

# Why a Wall?

Pratheepan Gulasekaram\*

*Initiated with Operation Gatekeeper in the early 1990s, and extended with significant funding by the Secure Fences Act in 2006, the United States has committed itself to physical fortification of its border with Mexico. The stated purpose of the border fence is to eliminate unlawful entry into the United States. Yet, since the initiation of the border fence project, critics and empirical researchers have found the fortification, at best, to be costly and ineffectual in accomplishing its stated goals; at worst, they argue it causes significant death without any deterrence.*

*In the face of this critique, this Article theorizes the creation and persistence of a border wall, arguing that several factors unrelated to actual deterrence inexorably provoke the building of a physical border barrier. After first describing the powerful cost-benefit case establishing the disutility of a border fence, the Article explains the underlying forces that render such critiques unpersuasive. Instead, the Article presents alternative rationales for border wall construction based on incentives for national lawmakers and the federal government that are only marginally related to actual elimination of unlawful entry. The Article then highlights the importance of the wall's physicality, explaining how its existence alters immigration enforcement and migration discourse in politically, culturally, and legally significant ways. Fundamentally, the border wall naturalizes and normalizes the idea of a national border, thereby facilitating harsh enforcement strategies. Meanwhile, its presence helps generate even more undocumented presence within the country, rendering the wall not only an apparent solution to a perceived problem, but constitutive of the problem itself.*

*Finally, the Article queries whether the existence of the border fence at our current historical moment portends the weakening of nation-state boundaries. A physical border barrier, counterintuitively, may be the harbinger of diminished sovereign power, serving more as a warning to the walled-in citizenry of the constructing nation than to putative migrants on the outside.*

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## INTRODUCTION

A popular, recent YouTube video documents two young women climbing a portion of the U.S.-Mexico border fence.<sup>1</sup> The clip records the women scaling the fence in less than eighteen seconds. The obvious point of the video is to mock the disutility of a border wall, implicitly provoking the watcher to contemplate the speed and ease with which a young, healthy Mexican or Central American male, motivated by livelihood and survival, could scale the fence. After detailing the monetary cost of the fence, text on the screen pointedly asks: “Is it worth the expense?”

The video provides basic insight into a broader quandary: even if there are justifiable reasons for attaching legal and social consequences to border transgressions, what purpose is served by the creation of a surmountable border fence? It is a question asked not just by young activists with video editing

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\* Assistant Professor of Law, Santa Clara University School of Law (J.D., Stanford Law School). I must thank Professors David Ball, Jennifer Chacón, Kyle Graham, Ellen Kreitzberg, Stephen Lee, Hiroshi Motomura, David Sloss, and Michael Wishnie for their comments and questions. In addition, a special thank you to Professor Karthick Ramakrishnan (Political Science, UC Riverside) for allowing me to present this paper at the Politics of Race, Ethnicity, and Immigration Consortium at UC Davis School of Law. This paper was also presented at the “Persistent Puzzles in Immigration Law” symposium at UC Irvine Law School; thanks to the participants for their questions and comments. Finally, thanks to Eric Ruehe (SCU Law 2012) and Chelsea Hopkins (SCU Law 2012) for their research assistance, and to Dean Donald Polden for his financial support of this project.

1. Rslaz024, *2 Girls Undermine Entire US Border Strategy in Under 18 Seconds*, YOUTUBE (Jan. 4, 2011), <http://www.youtube.com/watch?v=UtgMW8aMI-Q>.

capabilities, but also by social scientists and legal academics in their scholarly work.

This Article attempts to theorize the existence of a fortified border in the face of such critique. The conventional case against the border fence, predicated on evaluating the costs of such a policy against its ineffectiveness as a migration mitigator, is well established. But, that conventional critique—like the border fence itself—is apparently ineffectual and unpersuasive. The YouTube video—“2 Girls Undermine Entire U.S. Border Strategy in Under 18 Seconds”—can “undermine” federal border wall strategy only when the wall is primarily defined and evaluated by its ability to eliminate unwanted cross-border traffic. Given that federal law authorizing the fence expressly declares interdiction of unlawful crossers as its purpose, critics have reason to focus on the fence’s ability to accomplish that goal. But once we move beyond the policy’s stated justification, it is not clear that the wall’s ineffectiveness as a migration mitigator renders it irrational public policy.

Moving beyond this conventional debate raises deeper, more important questions about border wall policy. The fence may provide significant symbolic and expressive benefits to politicians and the polity, even though it only provides marginal deterrence. While theorists have both decried and defended thick conceptions of nation-state borders,<sup>2</sup> current legal commentary on the genesis and specific effects of a border wall policy, however, remains thin. This Article seeks to fill that void. It will argue that the purpose, mechanism, and consequence of a border wall are more intricate and nuanced than the government and supporters declare, or than commentators credit.

This Article argues that the incentives created by the political, legal, and social context of border transgression ultimately marginalize rational arguments against the cost and inefficacy of a fortified border. Once constructed, the fortified and physical border, in turn, reifies the very political, legal, and social context that initially gave it life. The physicality and existence of a wall change the way citizens conceive of immigration enforcement, alter the justifications for immigration enforcement itself, increase the perception and incidence of unlawful presence, and naturalize the idea of immigration as an existential threat to U.S. sovereignty. Thus, the border wall is both a putative solution to a problem and constitutive of the problem itself. This Article ultimately concludes that this cyclical reification, which results in ever more stringent legal consequences and

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2. Compare Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, in THE RIGHTS OF MINORITY CULTURES 331, 331–49 (Will Kymlicka ed., 1995) (arguing for open borders), and Howard F. Chang, *Cultural Communities in a Global Labor Market: Immigration Restrictions as Residential Segregation*, 2007 U. CHI. LEGAL F. 93, 97–120 (2007) (arguing that immigration laws are, from the perspective of global economic welfare, inefficient), and Kevin Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 197–203 (2003) (arguing for generally open borders), with MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 39 (1983) (arguing for strong control over national borders so that internal borders can be open).

ever more imposing physical structures, in fact undermines the very exercise and display of sovereignty it is intended to protect.

Accordingly, the border wall presents a complex paradox of immigration law, border policy, and national power. Part I of this Article begins by describing the erection of border fortification despite mounting evidence recognizing the ineffectiveness and human cost of such fortification. Part II follows by presenting alternative explanations for the border wall's construction and persistence despite its high cost and apparent inability to meaningfully deter unlawful migration. Here, the Article will argue that the legal consequences of migration outside of the law,<sup>3</sup> combined with political and psychic need for control, will drive border fortification despite the pragmatic ineffectiveness of a wall. These claims are situated within the theoretical and empirical claims of an expressive law framework, which helps explain how lawmakers can manipulate information asymmetries between themselves and their constituents to bolster support for policies like the border wall.

Having presented an alternative narrative for border wall erection—one divorced from actual interdiction capabilities—Part III details the specific ways in which a symbolic border wall alters the discourse concerning undocumented migration and immigration enforcement. Here, the Article will argue that the existence of a visible border structure domesticizes immigration law by associating it with property law norms, and naturalizes and entrenches the political, legal, and social framework that penalizes border transgressions. Finally, Part IV queries the future of border wall policy. Here, the Article argues that the fundamental irony of this border is that it prescribes the subsequent policy choices for the federal government and serves to weaken, rather than strengthen, the long-term significance of the nation-state boundary.

The ultimate point of this analysis is to explain the contradiction of U.S. border fortification policy and critique it, not from the perspective of its purported function, but from the perspective of the other social, legal, and political purposes it serves. Building upon the work of theorists like Wendy Brown and Mary Fan, whose excellent and nuanced meditations on the meaning of the border provide much of this Article's empirical and conceptual foundation,<sup>4</sup> this Article interrelates different strands of border study across disciplines, situates political and rhetorical critique of border wall policy within the framework of expressive law theory, and contemplates the generative and destructive facets of a physical border fortification strategy.

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3. Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2038–41 (2008).

4. See WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* (2010); Mary Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-Fillers in Border Regulation*, 42 LAW & SOC'Y REV. 701 (2008).

## I. THE BORDER WALL'S (IN)EFFECTIVENESS AS MIGRATION MITIGATOR

Increased attention to the national border in general, and the southern border specifically, is a product of multiple legislative and historic developments. The southern border is the product of a political compromise negotiated between the United States and Mexico in the aftermath of the Mexican-American War, delineated by the 1848 Treaty of Guadalupe Hidalgo and later by the Gadsden Purchase.<sup>5</sup> More recently, several important legislative markers and events, including the Immigration Reform and Control Act of 1986,<sup>6</sup> Operation Gatekeeper, the North American Free Trade Agreement in 1994,<sup>7</sup> enhanced legal proscriptions for unlawful presence and entry,<sup>8</sup> the 9/11 terrorist attacks, the Secure Fence Act (SFA),<sup>9</sup> and the current national economic downturn, all helped construct and produce the vision and version of the wall we have today. These developments exerted significant osmotic pressure across the southern border, as demand for Mexican labor created a steady stream of documented and undocumented migrants.<sup>10</sup> The significance of crossing the border is understood by, and raises the passion of, people on both sides of the issue through social context and interaction.<sup>11</sup>

To suggest that the border is historically, politically, legally, and socially constructed, however, should not obscure another equally significant truth: the border can also be physical fact. It is, in many places, a tangible and material construction, complete with steel, wires, barbs, reinforced posts, cameras, and security devices. In the past few decades, starting with Operation Gatekeeper<sup>12</sup> in the early 1990s to the passage of the SFA in 2006,<sup>13</sup> at great taxpayer cost, the U.S. government has erected a fortified boundary along a growing portion of its border

5. See JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE “ILLEGAL ALIEN” AND THE MAKING OF THE U.S.-MEXICO BOUNDARY 193–95 (2002). Although obvious, it bears mentioning that prior to this political outcome, the states and areas most immediately affected by unwanted border crossings—Arizona, Texas, New Mexico, and California—were a part of Mexico.

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

7. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

8. See generally 8 U.S.C. §§ 1182(a)(6)–(7), (9); 1225 (a)–(b) (2006).

9. Secure Fence Act of 2006, Pub. L. 109-367, 120 Stat. 2638 (signed into law on October 26, 2006).

10. See NEVINS, *supra* note 5, at 5–8.

11. See, e.g., Néstor P. Rodríguez, *The Social Construction of the U.S.-Mexico Border, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 223 (Juan F. Perea ed., 1997) (“Nation-state boundaries are social constructions. They do not exist independent of our volition.”); Gloria Valencia-Weber & Antoinette Sedillo Lopez, *Stories in Mexico and the United States About the Border: The Rhetoric and the Realities*, 5 INTERCULTURAL HUM. RTS. L. REV. 241, 242–43, 253–263 (2010).

12. See NEVINS, *supra* note 5, at 1–3.

13. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (codified as amended in scattered sections of 8 U.S.C. and 14 U.S.C.).

with Mexico. From Operation Gatekeeper to current initiatives, the federal government has reshaped the geography of the southern border, literally moving mountains to make way for a physical border barrier.<sup>14</sup> Several state and private lands have been requisitioned for fence building, and the multiple federal and state laws that would prevent such construction have been abrogated, preempted, and disregarded in service of wall construction.

Increasingly, however, many are beginning to doubt that a border wall is a viable solution to unwanted border crossing. Those who continue to espouse the virtues of such a strategy are easily caricatured as fringe characters, calling for militarized and absurd versions of a border wall.<sup>15</sup> The Department of Homeland Security's border enforcement scheme is more complex, contemplating a number of strategies, including expanding exclusion and deportation grounds, providing for expedited removal, beefing up border patrols, increasing worksite enforcement, exploring high-tech methods of border control, and, of course, building a border fence. Given these other strategies, questions remain regarding the necessity and wisdom of using a wall to define and defend those borders.

The SFA states that it is an “[a]ct to establish operational control over the international land and maritime borders” of the United States.<sup>16</sup> A subsequent provision further clarifies this, defining “operational control” as “the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contra-band.”<sup>17</sup> Although it is indisputable that the current fence and increased surveillance tactics have rerouted human traffic into the United States from Mexico, little evidence suggests that such traffic has been deterred.<sup>18</sup>

Sociologists have shown that the decrease in migrant flows since the renewed federal focus on border fencing and surveillance are better explained by the economic downturn coincident with these strategies than by border

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14. DENISE GILMAN, *THE WORKING GROUP ON HUMAN RIGHTS AND THE BORDER WALL, OBSTRUCTING HUMAN RIGHTS: THE TEXAS-MEXICO BORDER WALL* 4–5 (2008); NEVINS, *supra* note 5, at 1–5.

15. See, e.g., Julia Preston, *Some Cheer Border Fence and Others Ponder Cost*, N.Y. TIMES Oct. 19, 2011, at A17 (noting that Representative Michelle Bachmann called for double fencing of the length of the southern border, and that Republican presidential hopeful Herman Cain called for a twenty-foot high electrified border fence with barbed wire); see also Alex Pareene, *Herman Cain Will Veto Bills Longer than Three Pages, Have Alligators Guard the Border*, SALON (June 8, 2011), [http://www.salon.com/news/politics/war\\_room/2011/06/08/cain\\_three\\_pages](http://www.salon.com/news/politics/war_room/2011/06/08/cain_three_pages) (quoting Republican presidential hopeful Herman Cain as promoting a solution akin to the Great Wall of China as part of his immigration strategy for the United States).

16. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638.

17. *Id.* § 2(b).

18. CHAD C. HADDAL ET AL., CONG. RESEARCH SERV., RL33659, *BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER* 26 (2009); Fan, *supra* note 4, at 702 (“[T]he fundamental assumption behind the strategy—that raising costs would deter—proved wrong.”).

enforcement policy.<sup>19</sup> Most recent data details the significant decrease in recent migrant flows since the high point of a few years ago.<sup>20</sup> Even though some, like former Department of Homeland Security (DHS) Secretary Michael Chertoff, have been quick to credit increased border surveillance and enforcement as the reason for the decline,<sup>21</sup> doing so mistakes correlation for causation. Moreover, any deterrent effect at the border is likely mitigated by the accompanying reduction in successful entrants leaving the country.<sup>22</sup>

Commentators, researchers, government officials, and private actors in border regions all agree that, at present, the border fence fails to effectively, if at all, accomplish its interdiction goals.<sup>23</sup> Instead, researchers note the significant rise in migrant deaths with little evidence that migration has been deterred.<sup>24</sup> Still others have noted that even significantly increased border enforcement strategies—with a border fencing a key component—are unlikely to produce effective mitigation.<sup>25</sup>

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19. DEMETRIOS G. PAPADEMETRIOU & AARON TERRAZAS, IMMIGRANTS IN THE UNITED STATES AND THE CURRENT ECONOMIC CRISIS, MIGRATION POLICY INSTITUTE (2009), available at <http://www.migrationinformation.org/usfocus/display.cfm?ID=723>; Wayne A. Cornelius, *Controlling Unwanted Immigration: Lessons from the United States 1993–2004*, 31 J. ETHNIC & MIGRATION STUD. 775, 775–94 (2005); see also HADDAL ET AL., *supra* note 18, at 14; GORDON HANSON, MIGRATION POLICY INSTITUTE, THE ECONOMICS AND POLICY OF ILLEGAL IMMIGRATION IN THE UNITED STATES 12 (2009), available at <http://www.migrationpolicy.org/pubs/Hanson-Dec09.pdf>; Catherine Rampell, *Illegal Immigration as a Job Market Predictor*, N.Y. TIMES, May 15, 2009, <http://economix.blogs.nytimes.com/2009/05/15/illegal-immigration-as-a-job-market-predictor/> (citing Pia Orrenius's data on apprehensions versus employment trends).

20. Jeffrey Passel & D'Vera Cohn, PEW HISPANIC CENTER, *U.S. Unauthorized Immigration Flows Are Down Since Mid-Decade* (2010), available at <http://pewhispanic.org/reports/report.php?ReportID=126>.

