

Washington University Journal of Law & Policy

Immigration

Introduction

Stephen H. Legomsky*

It is a pleasure to write the Introduction to this well-conceived student symposium on what I continue to believe is becoming “*the* civil rights issue of the twenty-first century.”¹ The emergence of immigration and refugee law and policy as a key component of mainstream political debate no longer requires elaboration or the citation of authority. By broadening the subject matter of this symposium to embrace all facets of immigration, the editors have attracted several leading scholars whose present contributions collectively illustrate the wide spectrum of migration issues—from admission to expulsion, from substantive policy to procedure, and from the United States to Africa.

Professors James Hollifield and Daniel Tichenor lead off by examining the age-old question usually lumped under the heading of “migration theory:” Why do people migrate across national boundaries? The corollary question, to which most of their Article is devoted, is what might account for the fluctuations in migration

* John S. Lehmann University Professor, Washington University School of Law.

1. Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 320 (1993) (“In the United States, immigration policy will become *the* civil rights issue of the 21st century.”) (emphasis in original). *See also* Stephen H. Legomsky, *Immigrants, Minorities, and Pluralism: What Kind of Society Do We Really Want?*, 6 WILLAMETTE J. INTERNAT'L L. & DISPUTE RESOLUTION 153, 157–60 (1998) (1999 John C. Paulus Lecture) (renewing prediction and elaborating on why).

levels over time. In *Immigrants, Markets and Rights: The US as an Emerging Migration State*,² the authors argue that the large increases in immigration to the United States since World War II are attributable mainly to policy interventions by all three branches of the U.S. federal government. They contend that variations in the state of the U.S. economy have gradually become less influential than the conventional wisdom commonly assumes.

That alone is a controversial conclusion. Perhaps even more controversial, however, is their characterization of these interventions as largely “rights-based.” That depiction will surely evoke strong reactions from many who have been dismayed by AEDPA,³ IIRIRA,⁴ the 1996 welfare reforms,⁵ California Proposition 187,⁶ and the campaign rhetoric of the last several presidential elections. The “rights-based” origins of these developments are not obvious, but the authors’ larger point concerning the unappreciated influence of U.S. government policy interventions on migration flows is sure to stimulate lively debate.

The Article by Professor Jennifer Chacón, *Citizenship and Family: Revisiting Dred Scott*,⁷ is a plea for far greater congressional attention to the integrity of the family in the formulation of immigration policy. Professor Chacón makes a powerful and innovative point, drawing heavily on *Dred Scott*⁸ and the legacy of slavery. We all know that Dred Scott lost his battle in the United States Supreme Court and that the Court refused to recognize him as a U.S. citizen. Many of us had not known that, despite the Court’s refusal to recognize his citizenship, Dred Scott and his wife succeeded in their subsequent efforts to reunify their family. Their

2. James F. Hollifield & Daniel J. Tichenor, *Immigrants, Markets and Rights: The US as an Emerging Migration State*, 27 WASH. U. J.L. & POL’Y 7 (2008).

3. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (Apr. 24, 1996).

4. Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, Div. C (Sept. 30, 1996).

5. Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (Aug. 22, 1996).

6. The text of Proposition 187 is reproduced in full in *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 787-91 (App. A) (C.D. Calif. 1995).

7. Jennifer M. Chacón, *Citizenship and Family: Revisiting Dred Scott*, 27 WASH. U. J.L. & POL’Y 45 (2008).

8. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

story drives home the message that family unity is not a luxury reserved for citizens. Professor Chacón draws on this story, and on the subsequent constitutional amendments, for lessons on how the United States might plug some of the legal gaps that keep noncitizen families fragmented.

She cites several such gaps. They include the omission of same-sex partnerships from the list of family reunification preferences, the non-recognition of certain other nontraditional kinship relations, the long separation periods of lawful permanent residents from their spouses and young children, and the relative inattention to family equities in removal proceedings.⁹ One hopes Congress will respond.

Professor Jill Family, in *Threats to the Future of the Immigration Class Action*,¹⁰ discusses the strategic benefits of class actions in challenging systemic agency practices on either statutory or constitutional grounds. She then identifies several threats—some old, some new, and some speculative—to the continued availability of class actions in the immigration context. Some of those threats stem from more general statutory restrictions on individual-plaintiff judicial review of agency immigration decisions and one general judicially crafted constitutional restriction—the plenary power doctrine, under which courts accord special deference to Congress when addressing constitutional challenges to immigration legislation. Other identified threats stem from specific statutory restrictions on forms of action that seek to protect the rights of whole classes. Still others include “waivers” of judicial review, which Congress has required of noncitizens as a quid pro quo for certain immigration benefits.

In addition to these broad obstacles, Professor Family examines the trend toward impeding collective judicial review in the specific contexts of class actions and related litigation strategies. At a time when judicial power is under relentless attack in the immigration sphere, this Article is especially topical.

9. *Id.* at 66–68.

10. Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 WASH. U. J.L. & POL'Y 71 (2008).

Professors Timothy Lukes & Mihn Hoang, in *Open and Notorious: Adverse Possession and Immigration Reform*,¹¹ challenge the very notion that undocumented immigrants are present “illegally.” They analogize to the longstanding acceptance of adverse possession in property law. