Unconditional Relationships

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While much of private law is about the beauty of bargains, a fair amount of public law is about suppressing those private bargains that a legislature, a group of judges, or others among us disfavor. We do not permit even the most sophisticated parties to allow themselves to be tortured by the police or enslaved for their debts. Indeed, a fair fraction of legal scholarship concerns the exaltation of private bargains on the one hand, and arguments for their regulation on the other. When market failures or other circumstances suggest something other than pure private ordering, a legal ban on such ordering and its enforcement is an important but rather extreme option. The focus of this Lecture is, at least in part, on legally unsuitable bargains. My subject, however, includes not such things as self-enslavement and other tragic choices, but rather the bargains that define inclusion in communities or other relationships. Among other things, I aim to show that our legal system and our cultural norms work to exclude an interesting set of bargains concerning community membership, or inclusion in relationships more generally. The part of the argument that dwells on cultural norms suggests that we collectively appreciate the danger of bargains that can be destructive of community. The legal argument, however, is somewhat irresolute. Although courts and other legal institutions sometimes bar the kinds of bargains I explore, using constitutional language, for example, it is also the case that law enables evasions of just such judicial and regulatory obstacles.

Part I identifies several representative unsuitable bargains and uncovers what I describe as something of a communitarian structure in our legal system and in our private lives. Part II offers a diversion on the subject of unconstitutional conditions, a legal category that can itself be seen as defining unsuitable legislative bargains. Part III reaches for an
ancient text in order to emphasize the customary and deep-seated nature
of norms about inclusion in relationships.

I. Gatekeeping

Inasmuch as a good part of my story is about the tension between communal ideals and otherwise advantageous arrangements, I find it useful to focus on gatekeeping and, in particular, the terms of admission to various communities. The intuitive idea that drives this focus is that a community's egalitarian norms, enforced by restrictions on bargains and remedies, generate pressures to restrict admission to the community.¹ My story is about these egalitarian norms and the gatekeeping that goes on in their shadow. What gives the story some plot is that people are creative in bargaining around or otherwise avoiding restrictions they find inconvenient. I begin with immigration law because it incorporates obvious and large-scale gatekeeping rules. I then turn to university admissions, employment, and other arenas to reflect on the relationship among communal norms, admissions policies, and avoidance techniques.

A. Immigration Bargains

1. Unsuitable Immigration

Consider the likely political coalitions in most developed countries with respect to immigration policy. In the United States, for example, a significant minority of the population believes that we ought to open our gates and admit many more new residents and potential citizens than we do now.² Some of these convictions arise from the economic and political conditions in source countries,³ and others stem from free trade arguments supporting policies that would increase the mobility of labor, even when there are problems of displacement and of strategic behavior by other countries.⁴ Some of our greatest historical gains in competitiveness

¹ There are, of course, many reasons why members of a community might choose to restrict entry. The point here is simply that some voters would be more inclined to admit new members if they could restrict these new members' rights, mobility, and economic options.

² See, e.g., Julian L. Simon, The Economic Consequences of Immigration 357-61 (1989) (presenting and discussing the results of informal polls of economists and other social scientists in which significant numbers of the respondents indicated that increased immigration would have a positive effect on society).


⁴ See, e.g., Simon, supra note 2, at 307-10 (concluding that immigration should be increased despite some detrimental effects on native employment).
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and cultural achievement are, after all, associated with unidirectional waves of immigration.\footnote{5 See \textit{Maldwyn Allen Jones, American Immigration} 293-302 (2d ed. 1992) (discussing the positive effects of immigration on American industry, politics, and culture).} On the other side, however, there is no shortage of domestic interests and citizens opposed to increased immigration.\footnote{6 See, e.g., \textit{Peter Brimelow, Alien Nation} 94-95 (1995) (citing a number of polls in which a majority of respondents were opposed to increased immigration). Because there is also some suggestion that a majority of voters would prefer to decrease immigration, see, e.g., Susan Crabtree, \textit{Immigration Crossroads}, \textit{Insight on the News}, Mar. 25, 1996, at 18, 19 (referring to a recent poll that found 79\% of respondents favoring 600,000 or fewer immigrants annually), the current level of immigration may say something interesting about the power of interest groups or legislators' preferences. On the other hand, constituents' stated preferences are often at odds with enacted legislation, and this is hardly the place to consider when this is most likely and whether it reflects an acute agency problem. In any event, because the level of immigration—with egalitarian rules for all citizens, old and new—is not terribly relevant to what follows, I put aside the precise preferences of voters and the agency costs they confront. One way or another, the legislated level of immigration must surely involve something of a compromise.} This opposition usually arises from concerns about displacement costs\footnote{7 See \textit{George J. Borjas, Friends or Strangers} 79 (1990) ("The presumption that immigrants have an adverse impact on the labor market continues to be the main justification for policies designed to restrict the size and composition of immigrant flows into the United States.").} and about the value of creating a polity—with the expectation that other nations will do the same—that maximizes its own well-being rather than an aggregation of the welfare of all residents on earth. The idea is that free movement and trade of the kind we enjoy among states in our union is not necessarily a good model for similar openness among all countries. There are, of course, other important perspectives on immigration policy. For example, some citizens are relatively agnostic about the absolute level of immigration, but have strong views, in a variety of directions, about the composition of the admittees. These other views include the idea, to which I return below, that we might somehow agree on a level of immigration and then auction admission to the highest bidders.\footnote{8 See, e.g., \textit{Simon}, supra note 2, at 329-35 (recommending the auctioning of visas); Sykes, supra note 3, at 188 (suggesting that "simply charging the immigrant a fee for admission" might yield greater gains than the program of providing visas to those with the capital to launch new businesses in the United States); Gary S. Becker, \textit{An Open Door for Immigrants—the Auction}, \textit{WALL ST. J.}, Oct. 14, 1992, at A14 (arguing in favor of auctioning off immigration visas to the highest bidders).}

In any event, my immediate focus is only on the point that among many possible outcomes, we can think of the (ever-changing) details of immigration law as reflecting a temporary political compromise between those who would, very roughly speaking, increase our quotas and those who would decrease them. The question, then, is why a better, mutually
more advantageous bargain does not dominate this compromise. A larger coalition than the one that enacted existing law could agree to raise our legal immigration levels on the condition that these additional newcomers pay for the valuable spots they seek. Although the question is why this has not happened, it might be useful to dwell on the apparent political attraction of this proposal. Voters who prefer more permissive immigration will favor raising the level; voters or legislators who grudgingly compromised for the present level might agree to an increase in immigration in return for compensation, more easily paid to the country rather than to individual voters; and voters who preferred a market mechanism in the first place would likely prefer some use of such a political-market mechanism rather than its complete absence. I cannot, of course, prove in any rigorous way that a large majority would vote to allow additional immigrants, as part of what we might think of as a bifurcated immigration scheme, if these additional immigrants paid some political-market-clearing price. It is possible, after all, that as a higher price induced more voters to approve, it would offend even more voters who might, for instance, prefer not to be part of a system that admitted only those who could better afford to pay. However, the same theoretical uncertainty is present in most markets; we are generally willing to assume that, absent surprising empirical evidence, payments encourage some marginal actors without discouraging even more inframarginal ones.

If immigrants could defer payment for these visas or citizenship spots or could tender payment in a variety of forms, the demand for admission spaces would surely grow and, in turn, the subsequent increase in the

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9 Some commentators join these voters. See, e.g., Simon, supra note 2, at 301 (recommending a substantial increase in the level of immigration). Note also that the sale or auction of visas could increase the political palatability of increased immigration. See id. at 331 (contending that an auction plan would make immigration more popular); Barry R. Chiswick, The Impact of Immigration on the Level and Distribution of Economic Well-Being, in The Gateway: U.S. Immigration Issues and Policies 289, 308-10 (Barry R. Chiswick ed., 1982) (claiming that the sale of visas would enable the native population to capture more of the gains from immigration and therefore the political will to issue a larger number of visas).

10 I do think, however, that additional immigration, with classification, is likely to be a Condorcet winner, preferred by a simple majority over every other alternative in pairwise competition.

11 Thus, hiring Red Cross workers is not thought to be counterproductive because of the reduction in the number of volunteers who are then likely to seek employment. In a vaguely similar fashion, voters who are happy to admit x immigrants per year are likely to accept x+1 in return for some payment from the one. Although it may be that once these voters accept this payment they will prefer a more complete market system in which all immigrants pay, reducing the market clearing number below x, and although prescient pro-immigration voters may oppose the x+1 plan in the first place, both can be said of the Red Cross example and neither seems likely to derail such a plan.
market-clearing price would make it even more popular to offer these spots for sale. It is interesting and perhaps critical to the point I am building toward that to the extent that current immigration law does in fact sell certain entry slots, by way of preferences in the granting of immigrant visas to people who have outstanding credentials or training\textsuperscript{12} and to those who can commit one million dollars in investment capital to a commercial enterprise that will employ at least ten U.S. citizens,\textsuperscript{13} the purchase price, in terms of skills or capital, is observable at the outset. Both demand and domestic political willingness might increase if potential immigrants who lacked financial resources could compete on an equal footing with those who happen to have the means in hand. The most obvious way to do this would be to allow promises of future payment.\textsuperscript{14}

In short, we can imagine a proposal to admit additional immigrants on terms that make such admissions more attractive to many of the very voters least inclined to raise immigration rates. Such a proposal would be the product of two separate bargains: domestic interests reaching a political bargain to bifurcate admission, and potential immigrants then “agreeing” to be admitted on those terms. These bargains might yield a new set of immigrants, perhaps admitted on the condition that they will be subject to higher future income tax rates than other residents and citizens.\textsuperscript{15}

One can even imagine a more extreme bifurcation in which the host country simply holds a kind of tournament, offering conditional visas or citizenship rights to some number of people per year, but turning these into permanent rights only for some percentage of the applicants deemed most “successful” in a five-year or other trial period. Such a tournament would provide maximum information to the organizer, in this case the country deciding on new citizens, and would allow applicants to compete even though they were initially without financial resources. In order to

\textsuperscript{12} See 8 U.S.C. § 1153(b)(1)(A)-(B) (1994) (allocating immigrant visas for those with “extraordinary ability” or who are “outstanding” professors or researchers); id. § 1153(b)(2) (setting aside visas for aliens who have advanced degrees or who possess “exceptional ability”); id. § 1153(b)(3) (allocating visas for, among others, “skilled” and “professional” workers).

\textsuperscript{13} See id. § 1153(b)(5) (allocating visas for immigrants seeking to enter the United States for the purpose of investing at least one million dollars in a new commercial enterprise that will create full-time employment for at least ten United States citizens or lawful aliens).

\textsuperscript{14} See infra note 30.

\textsuperscript{15} After delivering this Lecture, I was fortunate to come across a July 16, 1996 draft of an article by Howard F. Chang entitled Immigration as International Trade: Economic Welfare and the Optimal Immigration Policy (unpublished manuscript, on file with the Boston University Law Review). Professor Chang develops a case for optimal charges, or visa fees, taking into account both revenue and raising and economic welfare. My own emphasis is more on political feasibility, the possibility of charging penniless applicants through deferred liabilities, and the more general question of apparently unsuitable bargains.
make either bifurcation proposal more attractive to domestic interest
groups, the revenues raised could be earmarked for particular pro-
grams. 16

Tournaments of the kind just sketched are not unknown. Most work-
places lacking tenure and civil service protection are essentially tourna-
ment sites, with the rules of the game hidden at the outset, but where
applicants often receive either promotions or dismissals after a proving
period. 17 On the other hand, there are settings in which such tourna-
mants seem unacceptable. I turn to this contrast below, 18 but for now the
point is that there is something puzzling about the absence of a coalition
or serious proposal for this sort of bifurcated immigration policy. The
puzzle lies in our unwillingness to sell something we have that others
want desperately; in our disinclination, when we are willing to resort to
the market, to expand demand by offering to finance purchases; and in
the apparent failure of interest groups and politicians to bargain for such
an immigration policy when there are terms that would satisfy both those
who prefer more open borders and those who fear the economic costs
and redistributive effects of increased immigration. The narrower puzzle
is current law. Since 1994, we have allocated fifty-five thousand visas an-
nually by lottery to applicants from so-called "low-admission coun-
tries," 19 and several million people have entered this lottery each year. 20

16 The benefits could flow to the groups whose votes were needed for passage.
Note that earlier immigration patterns, in which many immigrants who experienced
financial difficulties returned to their places of origin, may be seen as reflecting such a
tournament scheme but with no cross-payments to the likely losers.

17 See Mark A. Rothstein et al., Employment Law § 2.27, at 138-39 (1994)
(discussing probationary periods and their effects). Unfortunately, employees may be
in for surprises as to which skills eventually earn rewards. In contrast, the immigra-
tion-law tournament that I imagine has specified rules. Note, however, that tourna-
mants are likely to be efficient in those circumstances in which there is enough infor-
mation about output to structure a set of prizes, but not so much easily obtained
information as to support more direct incentives for performance.

18 See infra Part I.B.1 (showing how in universities and law schools, competition
exists at the admissions stage and after graduation, but the schools strive for egalitari-
anism among current students).

19 These "diversity" visas are provided for in 8 U.S.C. § 1153(c) (1994). The first
annual drawing, a "transitional diversity" program that began in October 1991, for
40,000 visas on a first-come, first-served basis, permitted, perhaps through neglect,
multiple applications by single individuals and attracted an estimated 20 million applica-
tions. See 3 International Immigration and Nationality Law at U.S.-IV-10
(Dennis Campbell ed., 1993 & Supp. 2 Oct. 1994). This experience generated changes
in the forms of random selection and a limitation of one entry per applicant. 3 id.
The diversity program became permanent in 1994, making 55 thousand immigrant
visas available each year to natives of certain countries that have been determined to
have a low level of immigration to the United States in the previous five years. See 8
U.S.C. § 1153(c) (providing for the diversity program); id. § 1151(e) (setting the

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In addition to this lottery, we give preference to those with special skills and even to those who have already won the tournament of economic life, as it were, because, as already noted, we give priority to those with stellar résumés and to those who can offer investment capital and job opportunities to other Americans. These preferences, both in the United States and in other countries, limit our ability to explain law and practice with a claim that the use of market mechanisms in this context would be unseemly or immoral. On the contrary, when we do resort to the market, we do so in an unnecessarily anti-egalitarian fashion, because “on-site” tournaments would make these preferences available to those who did not already possess money or education.

2. Community Norms and the Immigration Puzzle

We seem to have a collective distaste for managing competitions that lead to the prize of citizenship even though we, like other countries, award the very same prize on the basis of lotteries and competitions that occur outside our gates. I call it a “distaste” because, as a functional matter, competitions hold considerable attraction. I refer to this distaste as applying only to competitions within our “gates” because we award preferences on the basis of a competition that takes place earlier, outside these borders or gates. Our scheme creates a kind of preliminary competition to amass the skills or capital necessary for our law’s preferences. It seems fair to say that although our system readily excludes applicants who are outside the gates and sponsors competitions among them for rights of entry, it is far more hesitant to experiment with internal competitions or even to expend substantial resources in excluding illegal “losers” who are already inside these somewhat metaphorical gates. The number of diversity immigrants at 55 thousand). However, even these visa recipients must have some minimal education or skill training. See id. § 1153(c)(2).


21 See supra notes 12-13 and accompanying text.

22 See BORJAS, supra note 7, at 202-04 (noting the preferences of Canada and Australia for educated or skilled immigrants).


24 The gates metaphor is imperfect, of course, because the immigration lottery is available to noncitizens already found within our borders and because there is some grey area between visa holder and citizen status.
system reflects a distaste for markets and other competitive institutions only when we would have to manage them domestically. This difference between the legal and cultural norms applied inside our country or community and the norms applied to outsiders, whom we identify in simple terms and even in the sense of physical absence, is familiar in the law of criminal procedure.25 There is, however, something especially interesting about the apparent inside-outside distinction in competition for inclusion, or membership, because it seems much more a matter of sensibility than function or necessity.

In the immigration context, it is not entirely clear whether the obstacles to competition within the community's boundaries are cultural or legal. In either case, their foundation could be either functional or moral. It may be that bargains of the kind suggested do not exist because enough of us recoil at the idea of deporting fellow residents merely for losing some economic tournament, especially when bad luck might have affected performance. It is a bit more difficult, though, to posit that we do not admit new citizens on the condition that they pay higher tax rates because we find that sort of differential terribly offensive. It is possible that because some bifurcated arrangements make us uncomfortable, we adopt a cultural norm that is overbroad and hostile to bifurcated arrangements in general.26

There is a venerable philosophical argument or tradition in favor of the inside-outside distinction—in physical terms, more or less—and opposed therefore to internal bifurcation. This perspective defines communities by their ability to set the rules of admission and to treat unadmitted outsiders less generously, but also by their obligation to treat insiders in an egalitarian fashion.27 To the extent that it is this sort of argument that causes us to vote and even to recoil as we do, it is somewhat surprising to find overbroad compliance with its terms. An immediate and practical


26 I turn below to situations in which such arrangements appear acceptable. See infra Part I.B.2.

27 See RONALD DWORKIN, LAW'S EMPIRE 195-216 (1986) (discussing the "associative obligations" that exist within a community); MICHAEL WALZER, SPHERES OF JUSTICE 60-61 (1983) (arguing that political justice requires that "the process of self-determination through which a democratic state shapes its internal life, must be open, and equally open, to all those men and women who live within its territory, work in the local economy, and are subject to local law"); Bosniak, supra note 23, at 1053-55 (discussing the debate over whether restrictions on the rights of immigrants constitute discrimination on the basis of alienage); Sykes, supra note 3, at 159 (observing that because illegal aliens "participate only minimally in entitlement programs, do not vote, and usually pay taxes much like other workers, it is by no means clear that their presence should be viewed as a 'problem'").
problem of application involves finding the point at which to grant membership or insider status. Mere physical presence is an unattractive trigger because tourists and illegal entrants have not met the standards set by the community for admission. One argument equates insider status with the grant of citizenship; another includes permanent residents in the insider circle, perhaps because to do otherwise is to permit their exploitation; and yet another argument calls for a kind of sliding arrangement in which longer or more permanent presence brings increased rights of equal treatment.\textsuperscript{28}

As for the legal unsuitability of bargains, it may be that political bargains regarding immigration rules are not of the kind suggested here because our courts would not tolerate their enforcement—perhaps because courts adopt one of the philosophical positions I just sketched. For example, even though unequal tax burdens are rarely challenged in litigation and present a most unlikely candidate for judicial rejection of legislative decisionmaking, we can be fairly confident that our courts would disallow a classification of citizens for tax purposes of the kind that I have just outlined.\textsuperscript{29} Oddly enough, the likely judicial reaction to yet more brutal

\textsuperscript{28} See Bosniak, \textit{supra} note 23, at 1054-55 (raising questions about the law's varying treatment of alien status and its effect on the allocation of rights and benefits in our society).

One provocative approach to the insider-outsider distinction is to have constitutional protections follow government powers, so that if the government has the constitutional power to act against someone's interests, then the person has constitutional protections. This is the position sometimes taken by Gerald Neuman. \textit{See, e.g.,} \textsc{Gerald L. Neuman, Strangers to the Constitution} 121 (arguing for qualifications on the government's power to exclude or expel aliens), 132 (noting that lawful residents incur reliance in the form of personal ties and contending that the government should respect this reliance). It seems likely that this argument requires additional distinctions: Our government may, for instance, have the constitutional and other power to wage war, but it seems unlikely that Professor Neuman would think that our Supreme Court could or ought to intervene on behalf of enemy citizens who desire to assert their right to speak against or be compensated for property losses caused by this war. In any event, the distinction suggested in the text requires only a recognition of the likelihood that judicial disapproval is more likely if we try to exclude someone who has established many ties to the community. This likelihood is consistent with Neuman's approach.

\textsuperscript{29} Although there is no case addressing the question of conditional, bifurcated citizenship, \textit{Bell v. Maryland}, 378 U.S. 226, 249 (1964), explains "that there is no second or third or fourth class of citizenship," and \textit{Schneider v. Rusk}, 377 U.S. 163, 168-69 (1964), holds that limiting the rights of naturalized citizens more than native born citizens creates an impermissible second-class citizenship. The legal barriers are unlikely to apply to charges levied as tariffs at the time entry is granted. \textit{See generally} Chang, \textit{supra} note 15 (discussing tariffs, quotas, and legal impediments). On the other hand, there is a rule discriminating in favor of natural born citizens where the office of the President is concerned. \textit{See U.S. Const. art. II, § 1} ("No person except a natural born Citizen . . . shall be eligible to the office of the President . . .").
bargains is perhaps more, rather than less, difficult to predict. In the case of the tournament idea, history suggests that most of the losers would voluntarily depart when their conditional visas expired. If we had the will and means to locate those who remained illegally, I doubt whether courts would block their forced exit.

It is interesting that even when nonlawyers and nonphilosophers suggest marketplace norms for immigration law, their most radical suggestions do not contemplate deportation. For example, Gary Becker's call for auctioning off slots takes the number of such immigrant places as politically determined or given, and then notes that commercial lenders might be willing to finance able applicants. There is, however, no discussion of the role law would play in making such a capital market function. Borrowers might agree up front to leave the country if they default, but the question is whether the legal system would support such private ordering. In the absence of this sort of penalty, there is reason to think that private lenders would rarely agree to finance immigrants. In any event, the cultural norms that weigh against deportation, or in favor of limiting serious tournaments to locations outside our gates, are either deeply ingrained—even in a free thinker like Gary Becker—or presumed to be an inviolable part of our legal system.

As the title of this Part suggests, I am more comfortable thinking about communities and their admission and exclusion policies in terms that I have labeled cultural and legal, than I am in thinking about them in philosophical, moral, or economic terms. This preference derives from discomfort with the idea that it might be morally preferable to exclude outsiders as one wished, so long as one treated insiders equally, rather than to admit desperate outsiders to an inferior class of membership that they and insiders might all agree to in advance. Our taste for egalitarian membership, as it were, might be indefensible in moral and economic terms and yet appealing to our cultural and legal sensibilities. In particular, there is a good case, in both moral and functional terms, for preferring a domestically managed tournament to the schemes represented in present

30 See Becker, supra note 8, at A14 (suggesting the availability of commercial loans for “highly reliable immigrants”). It is also interesting that Becker does not suggest accepting promises of future payments from buyers, although he does allow for the possibility that commercial lenders will perform this arbitrage function. Others, however, are willing to consider the future payment route. See Simon, supra note 2, at 333 (suggesting that immigrants pay large entry fees over time along with their federal income tax); Chiswick, supra note 9, at 309 (same). An additional question is what protection such lenders could receive. If commercial lenders were made secure by the exclusion of defaulting borrowers from the country, then we can imagine commercial lenders as intermediaries who would assess the future earning power of applicants in a somewhat depoliticized way.