21. Rachel L. Swarns, *Illegal Border Crossings Dip, and Official Cites Security*, N.Y. TIMES, Aug. 24, 2006, at A20 (“Michael Chertoff announced on Wednesday that tough border security measures . . . had significantly reduced the number of illegal immigrants entering from Mexico for the first time in several years.”).

22. Manuela Angelucci, *U.S. Border Enforcement and the Net Flow of Mexican Illegal Migration* 34–36 (Institute for Study of Labor, Discussion Paper No. 1642, 2005), available at <http://ssrn.com/abstract=756408>.

23. See, e.g., HADDAL ET AL., *supra* note 18, at 26–27; BROWN, *supra* note 4, at 26–27; GILMAN *supra* note 14, at 9–11; Fan, *supra* note 4.

24. Melissa Del Bosque, *Migrant Deaths on the Rise Despite Lower Apprehension Numbers*, TEXAS OBSERVER, July 20, 2010, <http://www.texasobserver.org/lalinea/migrant-deaths-increase-despite-lower-apprehension-numbers?tmpl=component&print=1>; MARIA JIMENEZ, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER 7–10 (Oct. 1, 2009), available at <http://www.aclu.org/immigrants-rights/humanitarian-crisis-migrant-deaths-us-mexico-border>; Evelyn Nieves, *Illegal Immigrant Death Rate Rises Sharply in Barren Areas*, N.Y. TIMES, Aug. 6, 2002, at A1.

25. See, e.g., STEVEN A. CAMAROTA, CENTER FOR IMMIGRATION STUDIES, THE HIGH COST OF CHEAP LABOR: ILLEGAL IMMIGRATION AND THE FEDERAL BUDGET 8 (2004), available at <http://www.cis.org/articles/2004/fiscal.pdf>; RAJEEV GOYLE & DAVID A. JAEGER, CENTER FOR AMERICAN PROGRESS, DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 8–9 (2005), available at [http://www.americanprogress.org/kf/deporting\\_the\\_undocumented.pdf](http://www.americanprogress.org/kf/deporting_the_undocumented.pdf); HANSON, *supra* note 19, at 12 (“Enforcement during the mid-2000s, which cost \$10–\$15 billion a year, allowed 500,000 new unauthorized immigrants to enter the country annually. Unless the next \$10 billion in

While Governor of Arizona in 2005, Janet Napolitano, the current Secretary of Homeland Security, succinctly encapsulated this sentiment when she observed, “[y]ou show me a 50-foot wall and I’ll show you a 51-foot ladder.”<sup>26</sup> Doris Meissner, former Immigration and Naturalization Service (INS) Commissioner, commented that the negative consequences of the fence outweigh any benefits it creates for the government and polity.<sup>27</sup> Even Governor Rick Perry, the Republican chief executive of Texas and presidential hopeful, noted that building a fence to cover the southern border would take significant time and would not be cost-effective.<sup>28</sup> Even if the border fence were extended to cover the entire southern border, David Martin, the current Principal Deputy General Counsel of DHS and former INS General Counsel, maintains that smugglers and those intent on crossing unlawfully would likely find other means of entering the United States.<sup>29</sup> Even interested private actors who care intensely about border security recognize the futility of a fence. Members of the Minuteman Civil Defense Corps, while participating in privately financed fence building on privately owned land at the southern border, acknowledge that neither their fence nor the government’s fence will likely slow or stop cross-border traffic.<sup>30</sup>

Indeed, in a report to Congress in March 2009, the Congressional Research Service concluded:

In the limited urban areas where border fencing has been constructed, it has typically reduced apprehensions. However, there is also strong indication that fencing, combined with added enforcement, has re-routed illegal immigrants to other less fortified areas of the border. Additionally, in the limited areas where fencing has been erected, there have been numerous breaches of the border fencing and a number of tunnels

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enforcement is much more effective than the first \$15 billion, it is difficult to see how one could justify a pure enforcement strategy to address illegal immigration, at least in terms of standard cost-benefit analysis.”); Ron Hassner & Jason Wittenberg, *Barriers to Entry 2* (June 2010) (unpublished manuscript), available at <http://witty.berkeley.edu/Barriers.pdf>.

Note also that current estimates indicate that attempting to remove all unlawfully present persons—heroically assuming such a result is possible—would cost nearly \$285 billion over the next five-year period. MARSHAL FITZ ET AL., CENTER FOR AMERICAN PROGRESS, *THE COSTS OF MASS DEPORTATION: IMPRACTICAL, EXPENSIVE, AND INEFFECTIVE 14–17* (2010), available at [http://www.americanprogress.org/issues/2010/03/deportation\\_cost.html](http://www.americanprogress.org/issues/2010/03/deportation_cost.html); RAJEEV GOYLE & DAVID A. JAEGER, CENTER FOR AMERICAN PROGRESS, *DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 8–9* (2005), available at [http://www.americanprogress.org/kf/deporting\\_the\\_undocumented.pdf](http://www.americanprogress.org/kf/deporting_the_undocumented.pdf) (using updated illegal inflow data for 2009 and CBP budget appropriates for 2009).

26. Linda Greenhouse, *Legacy of a Fence*, N.Y. TIMES (Jan. 22, 2011), <http://opinionator.blogs.nytimes.com/2011/01/22/legacy-of-a-fence>.

27. Fan, *supra* note 4, at 708 (quoting Doris Meissner).

28. Preston, *supra* note 15 (“Mr. Perry said that building a border-length fence would take ‘10 to 15 years and \$30 billion’ and would not be cost-effective.”).

29. David A. Martin, *Eight Myths About Immigration Enforcement*, 101 N.Y.U. J. LEGIS. & PUB. POL’Y 525, 543–44 (2007).

30. Fan, *supra* note 4, at 712–15.



discovered crossing underneath the fencing. It stands to reason that even if border fencing is constructed over a significant portion of the land border, the incidences of fence breaches and underground tunnels would increase.<sup>31</sup>

That same report notes that an “unintended consequence” of the federal government’s “prevention through deterrence” strategy has been loss of human life.<sup>32</sup> In a fifteen-year span since the creation of the first part of the border fence in 1990, deaths in the border region have increased nearly 150% as migrants enter through more remote and rugged terrain.<sup>33</sup> This horrific fact underscores the claim that the cost of the border fence cannot be measured in currency alone.

Further, the piecemeal assemblage of the fence is itself a concession that the fence cannot realistically eliminate unlawful entry. The first part of the fence, constructed in 1990 as part of Operation Gatekeeper, spanned fourteen miles inland from the Pacific Ocean.<sup>34</sup> That partial fence clearly had aesthetic and optical benefits, as it tended to reduce border crossing and apprehensions in the populated city of San Diego.<sup>35</sup> But, it had no meaningful effect on actual deterrence, as it simply pushed migration further eastward towards the Arizona border region.<sup>36</sup> Ironically, several lawmakers in 2006 pointed to the “success” of Operation Gatekeeper as the benchmark justifying their support of the SFA.<sup>37</sup>

Similarly, the current fence, as imagined by the SFA, is destined only to consist of seven hundred miles of noncontiguous fencing, sporadically spanning the more than two thousand mile-long border.<sup>38</sup> Several open gaps remain for entry in between these segments of border wall.<sup>39</sup> Of course, building across all two thousand miles of the border would prove extremely costly and difficult given the geography of the border.<sup>40</sup> To the extent one believes that a fence can eliminate unlawful entry, the only logical explanation of the piecemeal fence is that

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31. HADDAL ET AL., *supra* note 18, at 26.

32. *Id.*

33. *Id.* at 33; *see also* Fan, *supra* note 4, at 702.

34. BLAS NUÑEZ-NETO & YULE KIM, CONG. RESEARCH SERV., RL33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER 3, 13 (2008), *available at* [http://assets.opencrs.com/rpts/RL33659\\_20080513.pdf](http://assets.opencrs.com/rpts/RL33659_20080513.pdf).

35. *Id.* at 14–17.

36. *Id.*

37. *See* 152 CONG. REC. H6541 (2006) (statement of Rep. Edward Royce, R-CA) (discussing Secure Fence Act); *see also* Representative Duncan Hunter (R-CA), Statement from Presidential Campaign Website (Oct. 15, 2007), *available at* <http://immigration.procon.org/view.answers.php?questionID=000778> (“I know fencing helps secure our nation’s borders because criminal activity in every statistical category has been eliminated or decreased since we built the border fence in San Diego County.”).

38. *See* Secure Fence Act of 2006 § 3, Pub. L. No. 109-367, 120 Stat. 2638 (amending 8 U.S.C. § 1103 (1996) (§ 102(b) of the Illegal Immigration Reform and Immigrant Responsibility Act)).

39. *Id.*; *see* HADDAL ET AL., *supra* note 18.

40. *See, e.g.*, Preston, *supra* note 15 (quoting Mayor Richard F. Cortez of the border town of McAllen, Texas, as stating, “[Much of the state border] is a winding river. . . . Where in the world are you going to put fencing? To propose that suggests ignorance of the border and the terrain”).

even at its high but still manageable cost, a partial wall will deter and eventually eliminate migration by raising the risk of border crossing in unfenced areas—over desert and mountainous terrain—that are harsh and unforgiving.<sup>41</sup>

Yet, the rise in migrant deaths seriously undermines the claim that border fence policy could ever work.<sup>42</sup> In order for a fortified border to at least marginally deter unlawful crossing by raising the cost to migrants of unlawful entry—either because they actually have to pay more in the human trafficking black market or because they must overcome substantially more obstacles—those costs must have the desired deterrent effect. Actuarial and sociological evidence, however, suggests otherwise. That is, knowledge of potential death or even knowing a friend or relative who has died in an unlawful entry has not stopped other migrants from undertaking the journey. As Professor Mary Fan puts it, “immigrants are paying the ultimate price rather than being deterred.”<sup>43</sup>

Despite this evidence—some of it generated by the federal government itself—fence building has waxed in recent years, not waned. In addition, the costs of border wall construction and maintenance continue to rise.<sup>44</sup> Estimates vary, but figures from the U.S. government put the initial construction cost of a wall at two to four million dollars per mile.<sup>45</sup> Others note that such estimates, usually from governmental agencies, exclude many costs.<sup>46</sup> Accounting for excluded costs and long-term costs after initial construction, some estimate that the fence at the southern border costs between three million and twenty-one million dollars per mile.<sup>47</sup> The federal government details that in fiscal year 2008, \$196 million were appropriated for fence construction.<sup>48</sup> Including maintenance and rebuilding costs over twenty-five years, the U.S. Army Corps of Engineers predicted that the

41. NUÑEZ-NETO & KIM, *supra* note 34, at 1–5.

42. Wayne A. Cornelius, *Death at the Border: The Efficacy and “Unintended” Consequences of U.S. Immigration Control Policy 1993–2000*, 27 POPULATION & DEV. REV. 661, 677–81 (2001) [hereinafter Cornelius, *Death at the Border*] (“There is as yet no evidence from high-emigration communities in Mexico that appreciable numbers of potential first-time unauthorized migrants are delaying or abandoning their plans to migrate.”); see also JIMENEZ, *supra* note 24, at 7–10; Wayne A. Cornelius, *Impacts of Border Enforcement on Unauthorized Mexican Migration to the United States*, BORDER BATTLES (Sept. 26, 2006), <http://borderbattles.ssrc.org/Cornelius> [hereinafter Cornelius, *Impacts of Border Enforcement*].

43. Fan, *supra* note 4, at 703.

44. NUÑEZ-NETO & KIM, *supra* note 34.

45. HADDAL ET AL., *supra* note 18, at 18–19; GILMAN, *supra* note 14, at 12.

46. BROWN, *supra* note 4, at 37 (“The cost of the wall is difficult to establish. Much federal expenditure of bureaucratic and manual labor related to planning, building, maintaining, and analyzing the effectiveness of the wall is excluded from calculations.”); Preston, *supra* note 15 (“[S]ecurity analysts say very little research is available on how much a border-length fence would cost . . . . Based on what studies do exist, the analysts say that building and maintaining a fence . . . would run into billions dollars, with no documented impact on diminishing illegal crossings.”).

47. BROWN, *supra* note 4, at 37; Preston, *supra* note 15 (“In 2009, the Congressional Research Service reported that the [DHS] had spent roughly up to \$21 million per mile to build a primary fence near San Diego.”).

48. HADDAL ET AL., *supra* note 18, at 18–19.

fortified border could cost up to seventy million dollars per mile to maintain.<sup>49</sup> Since the SFA, which provided for the creation of major portions of the border fence, roughly \$2.4 billion has been allocated to complete approximately 670 miles of fencing.<sup>50</sup> Even this large number, however, fails to capture the several fixes, mistakes, and routine maintenance costs that will drive expenditure over the life of the fortification.<sup>51</sup>

More recently, the President announced that his administration was abandoning a project, green-lighted by the prior administration in 2006, to supplement the physical fence with virtual fence technology.<sup>52</sup> But, before discontinuation, that project already accrued expenses over one billion dollars.<sup>53</sup> As a useful comparison for all these figures, the entire annual budget for the enforcement arms of the DHS is fifteen billion dollars.<sup>54</sup> In real terms then, the cost of border fortification is not trivial or de minimis and becomes a recurring expense over time.

In addition to these monetary costs, fencing has increased migrant death toll, and has produced other unintended consequences as well. Recent years have witnessed the cartelization and consolidation of narcotics and human trafficking, with the going extortion rate of human smuggling skyrocketing from approximately five hundred dollars in 1986 to nearly three thousand dollars in 2008.<sup>55</sup> This cost increase has intensified people-smuggling enterprises, as well as dangerous living and work conditions in the United States.<sup>56</sup>

While all this evidence strongly supports discontinuing border wall policy, such a strategy remains popular and persists. Parts II and III, below, query reasons

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49. NUÑEZ-NETO & KIM, *supra* note 34.

50. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-244R, SECURE BORDER INITIATIVE FENCE CONSTRUCTION COSTS 4 (Jan. 29, 2009), available at [www.gao.gov/new.items/d09244r.pdf](http://www.gao.gov/new.items/d09244r.pdf).

51. Preston, *supra* note 15 ("These estimates do not include the costs of acquiring land, nor the expense of maintaining a fence that is exposed to constant efforts by illegal crossers to bore through it or under it or to bring it down.").

52. Jeremy Pelofsky, *U.S. Ends "Virtual Fence" Project on Mexico Border*, REUTERS, Jan. 14, 2011, available at <http://www.reuters.com/article/2011/01/14/us-usa-security-fence-idUSTRE70D4KN20110114> ("The project, begun in 2006 and run by Boeing Co., has cost about \$1 billion and was designed to pull together video cameras, radar, sensors and other technologies to catch illegal immigrants and smugglers trying to cross the porous border.").

53. *Id.*

54. HANSON, *supra* note 19, at 12; *Budget of the United States Government: Detailed Functional Tables FY 2010*, GPO ACCESS (Sept. 24, 2011), [www.gpoaccess.gov/usbudget/fy10/ft.html](http://www.gpoaccess.gov/usbudget/fy10/ft.html) (detailing \$5.5 billion budget for Customs & Border Patrol, and a \$9.4 billion dollar budget for Immigration & Customs Enforcement).

55. Ronald Campbell, "*Cynical*" Policy Tacitly Encourages Illegal Immigration, ORANGE CNTY. REGISTER, Nov. 9, 2011, <http://m.ocregister.com/news/-266490--.html>; see also Wayne Cornelius, *Controlling Unauthorized Immigration from Mexico: The Failure of Prevention Through Deterrence and the Need for Comprehensive Reform* 6, IMMIGRATION POLICY CENTER, June 10, 2008, available at <http://www.immigrationforum.org/images/uploads/CCISbriefing061008.pdf>.

56. See Cornelius, *Impacts of Border Enforcement*, *supra* note 42.

for this phenomenon and provide alternative narratives that explain border fortification regardless of efficacy.

## II. WHY BUILD WALLS?

Thus far, the rational public policy case seeking to calibrate costs and purported benefits of a border fence has not persuaded lawmakers to abandon physical border fortification as a migration control strategy. In America, as well as globally, the trend towards construction continues. The trend actually appears to be accelerating with over three-quarters of existing border walls built after 2000.<sup>57</sup>

Political scientist Wendy Brown, in her groundbreaking assessment of nation-state wall-building, notes that all walls built in the last two decades are very expensive, and “do not work” in the sense that they do not stop unwanted migrants.<sup>58</sup> Yet, she also notes that these walls enjoy popular support.<sup>59</sup> The acceleration and popularity of border fortification, both globally and domestically, raises the question of why wall building and border fortification continue. Here, the Article proposes some possible answers to this puzzle. First, the political incentives to construct border fortifications weigh in favor of national lawmakers authorizing a fence. Second, the citizenry’s longing for national government omnipotence over migration and security concerns persuade the polity and organized private actors that fence building is a necessary government solution. Relatedly, the background legal consequences of border transgression, increasingly punitive towards unlawful entry and presence, inevitably manifest in tangible border fortification. Finally, a border wall solidifies federal immigration power vis-à-vis the several states. These factors suggest that a wall’s inability to actually interdict and stop migrants is of limited relevance in decisions to continue border building.

### *A. Incentives for the Secure Fence Act and Border Fortification*

The simplest explanation as to why walls are popular public policy concerns the political benefits of such legislation to national lawmakers. It is not revelatory to argue that politicians can mollify constituencies when they promise to get “tough on immigration” or “enforce the border.”<sup>60</sup> And, as some political

57. Hassner & Wittenberg, *supra* note 25, at 22 (“Three-quarters of contemporary barriers were built in or after the year 2000.”).

58. BROWN, *supra* note 4, at 27 (“All [walls] generate significant effects in excess of or even counter to their stated purposes; none really ‘work’ in the sense of resolving or even substantially reducing the conflicts, hostilities, or traffic at which they officially aim.”).

59. *Id.* (“[E]ach is expensive, yet strikingly popular.”).

60. See Michael Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 55–56 (2007) (“Congress . . . tried to enact severe measures, which in the anti-immigrant climate, could pass because no elected official wants to be painted as ‘soft on immigration crime.’ Were I in office, I would not want to be perceived as weak on such a fundamental issue.”). Arizona Governor Jan Brewer’s poll numbers in the Republican

scientists have argued, legislative outcomes at the local and state level that are antagonistic towards immigrants and undocumented aliens are better explained by partisanship than by demographic factors frequently cited by elected officials and scholars.<sup>61</sup> Nevertheless, dissecting voting patterns for the border fence at the national level usefully sheds light on one reason the conventional cost-benefit analysis fails to persuade lawmakers. Further, it provides yet another example of the political efficacy of outwardly tough, but ultimately ineffective, immigration and border policy.

Examining congressional voting on SFA reveals the notable fact that interior, nonborder states with extremely low immigrant (both documented and undocumented) populations most enthusiastically supported the border fence policy. The border with Mexico encounters, and runs through, only four states: California, Arizona, New Mexico, and Texas. Like the Congress generally, a majority of congressional members in those four states combined voted in favor of the SFA, as the bill passed 283–138 in the House and 80–19 in the Senate.<sup>62</sup> However, California, Arizona, and Texas also produced a majority of the nay votes on the SFA. In fact, a substantial majority of California representatives voted against the bill.<sup>63</sup>

In contrast, the House members of seventeen states voted unanimously to pass the law.<sup>64</sup> Of those seventeen states, thirteen also had unanimous votes by their senators in favor of the bill.<sup>65</sup> A cartographic examination of those states

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Gubernatorial Primary rose from twenty-six percent to forty-five percent in one month after signing Arizona's SB 1070 into law. *AZ Gov. Jan Brewer Surges in Popularity*, RASMUSSEN REPORTS, available at [http://www.rasmussenreports.com/public\\_content/politics/elections/election\\_2010/election\\_2010\\_governor\\_elections/arizona/election\\_2010\\_arizona\\_republican\\_primary\\_for\\_governor](http://www.rasmussenreports.com/public_content/politics/elections/election_2010/election_2010_governor_elections/arizona/election_2010_arizona_republican_primary_for_governor).

61. S. Karthick Ramakrishnan & Tom K. Wong, *Partisanship, Not Spanish: Explaining Municipal Ordinances Affecting Undocumented Immigrants*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* 73 (Monica W. Varsanyi ed., Stanford Univ. Press 2010) (arguing that demographic factors poorly explain the emergence of subnational immigration regulation; instead, partisanship offers a more complete and empirically supportable explanation).

62. GOVTRACK.US, <http://www.govtrack.us/congress/vote.xpd?vote=h2006-446> (last visited January 24, 2012).

63. Thirty-one representatives from California voted nay; twenty-two voted aye. In addition, Colorado, Illinois, Maryland, Michigan, Florida, Massachusetts, New Jersey, and New York also produced significant nay votes.

64. States with all House members voting aye on H.R. 6061: AL, DE, ID, IA, KS, KY, MT, NE, NV, NH, ND, OK, SD, TN, UT, WV, WY; see GOVTRACK.US, <http://www.govtrack.us/congress/vote.xpd?vote=h2006-446> (last visited January 24, 2012). The House voted 283-138 to pass the bill, with 10 members not voting, and 212 votes needed to pass.

65. States with all Senate and House members voting aye on H.R. 6061: AL, IA, KS, KY, MT, NE, NH, ND, OK, TN, UT, WV, WY; see GOVTRACK.US, <http://www.govtrack.us/congress/vote.xpd?vote=s2006-262> (last visited January 24, 2012). The Senate voted 80-19 to pass the bill with one member not voting.

reveals that eleven of them are located within the heartland of the United States, overlapping neither an international nor maritime border.<sup>66</sup>

Perhaps more important than the location of those states strongly supporting fencing at the national border, all states producing unanimous votes have extremely low immigrant populations, both lawfully and unlawfully present. In terms of total foreign-born, all of these states—with the exception of Tennessee, which ranked twenty-fourth in 2007—are in the bottom half of states nationwide, with the majority in the bottom third.<sup>67</sup> Focusing solely on the undocumented immigrant population, these states also experience low estimated undocumented immigrant populations, and low (with the exception of Nevada) shares of unauthorized immigrants in the labor force.<sup>68</sup>

Comparing voting on the SFA to the actual presence of immigrants and undocumented immigrants—and even to undocumented presence in the work force—suggests that lawmakers and constituencies most likely to support border fortification policies are exactly those who have the least contact with immigrants, whether lawfully or unlawfully present.

A national border wall then, is likely not responsive to a particular public policy problem faced by the lawmakers' constituents in those states.<sup>69</sup> Further, it suggests that it is unlikely that those lawmakers must account for any meaningful political check from immigrant and immigrant-friendly constituencies.<sup>70</sup> For these policymakers, voting to build walls at the border creates only political gains without having to deal with the human life, labor force, social, or law enforcement costs of unlawful migration. They accrue concentrated benefits by supporting popular legislation for their constituencies, while enjoying the benefit of diffuse costs—because spending comes from the federal budget mediated by DHS—or borne overwhelmingly by other states with higher immigrant populations.

It is precisely these perverse political, social, and monetary incentives that spurred the mayor of Eagle Pass, Texas—a border town—to oppose the border fence and poignantly suggest that states and localities in the interior of the nation

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66. Iowa, Kansas, Kentucky, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Tennessee, Utah, West Virginia, and Wyoming. Alabama, with only a fraction of its border abutting the Gulf of Mexico, was excluded from this list, although it could easily be considered as a part of it.

67. MIGRATION POLICY INST., *Number of Foreign Born by State (1990, 2000, and 2009)*, available at <http://www.migrationinformation.org/datahub/acscensus.cfm>. Other than Tennessee (24) and Utah (26), in 2007 (the year after passage of the SFA), all other unanimous voting states were ranked between 30th and 50th in the nation by number of foreign born (e.g., OK—30th, IA—35th, KY—36th, NE—38th, MT—47th, ND—50th).

68. Jeffrey Passel & D'Vera Cohn, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade 15*, Table A2 (Pew Hispanic Center Research Report, 2010).

69. *Cf.* Ramakrishnan & Wong, *supra* note 61 (arguing that subfederal immigration regulations do not necessarily respond to particular and unique public policy challenges).

70. *See, e.g.*, Patricia Mazzei, *Immigration Reform: Tricky Political Tightrope in Tallahassee*, MIAMI HERALD, Apr. 14, 2011, <http://www.miamiherald.com/2011/04/14/2167855/immigration-reform-tricky-political.html>.

wall-in their own jurisdictions if they felt that the threat of Mexican migration was an actual problem.<sup>71</sup> While his critique pointedly puts the onus on jurisdictions with few immigrants to take a realistic view of unlawful migration and border policy, the fact that nonborder jurisdictions support the border fence is some evidence that the empirical realities of border fortification and its consequences matter little in influencing political outcomes. Thus, congressional voting on the SFA provides at least one important example of national lawmakers supporting strong border policy and tough immigration regulation because they can do so without expending significant political capital.

Notably, once legislated and erected, the border wall is unlike other enforcement strategies. It becomes physical fact, an unmoving feature of the geopolitical landscape.<sup>72</sup> While any legislation, once passed, generates its own inertia and is difficult to subsequently overturn, the wall's physicality makes it particularly sticky public policy.<sup>73</sup> Abandoning the border fortification policy requires genuine labor in deconstructing the wall, at high public cost.

Undoubtedly, should the cost of dismantling prove too much, the government could instead decide to simply leave the wall in state of disrepair. This possibility, however, would exact a high symbolic and expressive toll from the federal government. Like a rusted and broken fence outside of a city park, or an abandoned house with a rotting exterior, the slowly degrading border wall would become a visible, permanent testament to failed national policy and wasted public funds. Avoiding this potentiality itself incentivizes wall maintenance regardless of its utility.

### *B. Fortifying the Federal Government Through Border Fortification*

In addition to the political benefits to national lawmakers of an ostensibly tough border policy, the border fence responds to, and is made necessary by, Congress's prior legal construction of the border, the public's desire that the federal government do something to address a perceived crisis in unlawful migration, and the Supreme Court's conception of national immigration power vis-à-vis the states. Here, the Article argues that the current background statutory framework, which penalizes unlawful entry and presence, combined with renewed

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71. *Fighting the Fence: Texans and Owls Take On the Federal Government*, THE ECONOMIST, June 12, 2008 ("There's a misconception in mid-America that Mexico is overrunning the borders,' says Mr. Foster. He suggests that the rest of America fence their own communities if they feel insecure."); see also *Texas Mayors Oppose Plan for Border Fence*, NPR (Oct. 16, 2007), <http://www.npr.org/templates/story.php?storyId=15315131>.

72. BROWN, *supra* note 4, at 27 ("[E]ach [wall] is built as provisional while taking shape as permanent . . .").

73. Cf. Cass R. Sunstein & Timur Kuran, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 743 (1999) (arguing that once policies based on misinformation are enacted and stabilized, they may endure by influencing future generations who will carry on the distortions that led to the creation of the initial policy).

government focus on interior enforcement, create conditions that make a border fence an ideal and logical complement to a robust statutory and enforcement scheme. Second, the border wall's physicality allows federal lawmakers to mollify the citizenry's desire for ostensibly security-enhancing public policy. Finally, a wall reifies federal power over immigration matters by serving as a tangible reminder of the primacy and necessity of national immigration control.

### *1. Complementing the Legal Consequences of Unlawful Migration*

Even prior to the passage of the SFA, the Immigration and Nationality Act (INA) already attached significant legal consequence to border transgressions.<sup>74</sup> Congress and the DHS legally constructed the border through prohibitions and consequences for unlawful presence and entry without inspection. In addition, the DHS expanded the definition of the border zone, allowing expedited removal proceedings not just for those caught at a port of entry or at the actual border, but also for those found within one hundred miles of a U.S. land or maritime border.<sup>75</sup> Repeat unlawful entries carry significant penalties.<sup>76</sup> Additionally, the INA, along with the U.S. Criminal Code, provides wide berth to prosecute those who, while not terrorists themselves, may have materially supported organizations related to ones that engage in terrorism.<sup>77</sup> Further, as Professor Ayelet Shachar notes, in legal terms, Congress has expanded and redefined the "border," both internally within the nation and internationally, in order to provide greater flexibility and leeway in interdicting unlawful entrants and putative national security risks.<sup>78</sup>

Yet, these powerful legal tools, the true brawn of a muscular border policy, are all invisible; even as they allow enforcement reach well within and outside the national boundary, and include criminal penalties, they exist primarily in statute books and administrative proceedings. As such, they lack the visceral power of a fence.<sup>79</sup> Thus, even as the Obama Administration steps up enforcement efforts and removes more aliens than any prior administration,<sup>80</sup> his administration is

74. See 8 U.S.C. §§ 1182; 1321–30.

75. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004). The American Civil Liberties Union calls this 100-mile zone a "Constitution-Free" zone.

76. See 8 U.S.C. § 1326.

77. 18 U.S.C. § 2339B (criminalizing "material support for terrorism"); see Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

78. Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 30 MICH. J. INT'L L. 809, 811, 837 (2009) ("This *shifting border of immigration regulation* . . . is selectively utilized by national immigration regulators to regain control over their crucial realm of responsibility, to determine who to permit to enter, who to remove, and who to keep at bay.") (emphasis in original).

79. Marc Lacey, *Arizona Officials, Fed Up with U.S. Efforts, Seek Donations to Build Border Fence*, N.Y. TIMES, July 19, 2011, <http://www.nytimes.com/2011/07/20/us/20border.html> (discussing Arizona's solicitation of private donations to build a fence on state and private land, and quoting State Senator Steve Smith as stating, "[A fence] is a tangible, legitimate structure people can see, taste and feel").

80. Peter Slevin, *Deportation of Illegal Immigrants Increases Under Obama Administration*, WASH. POST (Jul. 26, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/25/>



perceived as soft on immigration.<sup>81</sup> Without border fortification, the border as a social and legal construct lacks emotive force.

The most expeditious way to make the statutory border developments salient is to couple them with a fence.<sup>82</sup> Whereas the citizenry at large may not comprehend the complexities of the unlawful entry provisions or the three-year, ten-year, and lifetime bars to admissibility in the INA,<sup>83</sup> the fence is a straightforwardly understood symbol that the United States is resolved to stop the foreign invasion from the global south.<sup>84</sup> Unlike legal proscriptions, with a fence administrative officials need not discuss how the various sanctions in immigration law will eventually deter unlawful presence or make putative migrants reconsider border crossing. Regardless of its actual effect, a border wall appears self-explanatory.

## 2. Border Wall as Security Blanket

Prior to 9/11, the creation of walls and fences was not popular amongst lawmakers,<sup>85</sup> and other than a cosmetic fourteen-mile fence, the border was not physically fortified. The events of 9/11 drastically altered the immigration debate,<sup>86</sup> and inexplicably focused attention on the southern border of the United

AR2010072501790.html (reporting that Obama administration is deporting “record numbers” of immigrants).

81. Julian Aguilar, *Alien Removals Increase Under Obama*, TEXAS TRIBUNE (Aug. 8, 2010), <http://www.texastribune.org/immigration-in-texas/immigration/alien-removals-increase-under-obama> (“Not only has the Department of Homeland Security referred more immigrant-related cases for prosecution under President Obama than under his predecessor, but it has also removed more aliens than the Bush Administration did, even in its busiest year.”); Andrew Becker, *Tension over Obama Policies Within Immigration and Customs Enforcement*, WASH. POST (Aug. 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/26/AR2010082606561.html>; Eve Conant, *Obama Is Not Soft on Immigration*, NEWSWEEK (Jul. 31, 2010) (interview with Janet Napolitano), <http://www.newsweek.com/2010/07/31/obama-is-not-soft-on-immigration.html>.

