclusion of migrants engaged in human trafficking[168] also implicates the global welfare theory. Migrants seeking lawful entry into the United States will be turned away if the U.S. immigration authorities conclude that the migrant has committed or conspired to commit human trafficking offenses.[169] Human trafficking involves breaking the law of multiple nations.[170] It can involve the breaking of civil law surrounding emigration/immigration or even fraud.[171] It can involve the breaking of criminal law with threats, coercion, and abduction.[172] It can also involve international law.[173] One can understand the denial of beneficence to such lawbreakers under the global welfare theory in that the law addresses global concerns (trafficking) in some way (restricting the movement of traffickers) while still recognizing the primacy of national interests (to not include lawbreakers in its membership).

2. Comparing the Theories

a. Individual Rights vs. Global Welfare

The individual rights theory and the global welfare theory have strong similarities. Both focus on the rights of individuals living outside of the United States. Both draw upon concepts of equity and fairness. Both argue that restrictive citizenship, "like feudal birthright privilege[,] . . . is hard to justify."[174]

At the same time, the theories are distinct. The individual rights theory is, at its heart, focused on the individual immigrant who has both the desire and the means to change his national membership status. The theory largely focuses on *inaction* by the United States—noninterference with the potential immigrants' natural rights. It is less focused on *action* by the United States to protect those rights.

In contrast, the global welfare theory focuses in large part on action by the

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168. *See* 8 U.S.C. § 1182(a)(2)(H). The U.S. Department of State provides a wonderful chart outlining exactly what "human trafficking" is. *See Human Trafficking Defined*, U.S. DEP'T OF STATE (June 4, 2008), http://www.state.gov/j/tip/rls/tiprpt/2008/105487.htm.

169. BRIDGETTE CARR ET AL., HUMAN TRAFFICKING LAW & POLICY 151 (2014).

170. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 9, 29, 43–44, 58 (2014).

171. CARR ET AL., *supra* note 169, at 131.

172. *Id.* at 113, 131.

173. *Id.* at 129; *see, e.g.*, Benjamin Pomerance, *Not Just Child's Play: Why Recognizing Fundamental Principles of the UN Convention of the Rights of the Child as Jus Cogens Would Give Needed Power to an Important International Document*, 16 GONZAGA J. INT'L L. 1 (2013).

174. Carens, *supra* note 9, at 252; *see also* Michael Blake, *Immigration and Political Equality*, 45 SAN DIEGO L. REV. 963, 966 (2008).

United States. The United States is seen not as a passive entity, engaged in non-interference with would-be immigrants, but as an active participant in the global community—indeed, one of many active participants. Thus, in accepting its share of refugees from overseas, the United States is also accepting responsibility for transporting these individuals to the United States, supporting them for a period of transition to the United States, and, ultimately, assimilation of these individuals into U.S. society. Similarly, in handling foreign medical students, the United States takes an active role to ensure the students' compliance with the two-year foreign residency requirement. The foreign medical students might be able to point to an individual rights theory to argue that they ought to have a right to remain in the United States, but the global welfare theory overrides those individual concerns in favor of a global perspective.

b. Domestic Interest vs. Global Welfare

The domestic interest and global welfare theories are aligned in their focus on consequences. Both look not to the rights that drive law but at the consequences of any given law. Yet the focus of the domestic interest theory is inherently narrower—looking, as it does, exclusively within the United States whereas the global welfare theory takes a worldwide perspective.

This divide is apparent in the arguments surrounding the two-year foreign residency requirement for migrants who receive graduate medical education or training in the United States. Under a global welfare theory, this requirement is justified to mitigate the international effects of brain drain. Under a domestic interest analysis, however, this requirement may not be justified if it turns out that there is an appreciable need for medical professionals in the United States. Indeed, the domestic interest arguments prevailed, in part, with Senator Conrad's "State 30" Program, which waived the foreign residency requirement for foreign physicians hired by states to practice in medically underserved areas of the country.[175]

c. National Values vs. Global Welfare

As with the individual rights/domestic interest comparison, the national values and global welfare theories differ along both the deontological/consequentialist divide and the country/non-country focus. Global welfare focuses on the worldwide consequences of law while national values looks at the domestic morality of law.