31 At the very least, financiers would probably require a share of any upside return, and this itself creates a variety of agency and enforcement problems.
immigration law. Current law refuses to organize a tournament of its own, and thus merely shifts what we will not do within our own borders to an earlier time and another place,\textsuperscript{32} discriminating against some applicants and sacrificing valuable information. In return, we are able to characterize our nation, or community, as kinder and gentler, and perhaps even to construct philosophical theories that rationalize most of our rules. The more \textit{ex post} the sorting process, or tournament, the more brutal the rejection step seems to those who have already arrived. This perceived brutality is, in turn, destructive of community. It goes almost without saying that this inclination to push tournaments to unseen venues may seem anything but humane to those in dire straits elsewhere.

3. Norm Evasion

Formal constraints on private ordering often generate informal markets and institutions that serve to evade the constraints. These evasions appeal to some observers and horrify others, but do not by their mere existence prove much about the wisdom of the original constraints.\textsuperscript{33} Public resources spent on enforcement sometimes signal the degree to which society as a whole supports or rejects the original constraints. In some settings the evasions are communal, a situation that is particularly likely when the constraints fall primarily on the government. In the case of immigration law, even while legal and cultural norms or philosophical arguments reject the creation of a second class of citizenry that must contribute higher taxes or participate in a tournament to exclude losers or deadbeats, legal and political institutions come close to creating such a world.

One source of evasion is the grey area between exclusion, or outsider status more generally, and citizenship. We grant a variety of categories of visas, and there is necessarily some slippage when it comes to renewing

\textsuperscript{32} Thus, in \textit{Plyler v. Doe}, the Court interpreted the Equal Protection Clause of the Fourteenth Amendment to mean that children of illegal aliens could not be excluded from public schools. 457 U.S. 202, 230 (1982); see also \textit{League of United Latin Am. Citizens v. Wilson}, 908 F. Supp. 755 (C.D. Cal.) (enjoining the implementation and enforcement of those parts of California’s Proposition 187 that barred undocumented immigrant children from public schools, excluded all undocumented aliens from non-emergency state-funded medical services, and required social service providers to report any alien applicant suspected of undocumented status to the Immigration and Naturalization Service), \textit{aff’d sub nom. Gregorio T. v. Wilson}, 59 F.3d 1002 (9th Cir. 1995).

\textsuperscript{33} By way of analogy, rent control laws may generate side payments to landlords and may discourage tenants from moving. These effects seem to support the claims of those who oppose rent control, but they do not dissipate all the advantages that supporters of rent control see in such regulation. We expect mixed reactions in both groups as to the morality of making side payments in order to obtain or retain a rent-controlled apartment. Similar developments follow constraints on gambling, interest rates, drug and alcohol use, and so forth.
these visas or upgrading visa holders to citizenship status. People who receive visas because they are engaged to marry U.S. citizens or because they can arrive with substantial investment capital may be unable to stay in the United States if misfortunes develop or plans change. There is, therefore, a sense in which these immigrants may seek citizenship but find themselves in a kind of proving period of the very kind that the society seems unwilling to offer more broadly.

The evasion—or reality—is most profound when we take illegal immigration into account. Some fraction of our millions of illegal aliens will prove themselves economically, politically, or socially and then, through a variety of means, will be permitted to stay. By calling these entrants “illegals” rather than “second class citizens,” we manage to avoid seeing ourselves as the sort of people who exploit the vulnerability of outsiders by holding a formal competition within our borders. But I intend this as a positive rather than a normative statement about current immigration law. There is a kind of communitarian constraint on bargains and competition for citizenship, in that the legal and political systems prefer competitions outside our gates in order to foster the sense of community or egalitarian treatment within our borders. At the same time, our treatment of illegal immigrants reflects the very sort of bifurcation that we seem to find unacceptable and that is not even a very good substitute for a more explicitly market-based or competitive system. The existing system favors potential immigrants who can travel or walk to our borders over others who would need to invest more to enter our competitions. It also takes in less revenue and fewer of the skills and qualities we might attract with an explicit system. The present implicit system does, however, allow us to maintain an enticing myth about our community. Moreover, it is hard to imagine an immigration system free of this tension. So long as borders are not completely open but enforcement is imperfect, bifurcation is virtually inevitable. The alternative would be to promise “illegal” immigrants that once they enter our gates they will become full citizens, because we wish to treat all people alike within our borders. This would, in turn, further encourage border crossings, false tourism,

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34 See 8 U.S.C. § 1101(a)(15)(K) (providing a nonimmigrant classification for fiancées or fiancés of American citizens as well as for their minor children); id. § 1184(d) (establishing requirements for the issuance of visas to nonimmigrant fiancées or fiancés).

35 See supra note 13 and accompanying text.

36 See 8 U.S.C. § 1186b (providing for the termination of the resident status of entrepreneurs admitted under § 1153(b)(5)); id. § 1184(d) (allowing the deportation of aliens admitted under § 1184 for failure to marry within three months).

37 See, e.g., id. § 1255a (authorizing the adjustment of the status of certain illegal aliens to that of temporary or permanent resident).

38 It is also consistent with the philosophical position noted earlier. See supra note 27 and accompanying text.
and so forth. In short, there is a serious limit on our ability to reify our collective distaste for competition of a certain kind.

B. Other Communities and Their Unsuitable Bargains

1. University Admissions

The immigration law pattern described in the previous Part is nicely replicated in the context of admissions to universities. Although different kinds of interest groups influence these two sets of admissions rules, their similarities illustrate the utility of the communitarian perspective. In both settings, formal restrictions keep certain kinds of competition outside the "gates," allowing the community to see or describe itself as egalitarian, but at some substantial functional and moral cost. In both settings a pattern of evasion develops a kind of compromise, albeit one of uncertain and nonuniform stability.

Most readers of this "Lecture" will find university practices familiar. Although competitive admissions processes make modest use of valuable information acquired once students and faculty are inside the "community," as when some master's degree students are selected for a doctoral program, there has been a pronounced trend in elite universities toward graduating most matriculants and limiting exclusion to the front end. Colleges and law schools often advertise the high percentage of entering students who complete the degree. In the case of law schools, for example, performance during the first year of law school is almost certainly a better predictor of future performance than is some combination of undergraduate grades and scores on standardized exams, but law schools have moved away from a system in which they culled many students after one year of law school. Elite law schools in particular are highly selective at the front gates but dramatically egalitarian inside, if retention can be fairly associated with nondiscrimination. Similarly, evidence of aca-

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39 I will ignore faculty hiring, although it is noteworthy that it is generally thought to be easier to be promoted from within a faculty than to be hired laterally from another university.

40 See Robert Stevens, Law School: Legal Education in America From the 1850s to the 1980s 221 n.38 (1983) (noting that, by the 1970s, failure had become "rare" at the Harvard, Yale, and Notre Dame law schools).

41 There are some law schools that exploit the value of information generated by performance in, rather than outside, law school, by inviting some applicants to a summer session prior to matriculation. See, e.g., Paul T. Wangerin, Law School Academic Support Programs, 40 Hastings L.J. 771, 777 n.30 (1989) (describing the use of such a program at John Marshall Law School). The session is in essence a competition for admission, as well as a period in which potential students might gain information about the study of law and the particular school. The winners join the mainstream students, apparently but not surprisingly outperforming them, and the losers depart. See id. A clever aspect of this atypical competition is that most of the community avoids interaction with those who are forced to depart. Moreover, the competitive
ademic wrongdoing is likely to be fatal if known at the time of the admis-
sion decision, but many law schools are remarkably protective of students
who behave dishonestly once in law school.

Internal arrangements also exhibit an egalitarian flavor not found in
many other markets. Schools allocate dormitory rooms and limit places
in popular courses by lottery rather than auction. Students who major in
physics or classics typically pay the same tuition as those who study histo-
ry or sociology, even though the cost of educating is much higher when
the students require laboratory facilities and the classes are smaller.
Although tuition often varies among schools in a particular university,
this discrimination is less threatening to the egalitarian and intellectual
ambiance.

Again, the evasions and creeping market phenomena are unsurprising
and sometimes brutal. When cutbacks come, they often hit some depart-
ments more than others. At those times, it may seem that ongoing user
fees would be superior to an egalitarian structure followed by amputa-
tion. Graduate fellowships are more available and more generous in
some departments than in others. More interesting, perhaps, is the fact
that competition is present upon exit as well as entrance. Although many
graduates of identifiable programs will likely be unemployed, and many
may experience grave regret in having chosen the fields that their univer-
sities encouraged, the schools do not promise equal treatment in the post-
graduation period.\textsuperscript{42} The competition at both ends highlights the egalita-
rian nature of the university community.

In short, the admissions policies of elite schools resemble those of
wealthy countries. At the front gate, there is a serious tournament based
on imperfect information, as provided by standardized exam scores and
previously acquired skills or wealth, along with something of a lottery.
Within the community’s gates, however, distinctions are frowned upon
and exclusion is almost out of the question. This communitarian perspec-
tive with regard to universities may be strengthened by the observation
that competitive admissions and high retention rates accompanied in-
creased diversity in the student population. Racial and other diversity
may have drawn attention to the purposeful construction of university
communities, and the maintenance of these communities was enhanced
by the admissions process and the promotion of egalitarian and perma-
nence norms once membership in the community was established.

Once again, a community’s norms or preferences as to what bargains

\textsuperscript{42} There was, however, a time when “tuition postponement” plans, under which
participants could elect to join a pool of classmates that repaid their aggregate loans
based on individuals’ earnings, offered the option of a kind of post-graduation egalita-
rian norm. See generally D. Bruce Johnstone, New Patterns for College
Lending: Income Contingent Loans (1972).
are suitable can easily make most outsiders and applicants worse off. Applicants may prefer the opportunity to prove themselves in the community, at the risk of failure and exclusion, and the society at large might benefit from better matching of applicants and institutions. However, we are about as eager to fail out half of our students as we are to deport millions of illegal aliens.

When serious competition exists among communities, as among universities but perhaps not among countries, there is also a kind of race to the bottom. If all competitors excluded numerous students, an innovator might promise, perhaps implicitly, that it would not do so. Risk-averse, highly qualified applicants might then gravitate toward this innovator. Over time, all schools could be “forced” to promise high retention rates. Put slightly differently, so long as applicants prefer graduation with low grades to exclusion, the equilibrium will likely involve little exclusion. One can imagine an equilibrium in which the most sought-after applicants receive assurances of nonexclusion, so that competitors who promise to retain virtually all students cannot tempt them, while other applicants face substantial risks of exclusion for subpar performance. Applicants might sort themselves in a socially and privately desirable manner in such a regime. Such schemes are not unknown, but the larger point is that the general decline in failure rates in many university programs, including law schools, is not surprising.

On a less dramatic scale, we can say much of the same about grading norms within schools. Harvard Law School may have ceased to exclude many of its students, perhaps because other schools captured some of the best applicants, but it continues to sort them with grades. Yale, on the other hand, appears to compete with less sorting and a more communitarian feel. But once again the egalitarian strategy can only be incomplete. When there is less sorting by grades, there is likely to be more competition through other means for professors’ attention and for their recommendations.

A different, or coordinate, explanation for the evolution of grading and exclusion policies in universities rests on the rising cost of education. As tuitions rose, it may have become more difficult for even the most prestigious schools to convince risk-averse applicants to invest where there was a substantial risk of failure. Upstart schools may have used less competitive grading policies in order to attract excellent applicants. Under this view, current students pay for pre-enrollment screening in a way that is consistent with the absence of any market failure. This explanation is consistent with the continued failure, or at least drop-out, rate in doctoral programs in the arts and sciences, in which tuition is often lower and in

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43 Although countries have something of a captive audience, their potential “customers” are few in number and are choosing among eager countries.

44 For example, a graduate or sports program might promise a “no-cut” arrangement to some applicants.
which fellowships further reduce the investment required by students. Moreover, in this market, universities have cleverly adapted the master's degree to soften exit. This may be something that law and other professional schools could come to emulate. A one-year trial period could serve the purposes of the school, because performance in the trial period would be a better predictor of future performance than would undergraduate grades and other information available at the outset. Students might also prefer a trial period, so as to learn about the likelihood and comparative advantages of various career options while gaining some certification. It is interesting that in the employment market, lawyers, more than recent recipients of doctoral degrees, are familiar with an analogous development. One thing that makes the competition within elite law firms attractive to associates and applicants is the prospect of good jobs with those firms' clients, or with employers who resemble these clients, in the event of exit.

2. Markets More Generally

I have compared countries and universities in order to make the point that although a purely functional approach to certain kinds of gatekeeping suggests testing periods or apprenticeships followed by serious sorting and rejection, a taste for communitarian ideals can push some of this testing to less efficient earlier and later periods, outside the borders of a particular community. There are, of course, other institutions suitable for similar analyses, but it may be more useful to stress that when a community is not captive, competitive pressures are likely to make this taste for communitarianism too expensive to satisfy. Egalitarian pay scales may drive highly prized but "undercompensated" employees elsewhere, egalitarian retention policies may cause customers to move their business to suppliers who raise average performance by excluding subpar employees, and so forth. In contrast, a country has a more captive audience and may satisfy its communitarian sensibilities with a modest decrease in wealth and no fear of collapse or extinction.

As a first example, consider an industry of non-standardized products in which imitation is difficult. Restaurant patrons, for instance, are a group that implicitly invites many new competitors, favors only a few, and imposes serious costs on the many failures. Although most new restaurants shut down in short order, we think of this as socially efficient competition. Indeed, any other means of economic organization for that sort of industry would likely lead to grave corruption, inefficiencies, and injustices. Restaurant patrons would need to be highly organized or centrally controlled, in order to prevent defections, before communitarian sensibilities in favor of protecting "inefficient" restaurants could be indulged.45

45 The analysis is similar if we view the matter from the perspective of restaurant owners who are constrained in their desire to treat their own employees in more egal-
A consideration of the arenas in which bifurcation is found brings this distinction between captive audiences, or markets, and competitive industries into focus. Although my earlier discussion explored the egalitarian norms attached to our conception of citizenship, it is also interesting to think about communities that tolerate bifurcation. Labor unions, for example, sometimes bargain for protections and wage schedules for existing members while agreeing to less generous terms for new hires. The union thus agrees to a bifurcated membership, allowing the employer to discriminate in the way that an employer in an unconstrained competitive market might. The union normally agrees to this arrangement not when its bargaining position is strong, but rather when the threat of job losses and of competition from nonunion competitors is most serious. Bifurcation thus enters the picture just when competition threatens a captive market.

Most enterprises operate in a competitive environment but attempt for profit-maximizing as well as noneconomic reasons to maintain a sense of community within the firm. To the extent that this communitarian aspiration is inconsistent with internal, exclusionary competition, the firm must reach a compromise that takes into account the characteristics of employees, potential employees, and customers. Consider, for example, the puzzling comparison of egalitarian elite law schools and brutal, tournament-style, elite law firms. If law schools appeal to risk-averse or interpersonally sensitive applicants by means of high retention rates and fuzzy grading systems, why is it that law firms deal with the same people, as associates, in a way that is even more competitive and tournament-like than most other employers? Most solutions to this puzzle depend, I think, on the competitive environment of law firms. Egalitarian retention and pay scales would lead to the departures of prized attorneys and clients. If law firms could use no lawyer for more than three years, I suspect that they would be less tournament-like and more like law schools and clerkship arrangements. Longer time horizons require firms to confront the questions of evaluation and retention, and thus create a more competitive environment. It is probably no accident that more egalitarian workplaces for lawyers, including some faculties, civil service settings, and court-

46 See supra Part I.A.

47 For a labor law question arising out of a bifurcated agreement, see Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65 (1991) (holding that the Air Line Pilots Association's settlement with Continental Airlines, including terms for striking union members that were different from those to be offered to non-striking members, was not a breach of the union's duty of fair representation).

48 Similarly, worker-managed firms often choose to admit non-participating employees in times of crisis.
houses, face fewer competitive pressures because they are monopolistic or not-for-profit institutions.

Even the most competitive environments do, however, appear to absorb the costs associated with avoiding certain unsuitable bargains. For example, it is uncommon for law firms and other employers to offer individual employees a choice between departure and demotion. Although law firms have gravitated toward offering “permanent associate” status to some disappointed partnership candidates, they will not tell a fifth-year associate to look for work elsewhere or remain at the firm on the same terms as a second-year associate.\(^4\) While the demoralization costs that fall on this employee might be offset by yet a further reduction in salary, the demoralization that other lawyers avoid by not finding such offers suitable is analogous, if not identical, to the discomfort we collectively avoid by not excluding unsuccessful fifth-year immigrants and first-year law students. It is interesting, however, that such “demotion bargains” are much more common when directed at a large group of employees. Thus, a labor union might agree to a “giveback,” and officers who stay on in a period of military contraction might all receive a demotion. Such group bargains can sometimes avoid the strategic behavior problem that lurks behind individual offers,\(^5\) but a more telling difference is that the equal treatment of a group need not threaten communitarian sensibilities.

Note, once again, the cost of the inevitable avoidance mechanisms when there are communitarian influences on the suitability of bargains. The more the hiring or promoting process is irreversible, the more law firms and other employers will be inclined to hire temporary workers, to make permanent associates rather than additional partners, to contract out work that might have generated greater rewards for existing employees, and to take other steps that weaken community bonds. Law firms, for example, might simply hesitate to make more partners that they could not easily demote. An optimist would say that a firm is a type of community and that within the boundaries of this community, some bargains are customarily found unsuitable in order to promote morale or the communitarian ideal. This ideal may be enjoyed at low cost or may even contribute to morale in a way that is economically profitable. A cynic would say that lawyers, among others, only feign the making of communities, and

\(^4\) Although some firms have recently developed two tiers of partnership, and some schools offer disappointed tenure candidates untenured posts as administrators or lecturers, it would again be surprising if these employees were told either to compete all over again or to accept absolute and significant salary reductions.

\(^5\) An employee who is offered the choice between a layoff and a demotion cannot be sure that the employer is not testing his reservation price. Thus, the fact that individual employees bargain for increases in pay by threatening departure more often than employers bargain for decreases in pay with corresponding threats is probably explained by the asymmetry in information as to credible threats.
that we fool ourselves by drawing arbitrary boundaries and imposing a cultural taboo on bargains that would benefit many among us.

3. Marriage

The discussion to this point has blurred the line between formal and informal constraints on certain anti-communitarian bargains. Nowhere are customary and formal legal influences more intertwined than in the rules pertaining to marriage.

We can best understand the relevance of marriage to the communitarian perspective on the suitability of bargains by thinking of unenforceable marriage contracts. A might wish to marry B only if B promises to limit visits by B's parents to two per year. Courts, however, will neither give A damages nor grant rescission on breach of such an agreement. An economist would say that allowing and enforcing such bargains among consenting adults might lead to more marriages and certainly to more social welfare. Lay people and courts, however, think otherwise. We view marriage, like citizenship, as more than the sum of any and all voluntary bargains. Because we see love and marriage as unconditional, more or less, some bargains are deemed unsuitable. Of course, the availability of divorce in modern law makes the rules about marriage itself somewhat less important. Put differently, although we can explain the availability of divorce in many ways, communitarian sensibilities are consistent with rules making exit from a relationship, or "mini-community," either very easy or very difficult. Still, the law's disinclination to enforce the terms of marriages is an example of an ethic exalting community or relational bonds by rendering contradictory private bargains unsuitable.

Finally, even in eras when legal and cultural constraints regarding enforceable marital bargains had more bite because divorces were more difficult to obtain, the constraints were only partially effective. Parties could, for example, avoid legal constraints by living together outside of marriage. There is little point in dwelling on this example, however, because there are other explanations for the evolution of family law and because I am not prepared to argue that all limits on private bargains and remedies say something about the communitarian perspective in the arrangement in question.

II. UNSUITABLE BARGAINS AND UNCONSTITUTIONAL CONDITIONS

It is tempting to try to connect these unsuitable bargains with the rich,

51 See Saul Levmore, Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage, 58 LAW & CONTEMP. PROBS. 221, 226 (1995);

Whether courts aim to encourage compromise with a love-it-or-leave-it rule or simply refuse to monetize or otherwise become entwined in ongoing spousal relations, there is little doubt that this is an area of law where the expected outcomes are limited to self-help, private negotiation, or the extreme step of dissolution.
difficult literature on unconstitutional conditions. A government can sometimes induce behavior by attaching conditions to benefits it offers, but it can also go too far in the eyes of courts as it expands upon or leverages its power in this manner. Courts will occasionally not permit the government to link together two things that it could otherwise do separately. However, the reach of the doctrine is notoriously difficult to specify.\(^5\) Thus, conditioning immigration or welfare on beneficiaries' agreeing to vote a certain way is surely unacceptable,\(^3\) but legislation that makes immigration or welfare contingent on beneficiaries' submitting to random drug tests may or may not be acceptable.\(^5\) The conventional wisdom is that such linkages enable the government to increase its already formidable bargaining power.\(^5\) We might trust most bargains if

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\(^3\) Cf. Elrod v. Burns, 427 U.S. 347 (1976) (protecting non-civil-service sheriff's employees who were threatened with discharge because they were not affiliated with the Democratic Party); Pickering v. Board of Educ., 391 U.S. 563 (1968) (protecting a public school teacher from being fired for writing a newspaper letter critical of the Board of Education); Speiser v. Randall, 357 U.S. 513 (1958) (invalidating a California statute granting a property tax exemption to veterans on the condition that they swear a loyalty oath).