82. Fan, *supra* note 4, at 711 (“[T]he more the prevention-through-deterrence paradigm has become strained by proof of its inefficacy, the more object-oriented it has become: more layers of triple fencing, more sophisticated military equipment such as remote sensors and unmanned aircraft.”).

83. 8 U.S.C. § 1182(a)(9)(A)–(C) (providing for three-year, ten-year, and lifetime inadmissibility bars for aliens with prior immigration violations or who are unlawfully present).

84. Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 26 (2009) (“Such insistent inadequacy to the task of preventing unauthorized border crossing means that the fence is primarily a symbol to the citizenry, our southern neighbor, and the world, that America is resolved to stem the tide of those who ‘invade’ our labor markets.”).

85. Thomas Canova, *Closing the Border and Opening the Door: Mobility, Adjustment, and the Sequencing of Reform*, 5 GEO. J. L. & PUB. POL’Y 341, 360 (2007) (“By the time of the Fox-Bush summit in early 2001, the opposition of U.S. workers to Porous or Open Borders was increasingly *seen* as anachronistic. Talk of fences along the border did not sit well with either U.S. business interests or liberals. . . . But reports of the death of borders were greatly exaggerated. The September 11th terrorist attacks suddenly made Open Borders and Porous Borders seem irresponsible, decadent, and dangerous.”) (emphasis added).

86. Johnson, *supra* note 2, at 202–03.

States as a potential entry point for terrorist threats. The empirical dubiousness of the terrorism/immigration association aside, the focus on the southern border meant that migrants from Mexico and Central America would be constructed in the American imagination as threats to the nation's rule-of-law ideals, its economic security, and its national security.<sup>87</sup>

Already capturing the consciousness of states like California since the 1980's and 1990's,<sup>88</sup> in more recent years, elected officials and issue activists have increased their focus on the southern border. In 2008, then-Representative Tom Tancredo's platform while seeking the Republican nomination for President primarily focused on controlling the U.S. southern border and stopping unlawful immigration.<sup>89</sup> Meanwhile, for many of the last years of his syndicated—and popular—news commentary show on CNN, Lou Dobbs nightly enflamed the passions of his viewers on the topic of immigration, sometimes making misleading and false claims when taking strongly restrictionist perspectives.<sup>90</sup> More recently, Governor Jan Brewer of Arizona gained national notoriety while increasing her in-state popularity, by signing the controversial Senate Bill 1070 state immigration enforcement law. Anti-immigration ideologues harp on the fact that the 9/11 attackers were migrants, who remained in the country after overstaying their student visas.<sup>91</sup> These and other public figures have ridden a wave of public consciousness and concern that increased migration presents a threat to economic well-being and national security.

This perceived crisis of unlawful migration, colored by the post-9/11

87. The notion of the border as a source of conflict, with the image of the Mexican migrant—or the migrant crossing from Mexico—as the lawbreaking, job-stealing, potential security threat is a relatively recent version of the border. See Danieljbmitchell, *Wilson's Re-Election Ads on Illegal Immigration*, YOUTUBE (July 15, 2007), <http://www.youtube.com/watch?v=o0f1PE8Kzng>. The U.S. southern perimeter was not always viewed as a stage for policymakers or the citizenry to clash with economic migrants from Mexico and Central America. Scholars note that early twentieth-century border policy emphasized the potential cooperation and overlapping interests that the United States and Mexico shared. Valencia-Weber & Lopez, *supra* note 11, at 266–73. The federal government's major concern was uninspected entry of non-Mexicans such as the Japanese and Chinese who were perceived as alien beyond recognition and repair. *Id.*; see also *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting) (“There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. . . . I allude to the Chinese race.”)

88. *DeCanas v. Bica*, 424 U.S. 351 (1976) (evaluating California law that imposed sanctions on hiring of unlawfully present workers); Cal. Proposition 187 (1994) (state law imposing substantial restrictions on public assistance and public-funded programs for undocumented immigrants in California).

89. Jeff Zeleny, *Tancredo's Platform: Immigration*, N.Y. TIMES BLOG (April 2, 2007 10:59 AM), <http://thecaucus.blogs.nytimes.com/2007/04/02/tancredos-platform-immigration/> (“His platform? Illegal immigration. Period.”).

90. See e.g., David Leonhardt, *Truth, Fiction and Lou Dobbs*, N.Y. TIMES, May 30, 2007, at C1.

91. See *The Role of Technology in Preventing the Entry of Terrorists into the United States: Hearing Before the Subcomm. on Technology, Terrorism, & Government Information of the Comm. on the Judiciary United States Senate*, 107th Cong. 54 (2001) (statement of Steven Camarota, Director of Research, Center for Immigration Studies).

conflation of terrorism and immigration, spurs public demand that lawmakers do anything to address existential threats to national sovereignty. A border wall satiates these critical needs. The wall at the nation's border, like the walls of a house or the fence at the edge of a front yard, gives comfort; it mollifies the citizenry by fulfilling the desire to believe, in the face of a perceived existential threat, that the government is an omnipotent caretaker. It allows the citizenry to believe that the demographic makeup and cultural mores of the community in which they live will be preserved untouched despite significant upheavals in the global economic landscape. Belief in the federal government as omniscient protector, Professor Fan writes, allows the citizenry to cope with the harsh truth that the forces compelling migration are beyond the reach of individual nation-states, and that unwanted migration, in all likelihood, cannot realistically be eliminated.<sup>92</sup>

What makes this fantasy of governmental action so seductive is that it does not depend on wholesale obfuscation of the practical disutility of border fortification. Rather, even if some of the citizenry remained aware of the wall's ineffectiveness as a migration mitigator, the fence allows them to disconnect reality from imagined possibility; they can indulge the innately human desire to engage in fantastical possibility rather than the disappointing actuality.<sup>93</sup>

Further, the fence ties into different conceptions of security—terrorism-related national security, labor-related economic security, and demography-related cultural security—while addressing unlawful migration systemically and without prejudice. The legal consequences of unlawful entry and statutory re-entry bars, conversely, can only be applied against one individual alien at a time through judicial, or quasi-judicial, proceedings. Their power to affect migration is limited either to the specific individual or diffusely through deterrent effects on putative migrants. The wall, by contrast, magnifies and depersonalizes the legal effect, ostensibly providing a systemic remedy to the same problem.

Although the focus on the southern border with Mexico renders the national security rationale suspect,<sup>94</sup> the actual existence of a terror threat is, from the

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92. Fan, *supra* note 4, at 703–04 (“People from divergent perspectives vigorously critique the state and its policies, *see* and live the gap between law and policy’s promises and reality, but the very critique regenerates desire for the omniscient power of the government and the law to fix things somehow, if only. . . . [Government’s] function is to comfort society and develop the structure of an elaborate dream world where logic creates justice.”) (emphasis added) (internal quotations and citations omitted).

93. *Id.* at 726 (“The person clinging to a fetish is fully aware of a traumatic truth, can discuss it rationally, but clings to the fetish as the embodiment of a disavowal of the traumatic reality.”).

94. BROWN, *supra* note 4, at 69 (“[Even the] border [wall] can have little or no effect on . . . biological and nuclear weapons or hijacked airplanes.”); GILMAN, *supra* note 14, at 9–10 (“[G]overnment officials have provided no evidence that terrorists are using the Texas/Mexico border to enter the United States. . . . If terrorists were to attempt to cross a land border illegally to enter the United States, it is more likely they would cross into the United States from Canada, since there are fewer controls on the Canadian Border.”); David Spiro, *Criminalizing Immigration: The Social*

perspective of border fortification, only marginally relevant. We—as the citizenry and policymakers—create meaning and ascribe importance to the border through our political and cultural interaction.<sup>95</sup> Stoked by lawmakers and media personalities, the blurring between terrorism and immigration in the public’s mind<sup>96</sup> creates the need for Congress to “do something”—anything—to mollify the perceived threat.<sup>97</sup> As Professors Cass Sunstein and Timur Kuran have shown, the reputational consequences for lawmakers of doing nothing on high-profile issues virtually ensures action, even when objective and empirical evidence suggests that such action is unnecessary or ineffective.<sup>98</sup>

This atavistic desire on behalf of a significant part of the citizenry to have their public officials address migration is evidenced by the recent, exponential rise in subnational immigration regulations.<sup>99</sup> Attempts to restrict residential leasing and businesses licenses, combined with increased local involvement in immigration enforcement, fundamentally express the citizenry’s urge to feel secure in their neighborhoods and communities. Yet, very few, if any, of these regulations correspond to an actual public policy concern.<sup>100</sup> Regardless, local lawmakers and targeted advocacy groups are able to capitalize on nebulous and unsubstantiated fears about cultural dilution and dissolution of prior community dynamics<sup>101</sup> to pass legislation that can be economically crippling to the jurisdiction.<sup>102</sup> Moreover, these subnational regulations enjoy dubious constitutional existence, surviving for the moment despite serious concerns

*Construction of Borders and National Security*, INT’L STUD. ASS’N WORKING PAPERS, Feb. 20, 2010, at 17 (“The physical changes and militarization of the US border with Mexico were not accompanied by similar efforts on the US border with Canada, which calls into question some of the reasoning of national security.”).

95. Michiel Baud & Willem van Schendel, *Toward a Comparative History of Borderlands*, 8 J. WORLD HIST. 211, 211 (1997) (“Although [national borders] appear on maps in deceptively precise forms, they reflect, at least initially, merely the mental images of politicians, lawyers, and intellectuals.”); Spiro, *supra* note 94, at 7.

96. BROWN, *supra* note 4, at 69 (“If open borders are (falsely) held responsible for growing refugee and immigrant populations and border fortifications are (falsely) imagined capable of stemming this tide, porous borders are also commonly figured as the scrim through which terror slips.”); Leti Volpp, *The Citizen and the Terrorist*, 49 U.C.L.A. L. REV. 1575 (2002) (discussing the disidentification of Arab or Muslim persons as citizens, and their racialization as terrorists).

97. Morales, *supra* note 84, at 46 (“Congress constantly overreaches . . . because We the People are sovereign and demand that our representatives do *something* about the problems of the day. The Secure Fence Act, if nothing else, telegraphed congressional concern to constituents.”).

98. Sunstein & Kuran, *supra* note 73, at 687–89, 701.

99. See NATIONAL CONFERENCE OF STATE LEGISLATURES, *State Laws Related to Immigration and Immigrants*, available at <http://www.ncsl.org/default.aspx?tabid=19897>.

100. Ramakrishnan & Wong, *supra* note 61; see also Ruben G. Rumbaut & Walter Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-Born Men*, in IMMIGRATION POLICY CENTER, SPECIAL REPORT (Spring 2007), available at <http://www.immigrationpolicy.org/special-reports/myth-immigrant-criminality-and-paradox-assimilation>.

101. Pratheepan Gulasekaram, *Subnational Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441, 1456–69 (2009).

102. *Id.* at 1469–76.

regarding the viability of nonfederal regulations aimed at addressing immigration.<sup>103</sup> The federally created border wall does not suffer from the constitutional vulnerabilities afflicting the legal restrictions constructed by state and local governments.

Responding to this irrepressible pressure to create any possible response, the most tangible, observable public policy outcome—a wall—offers several advantages. First, a physical, heavy, imposing border fence disallows critique that nothing was done. Its very presence is proof of action. As a comparison, consider that in 2010, President Obama ordered a substantial cadre of National Guardsmen to the southern border to aid in its control. While this move must at least marginally aid in the interdiction of unlawful entrants, it is also difficult to quantify and assess from the layperson's vantage. Moreover, National Guardsmen—or any border patrol force—is comprised of people who are inherently ephemeral facets of the border landscape. Individuals cannot be in all places at all times, and just as hastily as they were dispatched to the border, as national priorities change, they can also be recalled or otherwise leave the area. Indeed, recently, many of those same troops were removed from border patrol.<sup>104</sup> A border wall, in contrast, is fixed and permanent. It is always on the vigil.

Second, the logic of a wall connects with the polity in ways that other, likely more effective border policies cannot or do not. Because of the presence of walls and fences in our everyday domestic and residential interactions, a border wall facilitates the citizenry's belief in its value: if walls built around homes and land can keep out unwanted persons, animals, and threats, so too a wall at the national border keeps out undesirables. Even though Congress expressly justifies border fortification using rule of law and national security, its decision to focus only on the southern border<sup>105</sup> where migrants cross for economic and labor reasons suggests a less noble reason—or at least one that many would prefer not to voice publically. Keeping out Mexican and Central American migrants is implicit recognition of the “good life” that Americans live, and the government's investment in keeping the “basic” life of the global south out.<sup>106</sup> These unvoiced

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103. See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011); *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011); Pratheepan Gulasekaram, *No Exception to the Rule: The Unconstitutionality of State Immigration Enforcement Laws*, 5 ADVANCE: J. ACS ISSUE GROUPS 37 (2011).

104. Mike M. Ahlers, *Administration to Draw Down National Guard Troops on Southwest Border*, CNN U.S., Dec. 20, 2011, [http://articles.cnn.com/2011-12-20/us/us\\_border-national-guard\\_1\\_national-guard-troops-border-patrol-border-security?s=PM:US](http://articles.cnn.com/2011-12-20/us/us_border-national-guard_1_national-guard-troops-border-patrol-border-security?s=PM:US).

105. Contra Peter Andreas, *The Mexicanization of the US-Canada Border: Asymmetric Interdependence in a Changing Security Context*, 60 INT'L J. 449, 449 (2005) (“What began as US drug and immigration control anxieties, mostly focused southward, have now been extended northward, as US border security worries have shifted in the post-9/11 era to focus on the potential entry of terrorists and weapons of mass destruction.”).

106. BROWN, *supra* note 4, at 28 (“The U.S. barrier responds mainly to U.S. popular anxieties about the effects of an impoverished Global South on the American economy and culture.”); Fan, *supra* note 4, at 721–22 (“But there is also another layer of horror, an existential one. . . . [I]he

fears are the modern versions of the pernicious stereotypes openly expressed in the not-so-distant past, when notions of the dirty and poor Mexican informed public beliefs and societal ordering.<sup>107</sup>

The famous street artist, Banksy, at the Israel-Palestine border wall, made explicit this underlying fear through his art.<sup>108</sup> As a commentary on the evocative and psychologically gratifying nature of a fence, on the Palestinian side of the wall, he painted “holes” or “windows” in the fence through which Palestinians could see what they were being excluded from. In these imagined holes and windows, Banksy painted idyllic pictures of white sand beaches with palm trees or pastoral and lush hills. Although neither of these depictions accurately portrays what one would actually see through a hole in the Israel-Palestine fence, Banksy’s depiction nevertheless captures the essential feeling the fence-building nation evokes when it constructs a barrier intended to keep the less fortunate out. The fence therefore is a monument to a longed-for past of unparalleled international economic dominance and standard of living in the United States.

Further, the wall can effect “psychic humiliation” on the country and people that wall purports to keep out,<sup>109</sup> regardless of whether it actually keeps them out. In the case of the U.S. southern border with Mexico, the fence gives state imprimatur to the notion that undocumented migrants from Mexico—or even migrants generally—are an inferior class of persons, who could never legitimately claim to be a part of the American community. The wall buttresses the message sent by the legal restrictions on Mexican migration, which, despite United States proximity to, and history with, Mexico, codify unreasonably long wait times for lawful migration from Mexico.<sup>110</sup> Both the wall and immigration limitations

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traumatic element is that the *good life*—with its bounteous material, . . . its many rights and privileges . . . is founded on the exclusion of a multitude consigned to something less, a basic life without what makes the good life sweet.”)