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175. *See* Stephanie Gunselman, *The Conrad "State-30" Program: A Temporary Relief to the U.S. Shortage of Physicians or a Contributor to the Brain Drain?*, 5 J. HEALTH & BIOMEDICAL L. 91, 92 (2009).

Nonetheless, both theories can be brought to bear in considering arguments about the same law. Consider, once more, the Lautenberg Amendment.[176] I have already addressed the national values arguments in support of this law, which look to the First Amendment nature of the persecution suffered and our country's Judeo-Christian values. But the global welfare theory applies as well. The law builds upon well-established asylum laws, which are, as discussed, grounded in concepts of global burden-sharing.[177]

3. Limitations

One limitation of the global welfare theory is that it is based on multiple fictions. There is no global community or society of nations that includes "all men and women everywhere."[178] Even if we were to imagine such a community, it is impossible to come up with a set of goals and values for this community that is a true reflection of the goals and values of each of the members of it.[179] That is because "[t]here is no single set of primary or basic goods conceivable across all moral and material worlds—or, any such set would have to be conceived in terms so abstract that they would be of little use in thinking about particular distributions."[180]

Walzer expounds on this point with the simple example of food.[181] Food is a physical necessity. At first thought, food would seem to be, unequivocally, on the top of any list of primary goods. But it is hard to determine where food would rank on a list of primary goods if one takes into account moral as well as physical necessities. If food is conceived of as a means of hospitality there may be a social demand to share it with guests at the expense of one's own physical need.[182] Or, one could imagine, as Walzer does, a conflict between the physical need for food and a religious need for the same if, say, "the gods demanded that bread be baked and burned rather than eaten . . . ."[183]

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176. *See supra* Parts II.C.4, II.C.6.

177. *See supra* Part II.D.1.

178. *See, e.g.*, WALZER, *supra* note 4, at 29–30.

179. *Id*.

180. *Id*. at 8.

181. *Id*.

182. A fictionalized example of this quandary can be found in the 1984 film *Indiana Jones and the Temple of Doom* when Indiana Jones, Willie Scott, and Short Round find themselves in the impoverished town of Pankot where they are welcomed with "more food than these people eat in a week." *See* INDIANA JONES AND THE TEMPLE OF DOOM (Paramount Pictures 1984).

183. WALZER, *supra* note 4, at 8; *see also* BENHABIB, *supra* note 12, at 108–09 (discussing the hermeneutic problem of determining who should count as the "least advantaged" member of a society).

Benhabib notes that the epistemic problem is not limited to goals and values but extends to "generalized judgments about . . . responsibilities."[184] It is hard to tell whether the economic downturn of one country is causing unemployment in another, much less whether "the successful participation of developing countries in the world economy and the trading system will enhance or reduce the potential for international migration."[185]

These examples show a real limitation of the global welfare theory. The reality is that our view of global welfare will necessarily be distorted by our own values, which are the product of our modern democratic state and, thus, not necessarily reflective of the world as a whole.

Joseph Carens uses the writings of philosopher John Rawls[186] to challenge the idea that it would be impossible to come up with legitimate global values.[187] He argues that if everyone in the world were asked what principles should govern society—knowing nothing about themselves or the societies in which they live—they would all conclude the primary principles to be: (1) equal liberty to all and (2) social and economic inequalities are allowed only if they advantage the least well off and attach to positions open to all under fair conditions of equal opportunity.[188]

Even if Carens is correct, his analysis does not eliminate the fiction of the global community, dealing fairly among its members in an effort to distribute inequalities on a worldwide basis. The reality is that global decisions are made by the most well-off in an effort to help only so much as necessary to avoid having whatever global problems exist develop into national problems.[189]

III. EXAMPLES OF THEORETICAL INTERCONNECTIVITY

Having examined each of the four theories of immigration law individually, I now consider how they are interconnected, looking closely at two examples of immigration law—family-based migration and the diversity

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184. BENHABIB, *supra* note 12, at 106.

185. *Id*. (citing Hania Zlotnik, *Past Trends in International Migration and Their Implications for Future Prospects*, *in* INTERNATIONAL MIGRATION INTO THE TWENTY-FIRST CENTURY: ESSAYS IN HONOR OF REGINALD APPLEYARD 228 (2001)).

186. JOHN RAWLS, A THEORY OF JUSTICE (1971).

187. *See* Carens, *Aliens and Citizens*, *supra* note 9, at 255–62, 265; *see also* CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 125–76 (1979) (applying a Rawlsian ideal contractualism to international society).

188. Carens, *Aliens and Citizens*, *supra* note 9, at 255.

189. If the question considered were why a given law should be passed under the global welfare theory, an additional limitation would be cost. After all, the cost of an immigration law that abides by a global welfare theory will be low if the number of individuals who stand to benefit from it are low. If the numbers are high, the costs will be commensurately high.

visa system. Arguments in favor of family-based migration and the diversity visa draw from all four theories of immigration law. In this way, these examples show that while arguments concerning immigration law fall into one of four theoretical categories, law itself can draw support from multiple theoretical perspectives.[190]

A. Family-Based Migration

The United States has a long-standing tradition of favoring family-based migration. As research by Kerry Abrams suggests, early considerations of family migration were grounded in the individual rights theory.[191]

> In the late nineteenth and early twentieth centuries, the ability to relocate one's family was thought of as a male head of household's right. Under coverture, a man had the right to determine the domicile of his wife and children; the right to bring his wife and child with him when he immigrated was analogous. Most immigration was unrestricted, but even when Congress did restrict immigration—such as through the various Chinese exclusion acts—these acts were notably enforced in ways that still allowed a woman to enter if she was married to a man who was eligible for admission. In one case, for example, a court explained, "[A] Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either."[192]

While the nineteenth-century law of coverture and its concomitant focus on male heads of households is antiquated, its doctrinal descendant, family-based migration, has had a continued vitality through today. The Emergency Quota Act of 1921 was the first immigration law to "specifically privilege certain family members over other immigrants."[193] The privileged status of family members continues today with nearly 81% of those who obtained lawful permanent residence status in 2011 doing so on the basis of family relationships.[194]

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190. *C.f.* Cass R. Sunstein, *Incompletely Theorized Arguments*, 108 HARV. L. REV. 1733, 1736 (1995) (discussing how consensus on law can sometimes be reached by focusing on the particulars of law instead of competing theoretical justifications).

191. Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 10–15 (2013).

192. *Id*. at 10 (citations omitted).

193. *Id*. at 10–11.

194. *Id*. at 7 n.1 (noting LPR status was given to 234,931 family-sponsored preferences and 453,158 immediate relatives of U.S. citizens *as well as* 74,071 of the employment-sponsored visas going to family members, 22,004 of the diversity lottery visas going to family members, and

Not only has the law continued to privilege prospective immigrants on the basis of family ties, it also has continued to find grounding in the individual rights theory. Joseph Carens has called "[l]iving with one's family" a "fundamental human interest."[195] Justice Marshall similarly called "the right to live together as a family" a "fundamental" freedom.[196]

Yet the individual rights theory is not the only one that can be applied to the laws favoring family-based migration. Abrams' research identifies ways in which the domestic interest theory can also be applied to understand the law favoring family migration. Abrams argues that family-based migrants bring economic value to the United States in the form of low-skilled market labor, nonmarket labor, and gray market labor.[197] Family-based admissions tend to bring in low-skilled laborers, who are valuable because they form a flexible labor force that can respond to market conditions in a way that highly-skilled laborers cannot due to the investment they made in acquiring skills.[198] Family-based admissions also tend to bring in nonmarket labor—individuals who are capable of providing housework, child care, and elder care, freeing up other family members to engage in market labor while increasing family prosperity and reducing reliance on government support for such services.[199] Finally, family-based migrants may also become part of the gray market labor force—performing compensated care work outside their homes but without official employment protections. Gray market, like nonmarket labor, frees up others to engage in market labor while increasing family prosperity and reducing reliance on government support. The extensive economic benefits of family migration indicate that the law cannot be exclusively cast in an individual rights mold. It must be analyzed under the domestic interest theory as well.