\(^5\) *Cf.* Baker, *supra* note 52, at 1230 (noting that the Supreme Court has upheld state statutes providing free medical benefits to indigent pregnant women on the condition that they not have an elective abortion); Rosenthal, *supra* note 52, at 1125-26 (explaining that conditions may be upheld if they are relevant to a federal spending program or if they could have been enacted directly pursuant to some other constitutional power); Sullivan, *supra* note 52, at 1437 (discussing Wyman v. James, 400 U.S. 309 (1971), in which the Court rejected the claim that the government infringes on Fourth Amendment rights when it conditions receipt of Aid to Families with Dependent Children on the recipients' submission to warrantless residential searches).

\(^5\) *See* Kreimer, *supra* note 52, at 1296-97 (arguing that constraints may be necessa-
the distribution of political and economic power were equal, but with unequal distributions we are more suspicious. The same might be said about employment relationships; perhaps we have social norms that are opposed to employer-initiated demotions but not to corresponding initiatives proposed by the less well-endowed employee. In the constitutional context, however, we are unimpressed by the identity of the offeror. The idea might be that we accept some baseline of rights and then question bargains that threaten to move a politically weak party below this baseline. Courts might well permit the government to buy or exchange a parcel of land in return for giving the seller free billboard space in which to broadcast his or her ideas, but courts would be most unlikely to allow the government to sell land in return for the buyer’s agreement to cut back on political speech or to refrain from voting. Thus, the government can bargain with its superior endowments, just not in certain ways. This view of the unconstitutional conditions doctrine does not, however, illuminate other bargains that are unsuitable for reasons of community. Although the government can exploit its superior bargaining position in dealing with outsiders who wish to immigrate, constraints prevent it from bifurcating the citizenry. Moreover, the immigration and university admission contexts are so similar that there appears to be something more than governmental power at stake.

An alternative approach is to say that we deny the government the advantage of its “possession” of things we call constitutional rights. The government does not really own a citizen’s right to speak, vote, or be free of intrusive drug tests, nor does it own the right to determine the number of citizens; it simply controls aspects of these things as a kind of intermediary. It therefore should not be able to improve its position by bargaining with them. This approach, however, comes uncomfortably close to the well-known and much-maligned right-privilege distinction, and is unhelpful with regard to other admissions systems.

A very different approach views the doctrine of unconstitutional condi-

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tions as directed against political logrolling. If one legislative minority favored more drug testing and a different minority favored higher welfare payments, the two groups could combine into a majority coalition by linking their two goals. Similarly, one minority may prefer more immigration and another may simply prefer a new source of revenue, so that the two could combine on a plan to subject new immigrants to a special, higher income tax. In some sense, such logrolls are simply bargains that our private law training has taught us to exalt, making it hard to see why restricting the domain of bargains is desirable. However, we can draw analogies between bargains among interest groups or politicians and bargains among thieves. If A specializes in scoping out rich people who have unattended diamonds or children, and B specializes in stealing them, we would hardly expect our legal system to encourage or enforce bargains between A and B that sought to profit from the pooling of their skills. Similarly, the more one thinks that political coalitions externalize costs or overpower other disorganized voters by setting the legislative agenda, the more one will prefer minimizing legislative linkages. Among the many structural means or precommitments available to this end are familiar tools such as the line-item veto, which weakens coalitions by leaving them unsure that their packages will rise or fall as they intend, and the single-subject rule, which discourages alliances by requiring that votes be taken on one subject at a time. The single-subject strategy is of course full of imperfections, but the immediate point remains that the unconstitutional conditions doctrine can be seen as its close relative. At its most subtly optimistic, the unconstitutional conditions doctrine is an attempt by courts to screen multiple-subject bills and reject those that seem the product of certain unfortunate, undemocratic alliances.

The quick description of this last strand of unconstitutional conditions thinking is enough to suggest that it is this thread, or view, that is most closely related to the unsuitability of community-threatening bargains. We might see an immigration bill that admitted more immigrants but had them pay higher taxes as the product of a bargain between domestic manufacturers eager for low-cost labor and domestic interests that expected a portion of the revenue generated by these higher taxes, at the expense of the politically unorganized majority of the citizenry. A court concerned

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68 See Epstein, supra note 52, at 14 (arguing that bargains should not be enforced when they create joint gains for the contracting parties but contemplate the use or threat of coercion or fraud against third parties).


60 It is difficult to draft a rule that permits voting on subjects that are necessarily linked to one another but that removes the ability of legislative partners to solidify the enforcement of their agreements with single-bill logrolling.
about logrolls among organized interests at the expense of silent majorities might work to find such legislation unacceptable. Specifically, it is plausible that courts look for bargains among minority interest groups as well as for bargains that contradict communitarian sensibilities, and that judicial intervention is to be expected when both of these features are present.

This theory about good and bad political bargains is akin to that in antitrust law regarding price discrimination. Some price discrimination is welfare-enhancing, while some reflects and enhances monopoly power. There are arguments for banning all such discrimination, for permitting it all, and for asking courts or other regulators to examine all instances on a case-by-case basis. This antitrust example suggests that the unconstitutional conditions doctrine reflects the notion of examining many political bargains, as reflected in a certain kind of packaging of legislative grants along with constraints, and, in a case-by-case manner, striking some down as undesirable. Some "political discrimination" or nonegalitarian schemes are thus barred. In the immigration context, for example, there is more opportunity for political discrimination and dealmaking because the legislature can attach more conditions to immigration rights. If courts find distinctions that apply only to new citizens or certain visa holders unacceptable, their decisions will indicate, in these terms, the existence of a constraint on suspect political bargains.\footnote{Suspect, that is, under some normative views of desirable democracy.}

A similar concern about bargains and "discrimination" may explain the institutional or cultural disinclination to make universities more internally competitive. A norm requiring universities to treat all departments or students "alike" may save more in suppressing antisocial rent-seeking among constituents within a university than it costs in missed opportunities to raise revenues or encourage various forms of behavior. For example, if all universities were to abide by these norms, they could constrain the cost of failing to charge physics majors more than history students.

I regard this connection that runs through unconstitutional conditions, between the uncertainty about the desirability of certain bargains and instances in which the interests of community appear to preclude certain bargains, as fragile. However, even if it does no more than suggest that part of what makes certain bargains unsuitable is the likelihood that they are the product of undemocratic or otherwise undesirable alliances, it offers a new perspective on various legal and cultural norms.

III. CONTINGENT CONTRACTS AND COMMUNITIES (ANCIENT AND MODERN)

Cultural norms are often more difficult to discern than are legal doctrines. With respect to unsuitable bargains, for example, a judicial decision that invalidates a political bargain in the form of some piece of legis-
lation is more concrete than an inference drawn from the fact that we do not find employers or politicians or universities making certain kinds of offers. Nevertheless, I have hinted that the most interesting kind of community-oriented unsuitability is that which arises or evolves as an unstated norm. The practical side of this claim is that when we puzzle over the apparent failure of parties to reach certain bargains, we might entertain the possibility that some community-reinforcing function is at issue.

Consider, by way of distant example, the biblical story of Joshua and the Gibeonites. Joshua was Moses's successor, and the Book bearing his name chronicles his campaign to wipe out the preexisting residents of what the Bible calls the promised land. After several gory chapters, the residents of a place called Gibeon, having learned of Joshua's early and nearby victories at Jericho and elsewhere, were understandably concerned for their survival. Disguising themselves with tattered clothes and stale food in order to masquerade as travelers from some distant place, the Gibeonites went to Joshua and suggested a treaty or alliance. Joshua had been instructed to wipe out all residents of the promised land, and the Gibeonites surmised that if they could fool him into thinking they were from a distant place, he might regard them as potential allies rather than as competitors for his promised land. Although Joshua was suspicious of their place of origin, their smooth talk and appropriate props caused him to swear as they suggested and to sign on the dotted line. Joshua discovered the Gibeonites' fraud three days later, but regarded his people as bound by his incautious treaty. The most he could do was to condemn the Gibeonites to menial labor.