107. Emory S. Bogardus, *The Mexican Immigrant and Segregation*, 36 AM. J. OF SOC. 74, 77–80 (1930) (discussing American citizens’ attitudes towards Mexicans, and Mexican attitudes about belonging in America).

108. *Art Prankster Sprays Israeli Wall*, BBC NEWS (Aug. 5, 2005), <http://news.bbc.co.uk/2/hi/entertainment/4748063.stm> (including paintings described in the text above).

109. BROWN, *supra* note 4; see also Joel Roberts, *Calderon Likens Fence to Berlin Wall*, CBS NEWS (Oct. 26, 2006), <http://www.cbsnews.com/stories/2006/10/26/world/main2130155.shtml> (quoting former-President Vicente Fox on the day of signing the Secure Fence Act into law: “It is proof, perhaps, that the United States does not see immigration as a subject that corresponds to both countries”; and quoting then President-elect Calderon as stating, “The decision made by Congress and the U.S. government is deplorable. Humanity committed a grave error by constructing the Berlin wall and I am sure that today the United States is committing a grave error in constructing a wall along our northern border.”).

110. See *Visa Bulletin of March 2011*, DEP’T ST. (Feb. 9, 2011), [http://www.travel.state.gov/visa/bulletin/bulletin\\_5337.html](http://www.travel.state.gov/visa/bulletin/bulletin_5337.html) (detailing long wait times for permanent residency for applicants from Mexico under most visa categories).

naturalize the belief among the U.S. citizenry that there are simply too many Mexicans in the United States.<sup>111</sup>

Thus, the border wall acts as a graspable security blanket for the citizenry, synthesizing an imagined governmental potency and helping obscure the “traumatic reality”<sup>112</sup> seething underneath. The traumatic reality hidden by the southern border wall is the probability that human migration in a globalized world and unified economic market is likely beyond the control of any one nation-state. Expressive law theory substantiates the claim that the border fence can have these palliative effects on the citizenry, even when it is impotent to eliminate unlawful crossing.

Expressive law theorists teach that law is not simply about sanctions,<sup>113</sup> but also fundamentally about signaling the purposes, beliefs, attitudes, and mental states of a community or society.<sup>114</sup> As Brown notes, the use of a certain type of road barrier in downtown New York after 9/11 reflected, but also generated, fear, its presence itself conjuring a sense of emergency.<sup>115</sup> So too, the border wall is directly responsive to a citizenry’s need for comfort in times of anxiety caused by perceived or real security and economic threats—or even abstract threats to a rule-of-law culture. As public policy, it generates a “reassuring world picture” in a historical moment calling for psychological and physical security.<sup>116</sup> These effects are only, and need only be, tangentially related to empirically measurable outcomes in migration mitigation.

A law or public policy outcome renders information about the “intrinsic features of the world.”<sup>117</sup> Individuals aware of the public policy will make

111. See, e.g., Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POL’Y, March–April 2004, at 30 (“The persistent inflow of Hispanic immigrants threatens to divide the United States into two people, two cultures, and two languages. . . . The United States ignores this challenge at its peril.”).

112. *Id.* at 726; see also Sunstein & Kuran, *supra* note 73, at 714 (noting that cognitive biases that lead to “availability cascades” can help an objectively weaker position prevail over an evidence-based position).

113. Richard McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 339, 373 (2000) (“Legislation influences behavior not only because it imposes sanctions, but also because it signals patters of public approval. Thus, law matters for what it says in addition to what it does.”).

114. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000) (“[W]e argue that most of the purposes, beliefs, attitudes, intentions, and other mental states individuals can have on their own can also be properly attributed to groups, including the State.”); see also Sunstein & Kuran, *supra* note 73, at 689 (noting that many people have little information about a particular policy problem, and are allowing themselves to be led by others, which can lead to proliferation of misinformation). Moreover, expressive and symbolic mental states can be attributed to governmental entities and the meaning of any particular government action is socially constructed. Anderson & Pildes, *supra* at 1508, 1525; see also Dan M. Kahan, *Trust, Collective Action, and the Law*, 81 B.U. L. REV. 333, 345 (2001).

115. BROWN, *supra* note 4, at 73–77.

116. *Id.* at 26–28 (internal quotation and citation omitted).

117. Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 AM. L. ECON. REV. 1, 2–3 (2003) (“[I]through

corresponding inferences about proper normative behavior and general societal attitudes.<sup>118</sup> The process of deliberation and voting in a representative body allows individual citizens to infer that the policy outcome reflects superior information than that which they alone would be able to gather.<sup>119</sup>

In the border fence context, this information-aggregating ability of visible public policy outcomes incentivizes politicians to manipulate the information deficit between lawmakers and the citizenry to help propel muscular border policy.<sup>120</sup> Although law can have norm-shaping effects when individuals understand it to reflect aggregate preferences and superior information, in the border wall context, the policy outcome (building a fence) seems to only have norm-shaping and behavioral effects on those U.S. citizens within the territory and not on those who intend to cross the border. Expressive law theory predicts that once the government, through a democratic process, decides to build a fence and then produces the fence, the polity may tend to subsequently believe that a border wall can and will stop unwanted migration because it is ostensibly the product of superior, aggregated information.

This perception, and the information deficit between lawmakers and citizenry, can be exploited.<sup>121</sup> In the fence building context, lawmakers appear acutely aware of the limited ability of the fortified border to effectively stop migration.<sup>122</sup> Therefore, the policy outcome of a border fence does not reflect superior information regarding the ability of a fence to actually stop unlawful

the process of information aggregation inherent in legislative decision-making, the law can provide information about intrinsic features of the world. This information causes citizens to update their prior beliefs and thereby changes individual behavior . . . independently of the law's deterrent effect.”).

118. Sunstein & Kuran, *supra* note 73, at 689–701 (discussing how existence of official policies and actions transmits signals to public and other officials with limited information); see also Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale*, 58 BUFF. L. REV. 1, 37–40 (2010) (discussing how the existence of some legislative responses can trigger “epidemics” whereby such policies are replicated).

119. Carpenter, *supra* note 118, at 3–5 (“The mechanism we analyze is merely the pooling of information held by different legislators; even if individual legislators have no more information or expertise than individual citizens, the legislative process of aggregating votes will provide citizens with superior information.”).

120. *Id.* at 40 (noting that elected officials can manipulate the fear generated by informational deficits for political gain).

121. See James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, in ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY 153, 160 (Arthur Lupia et al. eds., 2000) (“Even in their normal policy making activities, elected officials make no effort to provide objective information. They use whatever rhetorical devices are likely to work. . . . Indeed, the public itself will sometimes induce pronounced biases in the information that it receives. If the public has strong predispositions about an issue, politicians will avoid taking positions or providing information that challenges those predispositions.”); see also Sunstein & Kuran, *supra* note 73 at 727; Carpenter, *supra* note 118 at 40.

122. HADDAL ET AL., *supra* note 18; see also Preston, *supra* note 15 (quoting Governor Rick Perry of Texas).



crossing.<sup>123</sup> But, once created, the existence of the wall then helps convince the public that the border is sealable, and the fence is a worthwhile legislative endeavor, regardless of the underlying evidence regarding migration mitigation (which, even if known by the public, may be taken as mistaken or perhaps incomplete, given the purportedly better information evidenced by the legislative outcome).

Thus, the border wall is a security blanket and opiate. Its familiarity as a domestic symbol comforts the polity, allowing the citizenry to disengage from the inevitability of migration and the potential deterioration of their standard of living. Its creation as the result of a democratic process fuels the fantasy of its effectiveness and suspends the disbelief between the wall's purported function and its ability to actually achieve that function.

### 3. *Consolidating Federal Power Vis-à-Vis States and Localities*

Finally, border fortification persists despite its inability to interdict because it reifies federal power vis-à-vis subfederal entities. The past several years have witnessed a significant rise in state and local regulation of immigrants and immigration.<sup>124</sup> Recently, Arizona passed or considered three separate laws,<sup>125</sup> including the notorious S.B. 1070, all of which have been or will be challenged in federal courts as violations of the supremacy clause or federal plenary power over immigration. Then-Arizona Governor Janet Napolitano cited what she characterized as federal failure to secure the border as her reason for signing Arizona's E-Verify law.<sup>126</sup> The U.S. Supreme Court recently upheld the law, holding that it did not conflict with federal law.<sup>127</sup>

To the extent federal authorities desire to jealously guard their exclusive power to regulate immigration—and the federal government's response to Arizona's S.B. 1070 and the more recent Alabama House Bill 56 suggests it

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123. Cf. McAdams, *supra* note 113, at 343 (“I am not claiming that law necessarily supplies correct information, or that law inevitably supplies information not previously available . . .”).

124. Cristina Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Pratheepan Gulasekaram, *Sub-National Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441 (2009); see also NATIONAL CONFERENCE OF STATE LEGISLATURES, *State Laws Related to Immigrants and Immigration*, available at <http://www.ncsl.org/default.aspx?tabid=19897>.

125. Support Our Law Enforcement and Safe Neighborhoods Act, ARIZ. REV. STAT. ANN. § 11-1051 (commonly known as Arizona's S.B. 1070 and challenged by *U.S. v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (Dec. 12, 2011) (No.11-182)); Legal Arizona Worker's Act of 2007, ARIZ. REV. STAT. ANN. §§ 23-211–23-214 (upheld in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011)); and S.B. 1308 (2011), 50th Leg., 1st Reg. Sess. (Ariz. 2011).

126. See, e.g., Press Release, State of Arizona Executive Office of Janet Napolitano Governor, Governor Signs Employer Sanctions Bill (July 2, 2007) (“Immigration is a federal responsibility, but I signed HB 2779 because it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs.”).

127. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

does<sup>128</sup>—a border wall reminds nonfederal entities and interest groups of the primacy and importance of the national government in immigration matters. Although it is theoretically possible that individual states could, through compact, agree to cooperate to build a wall along their respective state borders, the ability to engage in interstate construction and international interdiction is firmly only within the power of the federal government.<sup>129</sup> Most obviously, the fortified international border must cross state lines between California, Arizona, New Mexico, and Texas, rendering interstate wall building a clear Congressional responsibility.

In addition, the construction of the fence requires the abrogation of dozens of federal statutes governing the borderlands.<sup>130</sup> While Congress, through the REAL ID Act, allowed the DHS Secretary to seek waiver of these federal requirements for wall construction, it has not authorized any state official or private actor to do the same. Further, the cost of the national fence is borne by taxpayers of the fifty states; it is unlikely that the significant construction and maintenance costs could reasonably be borne by individual states. In short, only the federal government can realistically, and in the present regulatory order, legally, create an interstate fortification on the international border.<sup>131</sup>

This functional exclusivity reinvigorates and underscores the oft-repeated, but descriptively and normatively thin,<sup>132</sup> claim that state governments are constitutionally prohibited from legislating with regard to immigrants and

128. See *United States v. Alabama*, 2011 WL 4863957 (11th Cir., Oct. 14, 2011); *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (preliminarily enjoining parts of SB 1070 on preemption grounds); Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES (Apr. 23 2010), <http://www.nytimes.com/2010/04/24/us/politics/24immig.html> (quoting President Obama's criticism of Arizona's law). Note that I am not arguing that the federal government does not solicit state and local support in immigration law enforcement. See Memorandum from the Office of Legal Counsel for the Attorney General, Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (Apr. 3, 2002), available at <http://www.aclu.org/immigrants-rights/olc-memo-state-and-local-law-enforcement-immigration-laws>; see also 8 U.S.C. § 1357(g) (popularly named "287(g) agreements," allowing local law enforcement to enter into memoranda of cooperation with the federal government). However, these examples confirm that the federal government *seeks* state and local cooperation on terms that the federal government authorizes, under permission from the federal government.

129. See U.S. CONST. art. I, § 8 (commerce clause authorizing Congress to regulate commerce among the states and with foreign nations).

130. HADDAL ET AL., *supra* note 18, at 31–32 ("Congress passed waiver language in the REAL ID Act that allows the Secretary of DHS to waive all 'legal requirements' necessary to ensure expeditious construction of the barriers and roads in the vicinity of the U.S. border.").

131. Note that while Arizona recently has taken legislative steps to solicit funds for a fence within the state, that proposed fence could only exist, if at all, on land owned by willing private owners or the state itself. See Lacey, *supra* note 79 ("The most likely locations for the state's planned barriers are on state or private land . . .").

132. On this point, consider the significant rise in subnational immigration policy activity despite general acceptance of national primacy in immigration matters. See also Rodríguez, *supra* note 124 (discussing the "lie" of federal exclusivity).

immigration.<sup>133</sup> The wall has no need for constitutional interpretation or nuanced federalism analysis because of its geographic and pragmatic requirements. Building a wall then, is not just a signal to the citizenry, but a signal to the separate states as well: migration policy must be formulated at the federal level to the exclusivity of the states, unless the federal government itself devolves authority or empowers subfederal entities to participate.

### III. BORDER WALL AND IMMIGRATION DISCOURSE

Having proposed reasons for the federal government's continued border wall policy, Part III unpacks two important ways in which the existence of the wall subsequently changes the manner in which the citizenry and prosecutorial agents think about migration, enforcement, and national sovereignty. First, the erection of a fence helps import property law norms into immigration law. In doing so, the existence of a fence facilitates the belief that unlawful presence is easily diagnosed, and paves the path for citizen participation in identifying and apprehending unlawfully present migrants. Second, the existence of a wall allows for imputation of greater culpability to migrants. It naturalizes the idea of national border, allowing migration to be treated as an existential threat to sovereignty. By doing so, a border wall eases the implementation of harsher and ever-broadening immigration enforcement schemes.

#### *A. Importing Property Law Norms into Immigration Law*

The border wall alters immigration discourse by eliding the immigration law framework with one grounded in property law.<sup>134</sup> This alternative legal framework permits clearer and more easily understood justifications for targeting trespassers into the nation-state. This Article has already argued that one of the wall's chief virtues was giving tangible form to nebulous legal sanctions. In addition, the border wall helps legitimize legal sanctions by importing accessible property law norms into the more arcane fields of international relations and immigration law.

Much scholarship and media commentary on border and immigration policy has improvised themes on the Robert Frost poem "Mending Wall" and its oft-quoted wisdom, "Good fences make good neighbors."<sup>135</sup> The poem itself centers on the interaction of two neighbors with adjoining properties, concerned with,

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133. See, e.g., *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) ("[P]ower to regulate immigration is unquestionably exclusively a federal power.").

134. See, e.g., Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 981 (2010) (discussing local property restrictions based on citizenship and arguing "[t]oday, two seemingly disparate areas of law—property and immigration—are colliding.").

135. ROBERT FROST, *Mending Wall*, in *NORTH OF BOSTON* 11 (2d ed., 1917); see, e.g., Linda Greenhouse, *supra* note 26 ("Good fences may make good neighbors, but bad fences make bad law."); see also Morgan Lewis, Comment, *Good Fences Make Good Neighbors, But Do They Make Good Cents?*, 41 TEX. TECH. L. REV. 1193 (2009).

and questioning that which should belong on one side and/or the other of the wall.<sup>136</sup> Fundamentally, the poem mines the potential for conflict and cohesion at one of the most common types of borders—the domestic residential kind.<sup>137</sup> At these borders, however, property and tort law, not immigration law, govern interactions.

The legal transgressions most easily associated with Frost's poem are nuisance and trespass.<sup>138</sup> The presence of the wall clearly demarcates the boundary and clarifies the point at which one of the neighbors—or his cows or trees—crosses into the other's land. Although the existence of recorded property deeds renders a fence unnecessary as a legal marker of the property's boundary, the fence makes plain what the recorded property line dictates—that occupied spaces must be kept separated and subject solely to the control of the occupying party.