Family-based migration also implicates the national values theory. Consider the ubiquitous metaphor of America as a melting pot.[200]

> You simply melt right in,
> It doesn't matter what your skin.
> It doesn't matter where you're from,
> Or your religion, you jump right in,

72,047 of the refugee and asylee slots going to family members, out of a total of 1,062,040 (citing OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS, tbl.6 (2011)).

195. CARENS, IMMIGRANTS AND THE RIGHT TO STAY, *supra* note 15, at 15.

196. Fiallo v. Bell, 430 U.S. 787, 810 (1977) (Marshall, J., dissenting).

197. Abrams, *supra* note 190, at 19–23.

198. *Id*.

199. *Id*.

200. *See, e.g.*, *Schoolhouse Rock: Great American Melting Pot* (ABC television broadcast 1977).

> To the great American melting pot.
> The great American melting pot.
> Ooh, what a stew, red, white, and blue.[201]

The United States values having immigrants from around the world, but it also values their quick integration into the country—"you jump right in."[202] Family migration helps to promote the quick integration of migrants.[203] Having a complete family unit together promotes a sense of belonging and permanence. Togetherness gives license to put down roots and make a new home. Moreover, each member of the family will develop their own connections to the community through work, school, activities, and friendships. As each member brings those connections back to the family, the connections to the community multiply and strengthen. Since family-based migration helps to hurry along this process, it touches upon the domestic values theory.

Family migration can also be viewed through the lens of the global welfare theory. Picture an employment-based immigrant. If she were not allowed to migrate with her family, the country of origin would both lose a highly-skilled worker and would be left with a family that is down by one and necessarily weakened by the loss. Picture a refugee. If he were not allowed to migrate with his family, the country of current residence would be left with family members that continue to be in dire need of assistance and who, too, are weakened by the loss of a member. Thus, family migration can be understood to satisfy the United States' responsibilities to countries of origin addressing global concerns about family separation.

The national preference for family-based immigration is one that can be analyzed under all four of the immigration theories presented. Each highlights a unique aspect of the law. Each addresses a different answer to the question of why should the United States should favor these particular immigrants.

B. The Diversity Visa

The diversity visa program came into being with the Immigration Act of 1990.[204] In its current form, the diversity program allots 50,000 visas annually to individuals who come from countries and regions of the world from which

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201. *Id*.
202. *Id*.
203. Abrams, *supra* note 190, at 16–18.
204. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4798 (codified as amended at 8 U.S.C. §§ 1101–1537 (2014)).

the United States has had few immigrants.[205] Millions apply each year for these visas, and winners are chosen by lottery with worldwide odds of winning averaging around .25%.[206]

As with family migration, the diversity visa system can draw support from all four of the immigration theories.

Some arguments in favor of the diversity visa system can be categorized as belonging to the domestic interest theory. The diversity program screens individuals for basic education and employability.[207] As a result, the program does not apply to individuals who are likely to burden the country. Moreover, the system attracts only those highly motivated to live in the United States. These are individuals who do not have family connections to the country that could form the basis for their entry; they will leave their families behind. Thus, the program attracts individuals who are committed to investing in the United States, putting down roots, and staying. It would seem to be in our domestic interest to welcome such individuals.[208]

The individual rights theory sheds light on other aspects of the diversity visa program. The diversity visa lottery is the only means by which nearly any[209] prospective immigrant can gain admission to the United States without consideration of their family or work connections to the country. It is the only form of open migration that the country has—the only law that recognizes that individuals have a right to freely move from one nation to another with or without *need*. It even does away with the messy question of valuing rights. Rather than assess competing claims to entry on their merits, it is handled by lottery.

The diversity visa system can also be viewed through the national values lens. The United States places great emphasis on being "a country of immigrants"[210] and a "melting pot."[211] The diversity visa system can be seen

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205. *See* 8 U.S.C. § 1153(c) (2012).

206. *See Green Card Lottery DV-2012 Results*, IMMIGRATIONROAD.COM, http://immigrationroad.com/green-card/green-card-lottery-dv-2012-results-and-data.php (last visited Feb. 9, 2013).