The modern lawyer has two reactions to this story. The first is puzzlement over Joshua's disinclination to regard the treaty as fraudulently induced and therefore void. However, we too are accustomed to venerable agreements that cannot be voided even when critical facts have been withheld. A marriage is not necessarily voidable simply because one party was dishonest about his or her previous personal or medical history.

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62 Joshua 9:3-27.
63 Id. 9:3-6.
64 Id. 1:3-6.
65 Id. 9:12-15.
66 Id. 9:16-21.
67 Id. 9:22-27.
68 Concerning the treatment of fraud in treaty negotiation, see the Vienna Convention on the Law of Treaties, May 23, 1969, art. 49, 1155 U.N.T.S. 331, 344, which codifies the customary law of agreement between States that if a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the induced State may invoke the fraud as invalidating its consent to be bound by the treaty.
69 The problem is, of course, more interesting in a jurisdiction or era in which divorce is not readily available. For a sampling of such cases, see Keezer on the Law of Marriage and Divorce § 221 (John W. Morland ed., 3d ed. 1946).
A sitting President suddenly discovered to be underage might not be automatically removable, and legislation signed by this President would surely not be void. There is even the case of **Fletcher v. Peck**, in which the Supreme Court held land conveyances by the Georgia legislature, found later to have been corrupt, irreversible. The permanence of some legal rituals is thus a recognizable concept, although we would not expect another legal system, especially one in place thousands of years ago, to have precisely the same stripes of permanence.

Another biblical example of unconditional relationships is the story of Isaac's attempt to bless his first-born son, Esau. While Esau was out preparing as instructed for the big event, Jacob appeared, masquerading as his brother, Esau. Although Isaac was suspicious of the voice he heard, he was fooled by Jacob's woolly costume and proceeded to bless Jacob as his first-born son. Although Isaac later discovered the deception, it could not be undone under the rules of the game. Similarly, Jacob, who toiled seven years for Laban's daughter Rachel, was fraudulently married first to her sister Leah. Again, there was no suggestion that the marriage could have been voided after the fact, no hint that Jacob could force Laban to perform as he knew Jacob had expected, and only the possibility that Jacob's misfortune balanced his earlier gain from the analogous deception of Isaac. Our legal system might have remedied, or at least undone, all three of these transactions, but inasmuch as there are other serious missteps that we would not undo, Joshua's predicament is not entirely foreign to us.

It is, however, a second modern reaction to the Gibeonites' duping of Joshua that is most relevant to the discussion of unsuitable bargains and unconditional relationships. It would seem that Joshua was rash and badly advised. If his legal system did not allow mistake or fraud to undo contracts, his failure to make the treaty explicitly conditional on the truth of the Gibeonites' story seems inept. Similarly, Isaac should have made his blessing conditional on the correct identity of the supplicant before him, and Jacob should have been less trusting of Laban and should have entered into a more specific conditional contract.

One tempting response to this second reaction is that the repeated failure of the leading characters in the Bible to plan ahead suggests that contingency contracts were unknown or unthinkable to early drafters. But that is simply not the case. In the Book of Joshua itself, just a few chap-

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70 Insufficient years would surely be more likely to lead to a presidential candidate's removal from the ballot than from the office itself.
71 10 U.S. (6 Cranch) 87 (1810).
73 Id. 27:3-19.
74 Id. 27:21-23.
75 Id. 27:33.
76 Id. 29:18-28. Bridal veils were apparently quite opaque in those days.
ters before the Gibeonite episode, we find Joshua’s spies investigating Jericho and hiding in the house of Rahab.\textsuperscript{77} She offers them refuge and then a method of escape in return for their promise to spare her and her family during the invasion, and they agree to the deal.\textsuperscript{78} Three times in the course of a few verses the spies remind Rahab that the deal would be off if she reneged, turned them in, or gave away their pending attack.\textsuperscript{79} Joshua’s agents come across as a great deal more sophisticated than their leader, and we see that contingent contracts were indeed available in that world. The proximity of these two stories reveals the character of Joshua as too rash for anyone’s good. Even in the presence of low transaction costs, Joshua appears to have missed a useful bargain.

By thinking about communitarianism and unsuitable bargains, however, we can see Joshua as competent but constrained by the links between contracts and community. The spies’ deal with Rahab of Jericho was merely a one-shot contract that was easily made conditional. On the other hand, ceremonies regarding marriage, international alliances, and dynastic succession are things that cultures or legal systems might regard as permanent and sculpted in a way not amenable to modification by mere bargains. Their permanence is about relationships and communities. Thus, Isaac’s blessing, Jacob’s marriage, and Joshua’s treaty needed, perhaps, to be unconditional. The permanence of these relationships is analogous to our own conceptions of marriage, citizenship, and even membership in a university community. The analogy is limited, however, because our marriages are impermanent and our admissions or gatekeeping rules have more to do with communities’ egalitarian norms than permanence norms.\textsuperscript{80} But the analogy does serve to make the point that a variety of bargains appear unsuitable because they are destructive of community. The unsuitability of bargained-for modifications to arrangements can add value to these arrangements or relationships. Joshua, like Isaac, Jacob, and modern politicians, may have been rash, for he could have delayed the process of acceptance and inclusion in order to investigate the facts, but his story serves as a reminder of the place of unconditional, which is to say unbifurcated, relationships.

**Conclusion**

I have tried to suggest that law and customary norms reflect our intuitions about the value of bonds and community. Certain bargains are unacceptable, or even unimagined, because they are inconsistent with our intuitions about unconditional relationships. At the same time, I have

\textsuperscript{77} Joshua 2:1-7.
\textsuperscript{78} Id. 2:12-14.
\textsuperscript{79} Id. 2:14-20.
\textsuperscript{80} We do not, for instance, disapprove strongly of students who transfer from one university to another.
argued that the fuzzy feelings we often associate with communities and other unconditional relationships should not blind us to the idea that arms' length bargains in both the private and public arenas may be superior to our socially constructed communitarianism. We may get a warm feeling when we do not maximize our profits from the sale of citizenship slots to willing immigrants, but in reality we may be freezing many foreigners in their present surroundings. My central claim is that we are less enamored of bargains and more communitarian than we first think, but a secondary observation is that our communitarian instincts tend to privilege the interest groups we know. In contrast, unfettered bargains often privilege those far away in political space, who may be poorly endowed, so that in a counterintuitive way our communitarian sensibilities are sometimes selfish ones. My aim, however, has been more positive than normative, and in this regard I think it clear that some constraints on bargains support the egalitarian or permanence norms of communities and that, in effect, we decide that some relationships ought to be precommitted to unconditionally.

I have not tried to suggest a theory of the origin of the social norms described here. Egalitarian or permanence norms might be described as offering some functional advantages, but an easy case can be made for the nearly opposite idea that bargains and avoidance mechanisms prove superior in evolutionary terms. My intuition is that there is room for variety on this matter, and that it is even possible that the superior pattern in functional terms is for a social and legal system to adopt one or the other approach. Unconditional relationships and unfettered contracting may offer distinct advantages, but either may be superior to a norm that vacillates between these two positions with no default preference. Highly competitive environments may be unable to support egalitarian norms, but more protected cultures may, but need not, sustain such norms in the form of selected, unconditional relationships. It is the sometimes puzzling presence of these norms that I have explored in suggesting that our legal system may be more communitarian than first appears.