But even more than marking the property line plainly and visibly, the fence also helps manufacture and attribute moral culpability to the putative crosser. A fence cannot be transgressed or overcome without conscious effort and a volitional act. In Frost's poem, the Sisyphean project of fixing the fence every year mends the places in the wall that have become broken or become open.<sup>139</sup> It is a project worth pursuing year after year, despite the inevitability of degradation, because the repaired fence communicates and reconfirms the property owner's intentions. The open or disrepaired boundary invites crossing, or at least fails to provide clear, unequivocal notice to the trespasser of his unwelcome.

Importing these themes, the border wall at the U.S. southern border need not eliminate migration to serve an important purpose for the government and the citizenry. By importing property law frames into immigration law,<sup>140</sup> the fence accomplishes two critical tasks. First, it makes unlawful presence and entry without inspection appear as easily diagnosed and discernible transgressions.

136. FROST, *supra* note 135, at 12 (“Before I built a wall I’d ask to know / What I was walling in or walling out, / And to whom I was like to give offence.”).

137. BROWN, *supra* note 4, at 4 (“Gated communities in the U.S. are springing up everywhere, but are especially plentiful Southwest cities near the wall with Mexico.”).

138. LEGAL INFORMATION INSTITUTE, <http://topics.law.cornell.edu/wex/nuisance> (last visited Oct. 23, 2011) (“Nuisance is something that interferes with the use of property by being irritating, offensive, . . . or dangerous.”); *Trespass—Criminal Law*, FREE LEGAL ENCYCLOPEDIA, <http://law.jrank.org/pages/19129/Trespass.html> (last visited Oct. 23, 2011) (“Trespass is the unauthorized and unprivileged intentional physical intrusion onto the land of another. . . . [I]he Model Penal Code limits trespass culpability to cases in which there is an intrusion into . . . land that has notice posted, or otherwise communicated, precluding trespass.”).

139. FROST, *supra* note 135, at 11 (“The gaps I mean, / No one has seen them made or heard them made, / But at spring mending-time we find them there. / I let my neighbor know beyond the hill; / And on a day we meet to walk the line / And set the wall between us once again.”).

140. See Fan, *supra* note 4, at 727 (“[Walls and fences] are the emblems of ownership. The fence at once embodies the exclusion but also disavows the traumatic contingency of exclusion by occluding and naturalizing it in the emblem of property, one of the law’s most powerful means for justifying the vagaries in the distribution of good fortune.”).

Second, it reinvigorates ideas of the citizenry's possession over U.S. territory, helping to personalize the transgression of the border crosser.

On the first point, the border fence facilitates analogies between international border transgression and residential fence transgression. By doing so, the existence of the fence assists adoption of the uncritical, but alluring, logic of the anti-illegal immigrant slogan "what part of illegal don't you understand?"<sup>141</sup> Although even the Supreme Court recognizes that the honest answer to that question is "complex,"<sup>142</sup> crossing in the presence of, or with the knowledge of the existence of, a fence transplants innately recognizable neighborly norms into the complicated arena of immigration law. Eschewing nuance, this substitution empowers anyone in the citizenry to be the judge of unlawful presence, as they would in their own home and neighborhood. Just as property owners can comprehend an uninvited person, noise, or disturbance on their property, the border fence coaxes the same logic on immigration matters.

This analogizing effect possibly explains why laws like Arizona's S.B. 1070, and increased local involvement in immigration enforcement through 287(g) agreements, have emerged after significant fence building activity.<sup>143</sup> These subfederal enforcement schemes rely, at base, on the notion that local law enforcement officials and state residents, with minimal or no training in immigration law, can diagnose those who appear to be unlawfully present.<sup>144</sup> This oversimplified version of immigration law ignores the complexity of determining which state and federal crimes, for example, are "aggravated felonies" or "crimes of moral turpitude" that result in removability and obscures the fact that even unlawfully present persons may have asylum claims or are otherwise eligible for immigration parole, prosecutorial discretion, or deferral. Schemes that allow for local enforcement of immigration law make sense only when determining unlawful

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141. Lawrence Downes, Editorial, *What Part of 'Illegal' Don't You Understand?*, N.Y. TIMES, Oct. 28, 2007, at A1.

142. See, e.g., *Padilla v. Kentucky*, 130 S. Ct 1473, 1488–89 (2010) (Alito, J., concurring) ("The Court's new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. . . . Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law.")

143. Cf. *Villazor*, *supra* note 134, at 984 ("In particular, the current discussion of local housing ordinances [affecting unauthorized persons] has overlooked the ways in which these laws parallel alien land laws that states passed in the early twentieth century.")

144. See S.B. 1070, 49th Leg., 2d Sess. (Ariz. 2010) (codified in relevant part in ARIZ. REV. STAT. § 11-1051(B) and requiring officers make a reasonable attempt to determine immigration status of a stopped, detained, or arrested person if there is reasonable suspicion that the person is unlawfully present in the U.S.); *id.* § 13-3883(A)(5) (authorizing officers to make a warrantless search of a person where there is probable cause to believe the person has committed an offense that makes that person removable); *id.* § 11-1051(G)–(L) (allowing residents to sue state officials for adopting a policy of restricting enforcement of federal immigration laws to less than the full extent permitted by federal law)).

presence and deportability are imagined to be as easy as determining when a neighbor crosses a fence adjoining properties.

Second, citizens use fences in their domestic, residential lives to delineate land over which property law grants ownership and control. The fence at the southern border permits the same type of reasoning with regards to migration. By constructing U.S. territory as “owned” by citizens, a fence permits the citizenry to conceive of border transgressors as pure trespassers who can be expelled at the owners’ whim, just as unwanted solicitors on private property. The construct of ownership facilitates the expulsion of border transgressors for any reason—cultural or racial dilution, for example—just as owners of property need not provide reasons for their decision to entertain some guests but not others.

The idea of citizen “ownership”—and its converse of foreign dispossession—finds historical roots in the Alien Land Laws of the early twentieth century, which prevented noncitizens who were ineligible for citizenship from owning or leasing property.<sup>145</sup> As Professor Rose Cuison Villazor has persuasively argued, such laws were enforced by states like California in an attempt to expel a racially identifiable group from the state.<sup>146</sup> Although such laws were either struck down or repealed, the legacy of these laws and the intersection of citizenship and property rights is still important today in evaluating contemporary restrictionist measures by states and localities.<sup>147</sup> Further, this historical background lays the foundation for the underlying tropes of citizen “ownership” animating national border fencing today.

The property ownership paradigm created by the fence permits the citizenry to call for the expulsion of migrants regardless of whether the presence of migrants is economically beneficial to the citizenry. In the domestic setting, within local zoning limits and community rules, property owners are not required to maximize the value of their property and land through improvements. Even if it is in their best financial interest to do so, individual owners are free to decide that they are not interested in optimizing their property’s economic worth. Thus, the border fence permits the citizenry as a collective to diminish the significance of economic arguments favoring free labor migration across the southern border. More fundamentally, this framework created by the border fence facilitates the polity’s resistance to the conventional cost-benefit case outlined in Part I. Even if the public accepts that the fence entails significant costs with minimal benefits, as property owners, the citizenry is empowered to make that seemingly irrational choice.

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145. See *Oyama v. California*, 332 U.S. 633 (1948) (striking down California’s alien land law on equal protection grounds, as applied to a Japanese American citizen who was denied property ownership rights because of his father’s national origin).

146. Villazor, *supra* note 134, at 991 (“Indeed, many Californians saw restrictions in property rights as a crucial method of deterring Japanese from coming to the state.”).

147. *Id.* at 1023–40.

*B. Naturalizing the Idea of a National Border*

The physical fence imputes culpability to the migrant, thereby justifying swift and harsh government action. The physical border wall does this by naturalizing the idea of a national border and providing visible notice that putative migrants are unwelcome. Here, the Article argues that a low-tech, physical border barrier uniquely normalizes the concept of a national border, and defines such boundaries as natural and prepolitical. Then, once created, the wall generates and contributes to the background legal and social context in which the wall is viewed. Thus, the border wall is not just the product of political, legal, and social forces, but is itself an active participant in the production of the unlawful migrant “problem.”

A striking, but often overlooked, fact about U.S. policy at the southern border is that the fence *post*-dates more advanced technologies to fortify the border. Apart from the fourteen-mile construction at the San Diego and Mexico border pursuant to Operation Gatekeeper,<sup>148</sup> the federal government’s initial strategy to control unlawful entries over the past few decades was based on virtual and electronic technologies.<sup>149</sup> The Integrated Surveillance Intelligence Service (ISIS), consisting of motion, infrared, seismic, and magnetic sensors, was introduced in 1997.<sup>150</sup> ISIS evolved into the America Shield Initiative in 2004, supplementing those sensors with high-tech surveillance technologies to patrol the border.<sup>151</sup> In 2006, DHS replaced the America Shield Initiative with the Secure Border Initiative (SBI) which also employed varied and technologically advanced techniques.<sup>152</sup> And, it was a version of SBI, known as SBI<sub>net</sub>, that was finally cancelled by the current administration in January 2011.<sup>153</sup>

The DHS and private individuals, taking a page from several successful internet ventures, have even attempted to crowdsource border monitoring over the web, allowing everyday civilians to play virtual border agent.<sup>154</sup> Undoubtedly,

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148. NEVINS, *supra* note 5, at 2–5.

149. Rey Koslowski, *Immigration Reforms and Border Security Technologies*, BORDER BATTLES (July 31, 2006), <http://borderbattles.ssrc.org/Koslowski> (“The use of surveillance technologies by the former Immigration and Naturalization Service (INS) goes back to the 1970s and 1980s when low-light video cameras and portable electronic intrusion-detection ground sensors were deployed at the border.”).

150. *Id.*

151. *Id.*

152. *Id.*; Press Release, Department of Homeland Security, DHS Announces SBI<sub>net</sub> Contract Award to Boeing (Sept. 21, 2006), *available at* [http://www.dhs.gov/xnews/releases/pr\\_1158876536376.shtm](http://www.dhs.gov/xnews/releases/pr_1158876536376.shtm).

153. Pelofsky, *supra* note 52.

154. Brandi Grissom, *Virtual Border Surveillance Program Ineffective, Cost Millions*, EL PASO TIMES, Jan. 26, 2009, [http://www.elpasotimes.com/news/ci\\_11552806](http://www.elpasotimes.com/news/ci_11552806) (describing Texas virtual border surveillance program funded by federal grant money). Civilian groups maintained cameras on the border and would either stream or post video to a website where their members could report suspected illegal entry by noncitizens. See *Arizona Border Defenders (AZBD)—Videos*, ARIZ. BORDER DEFENDERS (November 22, 2011, 00:43), [http://www.azborderdefenders.org/index.php?option=com\\_content&view=article&id=63&Itemid=97](http://www.azborderdefenders.org/index.php?option=com_content&view=article&id=63&Itemid=97); TECHNOPATRIOTS, <http://technopatriots.com/articles> (closed in 2010).

these technologies and techniques are not anathema to a fence; they may be supplementary or complementary. Recently, however, while the government has reconsidered and abandoned some of its virtual border control strategies,<sup>155</sup> it has nevertheless continued with its physical border construction.

Only *after* many modern and sophisticated attempts to police the border did Congress pass the SFA, and initiate systemic wall construction.<sup>156</sup> Even as the federal government recently abandoned virtual fence projects due to cost considerations, funding for nonvirtual fence construction continues.

This evolution is counterintuitive, or at the very least, perplexing. Seemingly, enforcement and interdiction strategies would evolve towards virtual and high technology fixes, and away from brute, object-oriented policies. Commentators have argued that the physical wall's emergence after high-tech methods appears backwards and anachronistic.<sup>157</sup>

The obvious point of these critiques and comparisons to newer technologies is that the wall is an archaic device. Its existence conjures images of castles, moats, the Greek citadels, Hadrian's Wall, the Great Wall of China, and the Berlin Wall—in short, the vestiges and strategies of once great empires and bygone eras. None of those walls exist today except as tourist sites and monuments to the border control of yesteryear. In the contemporary world, the fence at the United States southern border finds its only reasonably comparable counterpart in the wall built by Israel ostensibly to control terror threats from Palestinians.<sup>158</sup>

But to argue that the U.S. border fence eschews modernity while embracing antiquity misses a vital truth: a wall is useful precisely because it connects with an ancient past. By juxtaposing current border fortification with a time immemorial, a wall transcends our current political and historical moment. This transcendence helps obscure the fact that the border is a contemporary political, legal, and social construction. The border wall naturalizes the idea and existence of a national boundary, moving it beyond its politically contingent reality as the negotiated

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155. Julia Preston, *Homeland Security Cancels 'Virtual Fence' After \$1 Billion Is Spent*, N.Y. TIMES (Jan. 14, 2011), <http://www.nytimes.com/2011/01/15/us/politics/15fence.html>.

156. Department of Homeland Security, *supra* note 152.

157. See, e.g., BROWN, *supra* note 4, at 80 (“[Walls’] physicality makes them *seem* like a literal throwback to another time, a time of fortresses and kings, militias and moats, . . . rather than a time of smart bombs, missile shields in space, global warming, [and] digital touch pads . . . .”); Kevin R. Johnson, *Opening the Floodgates, Why America Needs to Rethink Its Borders and Immigration Laws*, 61 SMU L. REV. 3, 3 (2008) (“In terms of immigration policy, the nation still lives in a world of kingdoms with moats, walls, and barriers, rather than a modern world of mass transportation, the internet, and daily international intercourse.”).

158. BROWN, *supra* note 4, at 27 (“The global proliferation of walling itself increasingly legitimates walls, especially in Western democracies, where we would expect such legitimation to be hard won.”). Even that comparison, however, is highly circumscribed. The Israel-Palestine wall divides two ancient cultures, each vying for statehood and control over the same vital land. Further, it is built several miles away from the internationally recognized border of Israel, thereby not precisely defining the national border. Finally, its primary concern is security and terrorism-related interdiction.



boundary between two nation-states, into primordial primacy.<sup>159</sup> Insulating the border fence within a narrative of ancient cultures marginalizes the effect of contemporary policy debate regarding the efficacy or normative desirability of muscular border policy.

When the border is perceived as natural, ancient, and prepolitical, it in turn normalizes and justifies the legal structure and framework of border enforcement and immigration policy generally. Therefore, just as the background legal consequences of border and immigration violations help give rise to a tangible and visible border,<sup>160</sup> the physical border in turn sanctifies a stern legal structure and rigorous immigration enforcement.

In comparison, when the border is viewed as a wholly human-created and contemporary phenomenon, tough enforcement cannot be justified easily by reference to the migrant's crossing of the national perimeter. Instead, the government must also satisfy the more searching, second-order inquiry as to whether such crossing should even be deemed unlawful in the first place. Thus, the government must provide two different normative justifications before imposing its authority and force on border transgressors. Accordingly, when the border is correctly understood for what it is—a wholly constructed idea that can be dismantled just as easily as it was made—harsh legal consequences and rigorous enforcement require critical discourse and defense.

Once the border is naturalized as an ancient and primordial fact, however, governmental crackdowns on undocumented populations acquire “easy legitimacy.”<sup>161</sup> Even if one argues that nebulous factors, like willing employers and labor shortages in certain economic sectors, are *de facto* invitations to migrants that evince tacit consent to their presence, the wall retorts. It provides notice that the crossing is unauthorized, makes plain the migrant's decision to willingly cross, and thereby legitimizes even harsh governmental action that may follow.