207. *See* 8 U.S.C. § 1153(c)(2).

208. *Cf.* GUEST, *supra* note 38 at 16 ("It takes energy and courage to leave the place where you grew up, where everything is familiar and grandma is always there to hold the baby when you are sick. So migrants tend to be strivers, doers and risk-takers. Everywhere they go, they are disproportionately likely to start businesses or make new discoveries.").

209. A diversity winner must have at least a high school education or its equivalent as well as two years of work experience in the last five years, "in an occupation which requires at least 2 years of training or experience." 8 U.S.C. § 1156(c)(2).

210. *See*, *e.g.*, *Immigration Debate Influences U.S. Presidential Campaign*, VOICE OF AM. (July 27, 2007), http://www.voanews.com/content/a-13-2007-07-27-voa53/352344.html (quoting then-presidential hopeful Barack Obama).

211. *See supra* notes 199–201 and accompanying text.

as a means by which we are adding diversity to the pot. Moreover, the ideas of fairness and equality addressed in the analysis of individual rights are also relevant to the national values theory. Our Declaration of Independence states that "all Men are created equal . . . endowed by their Creator with certain unalienable Rights." Having a lottery system of entry into the United States breaks down, in a small way, the inequalities created by favoring families and workers, and treats all applicants equally.

Finally, the global welfare system can also be a perspective from which to view the diversity lottery program. At any given moment, millions around the globe are displaced from their homes because of war, persecution, or natural disasters.[212] Millions more would like to leave their homes in search of better economic opportunities.[213] The diversity lottery system offers one way in which the United States can take a share—though admittedly small—of these global migrants.

The global welfare theory bolsters arguments in favor of the diversity visa system in yet another way. The existence of the diversity lottery might spur more individuals overseas to complete their education and increase their job skills in order to maintain their eligibility for the program.[214] Thus, the program benefits other countries by increasing the education and skill level of individuals denied entry to the United States under this program.[215]

IV. WHO RELIES ON WHICH THEORIES, AND WHY

It is possible to make a number of observations about the consumers of these theories, and to what extent these theories appeal to various groups.

In immigration law scholarship, the individual rights theory gains the most traction. When immigration scholars make normative arguments, they tend to do so in the individual rights mode. Their emphasis in this regard seems driven by a continuing desire to expound on what the law should be, as a moral question.

It should come as no surprise that entities dealing with issues of global concern—such as The Office of the United Nations High Commissioner for Refugees (UNHCR)—most often draw upon arguments steeped in the global

212. *See* UN REFUGEE AGENCY, *Ten Years of Statistics*, *in* UNHCR STATISTICAL YEARBOOK 2010 at 1, 6 (2011), *available at* http://www.unhcr.org/4ef9c8d10.html (estimating the worldwide refugee population to be 10.55 million at the end of 2010).

213. *See*, *e.g.*, Table of Migrants by Country, *supra* note 6.

214. Again, migrants are only eligible for a diversity visa if they have at least a high school education or its equivalent as well as two years of work experience in an occupation that requires at least two years of training or experience. 8 U.S.C. § 1153(c)(2).

215. *Cf.* GUEST, *supra* note 38, at 110 (discussing a similar effect among highly skilled would-be migrants such as nurses and accountants).

welfare theory. After all, the UNHCR is mandated to "lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide."[216] But such global entities also draw upon the individual rights theory—striving, as they are, "to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State."[217]

When U.S. legislators discuss immigration concerns, by contrast, they tend heavily to favor arguments that draw on the theory of domestic interest. For this reason, we can consider domestic interest to be the dominant theory explaining current U.S. immigration law. The domestic interest theory alone can explain every law concerning the exclusion (denial of entry)[218] and removal (deportation)[219] of migrants—that is, every denial of beneficence. This is true even if such laws can also be explained by way of one or more of the other three theories. The dominance of the domestic interest theory is understandable: U.S. legislators are country-focused and outcome-oriented. Yet the national values theory serves a supporting role here. It acts as a recessive argument that can bolster congressional support for immigration law that is already supported by domestic interest arguments. The individual rights and global welfare theories are less often employed by legislators, who for reasons having to do with our democratic and electoral structure, might be expected to be unconcerned, in large part, with those who cannot vote.