Although the presence of a fence *vel non* does not alter the migrant's culpability in the legal sense, the fence transforms the moral and social understanding of the migrant's crossing that informs the legal consequence of uninspected entry. By translating border violations into the talk of neighborly relations, the wall helps supplant the narrative of the hungry, hard-working migrant crossing the border for work in the United States with the image of the dangerous trespasser. Neither prosecutors nor the public need feel remorse because the rule of law, both as abstract democratic legal outcome and as a hardened wall, was transgressed.

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159. Baud & van Schendel, *supra* note 95, at 224 (“Sometimes adult borderlands are perceived as ‘eternal,’ as part of the natural order handed down by earlier generations.”); *cf.* BROWN, *supra* note 4, at 48.

160. See *supra* Part II.

161. See BROWN, *supra* note 4, at 32 (“Most walls constructed by nation-states today draw on the easy legitimacy of sovereign border control . . .”).

The nation-state's decision to attach significant legal consequence to the unlawful crossing, need only be justified on the basis that the border was violated. Since association with ancient iconography frames the border as prepolitical and prelegal, transgressing it is an attack on the very sovereignty and existence of the nation-state. Such existential transgressions then can be dealt with by any means, even those that are of dubious constitutionality.<sup>162</sup>

Indeed, this view of borders and sovereignty undergirds the Supreme Court's foundational immigration cases, *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*.<sup>163</sup> Those cases attribute prepolitical, prelegal, and preconstitutional status to the meaning of sovereignty and national power to control admission and expulsion of migrants. The simple physicality of the border fence, conjuring a time immemorial, reifies the extraconstitutional nature of immigration regulation reflected in those foundational cases.

In addition to normalizing border regulation and sanctifying the background legal framework, the border wall helps intensify perception of the very problem it purports to address.<sup>164</sup> Borrowing again from expressive law theory, Professor Dan Kahan notes that when the government engages in dramatic gestures to make individuals aware of certain penalties, the gestures themselves cause individuals to believe that the phenomenon requiring the penalty is prevalent.<sup>165</sup> In Kahan's example, the raising of tax penalties and the government's gestures to make taxpayers aware of those enhancements create the perception that more taxpayers than before are evading taxes.<sup>166</sup> The same theory is easily applied in the immigration context. Once created, a border wall is visible reassurance that the incidence of unlawful entry, the possibility of a Mexican invasion into the United States, and the likelihood that terrorists are using the southern border, are viable and credible existential threats to the nation.<sup>167</sup>

In this way, the bogeyman of the Mexican migrant or clandestine terrorist—the same one that helped lend public support to authorizing the fence in the first instance—is given a second life by the existence of the wall. In this regard, consider the participation of organized private actors in the project of fence

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162. See, e.g., 8 U.S.C. § 1225(b)–(c) (2011) (authorizing expedited removal, and removal without hearing); see also 8 U.S.C. § 1226 (authorizing detention of aliens without criminal trial or bill of rights protections).

163. *Chae Chan Ping v. U.S.*, 130 United States 581, 603 (1889) (“That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation.”); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (upholding deportation law allowing Chinese persons to be deported without testimony of credible white witness).

164. See generally Carpenter, *supra* note 118; Sunstein & Kuran, *supra* note 73.

165. Kahan, *supra* note 114, at 342.

166. *Id.*

167. See Morales, *supra* note 84, at 53 (“The very act of building a fence is proof to the populace that its fear of invasion . . . has a strong basis-in-fact.”).

building or fixing. The existence of a partial, government-created fence provides the impetus for private actors, like the Minutemen Civil Defense Corps, to help complete or fix the fence.<sup>168</sup> Private actors engage in fence building despite knowledge that their actions are mostly symbolic because they perceive the threat of undocumented migration as important enough to compel government action.<sup>169</sup> So important, in fact, that perceived government failure or delay in providing a solution cannot be idly tolerated; the concerned citizenry must help defend nationhood and sovereignty on its own.<sup>170</sup>

The attempt to naturalize the border through ancient iconography undermines the fact that borders are constructed and therefore capable of deconstruction. Once the possibility of deconstruction is marginalized, entry without inspection across the southern border resembles *malum in se* rather than *malum prohibitum*; the sovereign may discover and deport those individuals with minimal regard to their claims of belonging.<sup>171</sup> Concurrently, the ability of border fortification to substantiate and elevate public perception of a migration problem solidifies support for the exercise of sovereign power,<sup>172</sup> even to the extent of the public demanding solutions beyond the scope of the individual nation-state sovereign.

#### IV. THE FUTURE OF THE BORDER WALL

Part IV looks to the future of the border fence and the saliency of national borders. Ironically, the creation of a wall is a harbinger of the decline of the importance of the nation-state boundary, presaging the dismantling of the muscular national sovereignty and the wall that purports to protect it. In essence, while the border wall can change the narrative of immigration enforcement and unlawful migration, it can do so only for so long. At some point, the wall will cease to obscure the growing chasm between the realities of migration and fantasies of unilateral national control over the same.

Although the physical border can be self-generative in the ways discussed in Part III.B, it can also be self-destructive, or, as Wendy Brown argues, a signal of “waning sovereignty.”<sup>173</sup> First, while the border wall may be intended to do more symbolic work than interdiction, its expressive effect is limited by the legitimacy crisis it also creates. Second, while a physical fence is the very embodiment of the rule of law in tangible form, the creation of the structure requires several

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168. Fan, *supra* note 4, at 712.

169. *Id.*

170. See Lacey, *supra* note 79 (noting that supporters of the Arizona fence fund in the state legislature argue that a privately funded state fence will “allow everyday people fed up with the inability of Congress to address the problem of illegal immigration to contribute personally to a solution”).

171. Motomura, *supra* note 3, at 2049–55.

172. BROWN, *supra* note 4, at 39.

173. *Id.* at 24–26.

deviations from the rule of law. Finally, the presence of a fence presages the decline of the saliency of nation-state borders; the deterioration of the national boundary's significance undermines the need to protect the borders of the nation-state with border walls. Relatedly, the decision to physically fortify the national border limits the subsequent policy choices of a nation-state, ultimately acting as either as a harbinger of national impotence or totalitarianism.

### *A. A Growing Legitimacy Crisis*

Even as expressive law theory sheds light on important incentives that motivate the federal government and citizenry to promote fence building, the behavior and norm-altering potential of border wall policy has limited shelf-life. Certainly, the ability of a wall to signal the possibility of border containment will alter the attitudes and voting preferences of the U.S. citizenry. However, the border wall seems to have insignificant behavior and norm-changing effects outside of the citizenry.

While doing little to actually stop unlawful migration, border walls may intensify feelings about the border for populations on both sides. Because the meaning of any public policy outcome—here, the border fence—depends on social interaction and the practices of multiple constituencies, it need not have the same meaning for everyone affected.<sup>174</sup> In obvious terms, despite much of the American polity's sincere desire to believe that everyone should and does understand the simplicity of border wall transgression, a prospective migrant has no reason to share, or even comprehend, this view. For those for whom the border is not a naturalized fact, or for those who follow historic and familial migration patterns, or for those swayed by the osmotic pressure of labor need, the imposition of a border fence legitimates neither the border nor tough enforcement against unlawful entrants.

While prospective migrants might worry about increased coyote prices, fear the prospect of human traffickers, and dread the cartelization of the narcotics and human smuggling, the existence of a wall fails to naturalize and normalize an inflexible and sacrosanct border for the very population the border attempts to control. These limitations of the border's expressive capacity in a transnational context suggest growing disconnect between the citizenry's and putative migrants' perceptions of the wall.

Based on this increasingly disparate contextual understanding between walled-in and walled-out populations, the border wall suffers, or will eventually suffer, from a crisis of legitimacy. Compliance with border regulation from those kept outside diminishes when the policy is viewed as unjust.<sup>175</sup> If putative unlawful

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174. C. Edwin Baker, *Injustice and the Normative Nature of Meaning*, 60 MD. L. REV. 578, 592–95 (2001); Kahan, *supra* note 114, at 345.

175. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1410 (2005) (showing through

entrants do not feel they owe any duty to the United States prior to their entry, do not recognize the U.S. law as legitimate authority, or do not feel that the border policy and the border wall reflect their own community or broader international norms, they are more likely to enter despite the existence of a border fence.<sup>176</sup>

The border, and the broader immigration enforcement system, cannot effectively function if the primary way of inducing compliance is through law enforcement. Any functioning and healthy enforcement system depends on voluntary compliance by those whose compliance is sought.<sup>177</sup> In their study of American policing of Muslims, Professors Tyler, Huq, and Schulhofer arrive at a similar conclusion regarding the polity's view of law enforcement.<sup>178</sup> They further prove through empirical study that targeted and harsh enforcement tactics against one particular group (at least in the domestic context) can have spillover effects that negatively impact evaluations of law enforcements' legitimacy.<sup>179</sup> Thus, despite the significant discourse-altering benefits of border wall policy, and the incentives to create fortified borders, at some point the wall's negative outputs—especially its inability to achieve legitimacy and compliance with one of its target groups—will likely make it a mockery, even amongst those who currently support its creation.<sup>180</sup>

The legitimacy of border policy matters because it reflects back on the

empirical data that “perceived injustice of a particular law diminishes respect for the law in general”).

176. *Id.* at 1430 (arguing that people obey the law because they feel they owe a duty to legitimate authority, when the law reflects community norms).

177. Martin, *supra* note 29, at 549 (“No law enforcement system is healthy if assuring compliance must rely primarily on direct enforcement through the personal attention of the police. Healthy systems are based on widespread voluntary compliance, leaving police to target misbehavior around the margins.”).

178. See Aziz Huq, Tom Tyler & Stephen Schulhofer, *Why Does the Public Cooperate with Law Enforcement? The Influence of the Purposes and Targets of Policing*, 17 PSYCHOL. PUB. POL'Y & L. 419, 421 (2011) (“The ‘procedural justice’ model of policing contends that people’s reactions to law enforcement are shaped primarily by evaluations of the fairness of police conduct. . . . This model further proposes that procedural justice induces a belief in the legitimacy of the police, i.e. trust and confidence in the police and the view that they ought to be obeyed.”).

179. *Id.* at 20 (“The study finds support for the claim that people do attend to the abuse of their groups’ rights in both ordinary times and also when faced with unusually grave threats. . . . This suggests that the police lose legitimacy in the larger community when they engage in unfair tactics directed at one subgroup but generally viewed as being unfair by the entire population.”); see also Tom Tyler et al., *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans* 17–23 (N.Y.U. School of Law Public Law & Legal Theory Research Paper Series No. 10-15, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1559923](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559923) (identifying the central role of perceptions of fairness in inducing cooperation with law enforcement and viewing law enforcement as legitimate).

180. In some cases, the wall is especially easy to mock—for example, it actually fences “out” some people who are U.S. citizens living in the U.S. See Liz Goodwin, *The Texans Who Live on the ‘Mexican Side’ of the Border Fence: Technically, We’re in the United States*, YAHOO! NEWS (Dec. 21, 2011), <http://news.yahoo.com/blogs/lookout/teas-americans-live-wong-side-border-fence-christams-183312787.html> (describing the plight of U.S. property owners who live on the “other” side of the fence).

nation-state. The border cannot remain an exceptional land, beyond logical, legal, and constitutional restraint. In their study of the factors motivating the recent trend towards wall building, Professors Wittenberg and Hassner argue that wall-building states are almost uniformly wealthy and authoritarian.<sup>181</sup> Indeed, the United States is one of only a handful of nonauthoritarian regimes to construct a wall primarily to stop economic migrants. In other words, in comparison, the United States actions resemble those of Burma and Iran—countries whose moral legitimacy and method of governance are constantly under attack by U.S. policymakers.<sup>182</sup>

### B. *The Wall and Rule of Law*

The creation of the fence, imagined as a testament to, and an embodiment of, the rule of law, does significant violence to the rule of law.<sup>183</sup> Those in favor of harsh actions against undocumented persons and border crossers often cite maintaining the integrity of the rule of law as reason for their beliefs.<sup>184</sup> Amongst the many blameworthy descriptions foisted upon undocumented migrants—as job snatchers, as public welfare consumers, as crime mongers, and as alien invaders—one of the most effective is that of border violator as flouter of the rule of law.

In this view, rewarding border and border wall transgression through lax enforcement only breeds more contempt for the law. This rhetoric is understandably popular. It appears principled and divorced from pure xenophobic and racialized fears. Unlike the other constructions and characterizations of migrant illegality, it resists easy empirical contestation. And, as this Paper has argued, notions of fidelity to the neutral rule of law helped spur fence building in the first place.<sup>185</sup>

But, consider the sheer breadth of duly enacted federal law that must be abrogated or waived to clear legal ground for the border wall.<sup>186</sup> In the REAL ID

181. Hassner & Wittenberg, *supra* note 25, at 20 (“[B]uilding states are significantly richer than target states. . . . Second, although builders are more democratic than targets in relative terms, the average builder is still solidly authoritarian in absolute terms.”).

182. *Id.*; see Jonathan Head, *Burma Rejects Foreign Criticism*, BBC NEWS, May 28, 2009, <http://news.bbc.co.uk/2/hi/8071849.stm>; Press Release, The White House Office of the Press Secretary, Message from the President Regarding Iran (Mar. 10, 2010), *available at* <http://www.whitehouse.gov/the-press-office/message-president-regarding-iran> (“The actions and policies of the Government of Iran are contrary to the interests of the United States . . .”).

183. *Cf.* Sunstein & Kuran, *supra* note 73, at 736 (noting that policy responses built on informational cascades create “serious problems for democracy,” as apparently democratic outcomes will rest on misinformation).

184. See, e.g., *Statements on Introduced Bills and Joint Resolutions*, 149 CONG. REC. 22,948 (2003) (statement of Sen. Jeff Sessions (R-AL) to the Senate Committee on the Judiciary) (“America’s strength is based on its commitment to the rule of law. . . . In the world of immigration laws, a facade of enforcement that holds no real consequences for law breakers is both dangerous and irresponsible.”).

185. See *supra* Part II.

186. See generally GILMAN, *supra* note 14, at 6 (“On April 1, 2008, in the midst of significant

Act, Congress authorized the Secretary of Homeland Security—an appointed executive officer—to waive the requirements or application of any federal law that hindered wall construction, while virtually eliminating judicial review.<sup>187</sup> Using this unchecked authority, former Secretary Chertoff sought and received exemptions from over thirty laws passed by Congress. Notably, many were environmental and wildlife statutes pertaining to atmospheric, water, and habitat concerns that transcend political boundaries. The wall does not just conceptually dismiss democratic will expressed in those statutes; it also substantively—and incomprehensibly—erects a hard political boundary on and between inherently prepolitical subjects, like water and wildlife.

The wall thus embodies of the rule of law at the border only by undermining prior law and the apolitical order of wildlife and ecological systems. Ironically then, both the transgressing migrant and the wall she scales are amenable to the same critique; both can be branded affronts to our rule-of-law culture.

### *C. Presaging the Decline of National Boundary and Power*

Finally, since the border fence likely cannot eliminate unwanted migration, physical border fortification essentially showcases the performance of sovereignty, while hiding the vulnerabilities of the sovereign.<sup>188</sup> Building a wall is a visible claim to nation-state power with scant substantive backing. For example, the fourteen-mile fence constructed by the INS in 1993 as part of Operation Gatekeeper is hard to characterize as anything but a simulation of sovereign power over the border for its own sake. No one could have seriously thought a fourteen-mile fortification could have more than a cosmetic effect on unlawful entries.<sup>189</sup>

Such action, however, has prophetic and self-generative properties. Thirteen years after Operation Gatekeeper, U.S. lawmakers pointed to the success and existence of the fourteen-mile San Diego wall as justification for the seven hundred-mile extension in the SFA.<sup>190</sup> In essence, border wall enthusiasts are forced to rely on the existence of other past and contemporary walls for the legitimacy of their own fortifications, rather than the actual interdiction that a wall

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opposition to the construction of the wall, DHS Secretary Michael Chertoff executed a waiver of 30 environmental and other laws pursuant to his authority granted by federal statute.”); *id.* at 47 (listing, by statute, the Legal Requirements Waived by DHS for the Construction of the San Diego Border Fence); see also HADDAL ET AL., *supra* note 18, at 31–33; *Measure Seeks to Give Border Patrol Power to Circumvent Environmental Laws*, N.Y. TIMES, Nov. 13, 2011, at A21.

187. HADDAL ET AL., *supra* note 18, at 33 (“With respect to the Secretary’s use of the waiver authority, the provision allows legal redress only for constitutional violations and limits review to the district courts of the United States (though the Supreme Court retains discretionary appellate review over district court decisions). In essence, an individual could not sue DHS for bypassing the environmental impact statements requirements of the National Environmental Policy Act (a law it has waived) because that would be a statutory violation . . .”).

188. BROWN, *supra* note 4, at 90–103.

189. *Id.*; HADDAL ET AL., *supra* note 18, at 2–3.

190. See HADDAL ET AL., *supra* note 18.

may accomplish. This self-referential justification merely reveals a desire to project strength, rather than the ability to demonstrate strength through actual interdiction of unlawful border crossers.

This “theatricalized and spectacularized” display of sovereign authority in a border wall, Wendy Brown argues, is symbolic not of the potency of the nation-state but of its deterioration in relation to other international and transnational forces.<sup>191</sup> These economic and informational forces chip away at the relevancy of the nation-state as the arbiter of human movement. The existence of wall then, both covers and uncovers many a legal theorists withering critique: the absolute power to control borders, ascribed to the federal government in cases like *Chae Chan Ping*, *Fong Yue Ting*, *Knauff v. Shaughnessy*, and *Shaughnessy v. Mezei*, is, and always has been, fiction and fantasy.<sup>192</sup> It is neither natural nor inherent, and it can be unwritten and deconstructed just as surely as it was baldly inscribed.

Undoubtedly, the notion that a border fence evinces the diminution of the importance of the nation-state is contested. Ayelet Shachar, for example, convincingly showcases the ways in which the United States has redefined and shifted its border to regain and reassert robust sovereign control.<sup>193</sup> Shachar notes that the border fence is only one component of a larger project of expanding and changing the way border is perceived and regulated; in combination with other strategies, the border wall is indicative of the federal sovereign’s reinvigorated authority. Yet, Shachar’s narrative is not inconsistent with Brown’s. As the sovereign’s power to robustly control its borders and eliminate unwanted migration fades, the sovereign responds by both retrenching a static, visible, and ancient symbol (the wall)<sup>194</sup> and by altering the border’s legal construction (by expanding enforcement reach inside and outside the nation-state) to allow more opportunities for control.

Moreover, regardless whether border fences are a marker of nation-state strength or weakness, it is clear that the imposition of muscular border policy with a border wall demarcates a crossroads. National borders are constructs; they are the imagined limits to which the national sovereign projects its territorial power.<sup>195</sup> The fence moves the border from imagination into tangible reality. In doing so, it

191. BROWN, *supra* note 4, at 24 (“What appears at first blush as the articulation of state sovereignty actually expresses its diminution relative to other kinds of global forces—the waning relevance and cohesiveness of the form.”); Rodríguez, *supra* note 11, at 224.

192. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (denying due process claim of noncitizen excluded based on confidential information, and ascribing plenary power over exclusion to political branches); *Shaughnessy v. Mezei*, 345 U.S. 206 (1953) (excluding from reentry without due process, noncitizen long-time resident of the U.S. based on confidential information).

193. Shachar, *supra* note 78, at 837 (“It is ironic that the U.S. immigration talk is so heavily focused on erecting the fence as a symbol of regained sovereignty, while its immigration regulation and enforcement actions are in fact far more multifaceted and nuanced.”).

194. *Id.*; Fan, *supra* note 4, at 711.

195. Baud & van Schendel, *supra* note 95, at 211.



may be, as historians Baud and van Schendel write, the “ultimate” symbol of sovereignty.<sup>196</sup> Perhaps unintended on their end, the word “ultimate” has dual meaning—either the fence is the most powerful expression of sovereignty, or, alternatively, it is the last and desperate expression of sovereignty.

In light of this duality, consider the five stages of borderland evolution mapped by Baud and van Schendel in their comparative analysis of various border regions: embryonic, adolescent, adult, declining, and defunct.<sup>197</sup> They characterize the declining stage as the point when the national border begins to lose political salience, and significant cross-border networks rise. Although the U.S. southern border maintains its political and legal significance, supraborder and transnational networks have indeed emerged and entrenched.<sup>198</sup>

In the process of transition through any of these stages, Baud and van Schendel’s comparative analysis yields three categories of border behavior—the quiet, the unruly, and the rebellious borderland.<sup>199</sup> The current situation at the U.S. and Mexico border bears hallmarks of both the unruly and rebellious borderland. In the unruly borderland, despite the imposition of a politically negotiated border, the local societies in the border region defy the legitimacy of the border, and the sovereign exposes itself as weak when it unrealistically attempts to control communities at the border.<sup>200</sup> The claims of cross-border solidarity in border communities, along with the nation-states’ inability to curb unlawful entry fit this description.<sup>201</sup> In the rebellious borderland, they describe regional elite joining with the local population against the government that seeks to impose the rules of the border.<sup>202</sup> The disputes in Arizona and elsewhere over employer sanctions, and the broad coalitions that have been forged—between large corporations and immigrant activists—to challenge restrictive immigration enforcement, evince low-level resistance to the nation-state.<sup>203</sup>

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196. *Id.* at 226 (“This display of statehood symbolizes the effort of each state to maintain exclusive control of its half of the borderland, and in this respect the border is the ultimate symbol of sovereignty.”).

197. *Id.* at 223–25.

198. Angelucci, *supra* note 22, at 35 (“A more stable group of illegal migrants may have worse long-term effects on the stock of undocumented migration than a highly mobile one: the establishment of U.S.-based illegal migrant enclaves may decrease migration costs for prospective migrants . . .”). *But cf.* Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007) (developing the idea of transnational labor citizenship that would create a network of cross-border workers, and call for opening of nation-state borders to labor migration).

199. Baud & van Schendel, *supra* note 95, at 227–29.

200. *Id.*

201. M. Isabel Medina, *At the Border: What Tres Mujeres Tell Us About Walls and Fences*, 10 J. GENDER, RACE, AND JUST. 245, 245–55 (2007); Valencia-Weber & Lopez, *supra* note 11, at 266–91.

202. Baud & van Schendel, *supra* note 95, at 227–29.

203. *See, e.g.*, Rachel Port, *Strange Bedfellows on Plaintiffs’ Side in Chamber of Commerce v. Whiting*, YAHOO! NEWS (Dec. 7, 2010), [http://old.news.yahoo.com/s/ac/20101207/bs\\_ac/7322700\\_strange\\_bedfellows\\_on\\_plaintiffs\\_side\\_in\\_chamber\\_of\\_commerce\\_v\\_whiting](http://old.news.yahoo.com/s/ac/20101207/bs_ac/7322700_strange_bedfellows_on_plaintiffs_side_in_chamber_of_commerce_v_whiting) (noting the support of civil rights groups for the U.S. Chamber of Commerce in the Chamber’s continuing

Seen in this light, the U.S. and Mexico border appears as one in a turbulent process of entering a declining stage of border maintenance, rather than a moment of reinvigorated nation-state sovereignty. Of course, the relationship between the United States and its southern neighbors is hardly the same as the borderlands used by Baud and van Schendel as examples of these unruly and rebellious processes.<sup>204</sup> While current comparisons to some of the most unstable regions in the world are inapposite, the United States' relationship with Mexico and Central America may also change over time. Even now, the border fence, at least in part, helps produce the marked increase in violence in Mexican border towns and the flourishing of a mafia and cartel economy for cross-border traffic.<sup>205</sup>

Even if one remains unconvinced that the border wall portends a decline in sovereign potency and the saliency of national borders, the erection of a fence inherently limits a nation-state's subsequent policy choices.<sup>206</sup> Once erected for the stated purpose of interdicting and eliminating unlawful entry, but under conditions where deterrence is either marginally or negligibly achieved, the federal government leaves itself with few options.

First, it could expressly concede that the fence is largely symbolic and only marginally deters putative migrants. This option is unlikely and, from the government's perspective, unsatisfactory because it concedes the impotence of the sovereign to control unwanted migration and severely diminishes the return on the public's investment of billions of dollars in border control policy.

Second, the federal government might acknowledge that, as currently constituted, the wall fails to prevent unlawful entry, but that this failure proves the need for more extensive fencing. This option is economically and practically unfeasible given the massive costs of walling the entire border. Moreover, this strategy commits the government to the position that complete physical border fortification is the most appropriate solution to unlawful migration. If that strategy turns out to be only marginally more effective than partial fencing, the

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litigation against the Arizona Legal Worker's Act, *Chamber of Commerce v. Whiting*, which would impose heavy sanctions on employers who hire unauthorized workers).

204. Baud & van Schendel, *supra* note 95, at 227–29 (noting the Republic of Ireland/British border in the late 1960s as an example of an unruly borderland; noting the borders between China/Laos/Thailand/Burma, and the borders of Iran, Iraq, and Turkey with Kurdish populations as examples of the rebellious borderland).

205. See, e.g., BROWN, *supra* note 4, at 112 (“[B]order intensification and responses to them render the border zone itself an increasingly violent space.”); *War Without Borders, Mexican Drug Trafficking (Mexico's Drug War)*, N.Y. TIMES (Feb. 1, 2011), [http://topics.nytimes.com/top/news/international/countriesandterritories/mexico/drug\\_trafficking/index.html?scp=1&sq=war%20without%20borders&st=cse](http://topics.nytimes.com/top/news/international/countriesandterritories/mexico/drug_trafficking/index.html?scp=1&sq=war%20without%20borders&st=cse) (detailing rise in violence at U.S.-Mexico border).

206. BROWN, *supra* note 4, at 84 (“This condition [of walls signaling the loss of nation-state sovereignty's a priori status] is evident in the fact that the new walls codify the conflicts to which they respond as permanent and unwinnable.”); Sunstein & Kuran, *supra* note 73, at 743 (arguing that once policies based on misinformation are enacted and stabilized, they may endure by influencing future generations who will carry on the distortions that led to the creation of the initial policy).

government has left the nation worse off than without the fence.

Third, the federal government could augment the wall with coercive force to deter putative migrants. But, current research already shows that that fear of death by crossing over unforgiving terrain does not deter border crossers.<sup>207</sup> If knowledge of the possibility of death during a crossing attempt does not turn away putative migrants, one of the government's only remaining border control options would be to add the threat of intentional deadly force.<sup>208</sup> But, backing up the physical border barrier with lethal force would transform the U.S. and Mexico wall into a massive Berlin Wall,<sup>209</sup> a normatively despicable option wielded by totalitarian states, for which neither the citizenry nor the lawmakers of the United States have the stomach. Thus, by limiting government options, the deployment of a physical border fortification strategy constrains subsequent sovereign decision making and power in critical ways.

The claim that a border wall presages a decline in the importance of the nation-state and/or handcuffs subsequent policy choices, however, is not to reject the role of active choice and volition in the process. Although the wall possibly marks the last vestiges of robust federal control over its borders, it marks the crossroads not just of an imagined past of an omnipotent nation-state, but also a moment at which the federal government might reassess its role in a globalized world, where the supranational and the subnational are ascendant.<sup>210</sup>

By setting the nation down a path from which there are few opportunities to freshly reconsider migration strategies, a border wall commits current and future generations to regressive border policy. As Brown notes, walls tend to reproduce inside exactly what they purport to exclude.<sup>211</sup> Fundamentally, the wall is anathema to the production of an individualized, freedom-seeking, and equally dignified citizenry inside and outside of the nation.

207. See Cornelius, *supra* note 19.

208. See Fan, *supra* note 4, at 715 (quoting a rancher living near the Arizona-Mexico border, "The Israeli wall was backed by guns; that's why it worked in Israel, that's how it worked in Berlin. And I don't agree with shooting people").

209. The East-German soldiers stationed at the Berlin Wall had a standing "shoot to kill" order for anyone who attempted to cross over to West-Berlin. It is believed that 125 people were killed between 1961 and 1989 while attempting to flee East Berlin. Deanne Corbett, *Researchers Confirm 125 Berlin Wall Deaths*, DEUTSCHE WELLE (Sept. 8, 2006), <http://www.dw-world.de/dw/article/0,,2125882,00.html>.

210. Saskia Sassen, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* xii (Columbia Univ. Press) (1996) ("I argue that globalization under these conditions has entailed a partial denationalizing of national territory and a partial shift of some components of state sovereignty to other institutions, from *supranational* entities to the global capital market.") (emphasis added); see also Saskia Sassen, *The Global City: Strategic Site/New Frontier*, 41 *AM. STUDIES* 79, 79–95 (2000).

211. BROWN, *supra* note 4, at 41 ("Thus, the kinds of subjects that Western nation-state walls would block out are paradoxically produced within by the walls themselves—yet another way in which walls inadvertently subvert the distinction between inside and outside that they are intended to mark . . .").

## CONCLUSION

In his article *Immigration Outside the Law*, Hiroshi Motomura notes that one of the difference between the majority and dissent in *Phyller v. Doe* (striking down state law barring undocumented children from attending public elementary school) was that that majority understood the unlawful presence of the children as the starting point for analysis, while the dissent viewed their legal status as obviating any further judicial attention.<sup>212</sup> So too, here, the narrative of the border wall does not end with evidence whether it eliminates migration or effectively deters unlawful crossing. That debate is only the beginning of the analysis. The creation and sustenance of the border wall is more nuanced and complex than conventional diatribes by both supporters and critics would portray. The ability to eliminate unlawful entry into the United States, or even significantly deter it, may have little to do with the actual forces that compel the construction and maintenance of a border fence. In short, sometimes a wall is more than just a wall.

This Article argues that the border wall alters migration discourse, law, and enforcement in critical ways. It satiates an atavistic and primal need for security in a turbulent global landscape. It provides comfort to the citizenry and tangibly defines the “us” who should be protected from the “them” who must be kept outside. Further, it helps simplify the legal consequences of unlawful entry, translating complex immigration law violations into more easily understood transgressions of domestic spatial relationships. Once constructed, the southern border wall connects itself to an ancient tradition, subtly inscribing the notion that borders are more than mere political, legal, and social constructs, but are natural and primal lines between different peoples and cultures.

Ironically, however, the physical barrier at the southern border bespeaks a sad and shallow national triumphalism. While the construction of a border wall appears to be the nadir of national sovereign power, it also is a pyrrhic display, obscuring for a moment the underlying truth that controlling human migration is beyond the scope of any single nation-state. Thus, the U.S. border wall is yet another harbinger of the decline of the saliency of the nation-state in the global order. Many years hence, we will look upon it as the traveler once looked upon the broken visage of Ozymandias:

I met a traveller from an antique land  
Who said: “Two vast and trunkless legs of stone  
Stand in the desert. Near them on the sand,  
Half sunk, a shattered visage lies, whose frown  
And wrinkled lip and sneer of cold command  
Tell that its sculptor well those passions read  
Which yet survive, stamped on these lifeless things,  
The hand that mocked them and the heart that fed.

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212. Motomura, *supra* note 3.

And on the pedestal these words appear:  
‘My name is Ozymandias, King of Kings:  
Look on my works, ye mighty, and despair!’  
Nothing beside remains. Round the decay  
Of that colossal wreck, boundless and bare,  
The lone and level sands stretch far away”.<sup>213</sup>

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213. PERCY BYSSHE SHELLEY, *Ozymandias*, in THE COMPLETE POEMS OF PERCY BYSSHE SHELLEY 589 (1999) (1817).