Interestingly, social science indicates that U.S. politicians—in so far as they mean to cater to voters—may be taking the wrong approach. Research shows that Americans are more likely to support policies that are framed in the language of individual liberty.[220] Asking Americans to think about the "greater good"—the focus of the domestic interest theory—can undermine their willingness to lend a policy their support.[221] Thus, for politicians, the individual rights and national values theories (insofar as "individual liberty" is a national value) might serve as a new way to frame discussion of immigration reform in a manner that appeals to American voters.

Of the four theories, the national values approach is the least utilized, yet perhaps it has some of the greatest domestic potential. It could serve as a bridge between legislators' focus on domestic interest and scholars' focus on

216. *See* UN REFUGEE AGENCY, *About Us*, UNHCR.ORG, http://www.unhcr.org/pages/49c3646c2.html (last visited Sept. 25, 2014).

217. *See* UN REFUGEE AGENCY, *What We Do*, UNHCR.ORG, http://www.unhcr.org/pages/49c3646cbf.html (last visited Sept. 25, 2014).

218. 8 U.S.C. § 1182.

219. *Id.* § 1227.

220. Steve Inskeep & Shankar Vedantam, *What Is The Effect Of Asking Americans To Think About The Greater Good?*, NPR NEWS (Mar. 19, 2013), http://www.npr.org/2013/03/19/174708597/when-pitching-the-common-good-is-bad.

221. *Id.*

individual rights—taking, as it does, one element from each of those theories—a country focus from domestic interest and a deontological focus from individual rights. And, as just discussed, it may be an appealing framework for American voters.

CONCLUSION

This Article presents a new means for categorizing arguments about immigration law. The recognition of the value of categorization as an intellectual exercise goes back at least to Aristotle.[222] He grouped animals, for instance, into those with blood and those without, those who were live-bearing and those were who egg-bearing.[223]

Our strong, perhaps innate, desire to categorize might be understood as desire to bring order to chaos. Categorization simplifies.[224] And switching modes of categorization can offer a lens through which information can be viewed a new light.

New perspectives created through categorization can be transformative. When poet Audre Lourde received her first pair of glasses, at age three, the new perspective was, in some ways, unwelcome: "the dazzling world of strange lights and fascinating shapes which I inhabited resolved itself in mundane definitions."[225] In other ways, it was magical. One "stunted" tree on a public playground yielded a

> sudden revelation of each single and particular leaf of green, precisely shaped and laced about with unmixed light. Before my glasses, I had known trees as tall brown pillars ending in fat puffy swirls of paling greens, much like the pictures of them I perused in my sister's storybooks from which I learned so much of my visual world.[226]

It is in this spirit that this Article is offered, albeit with a strong dose of

222. Aristotle, *Categories*, *in* THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., Princeton Univ. Press 1984).

223. Aristotle, *The Parts of Animals*, *in* THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., Princeton Univ. Press 1984).

224. Instead of asking one to examine every individual thing on its own, categories allow for grouping of different things together, transforming them into equivalent items. *See* JEROME S. BRUNER ET AL., A STUDY OF THINKING 1, 2 (1956). Categorization also provides a way to harness and use information. By grouping items based upon their shared characteristics, categorization allows for both the quick navigation among ideas and rapid location of specific information. *See, e.g.*, Sue Feldman, *Why categorize?*, KMWORLD MAGAZINE, Oct. 2004, at 8, *available at* http://www.kmworld.com/Articles/Editorial/Features/Why-categorize-9580.aspx.

225. AUDRE LOURDE, ZAMI: A NEW SPELLING OF MY NAME 31 (1982).

226. *Id.* at 32.

modesty. It would be too bold to suggest that the categorization rubric I offer here will transform the analysis of immigration law from cartoon-like outlines to photorealistic clarity. Nonetheless, the typology presented here may provide value in creating order out of the chaos of the immigration debate.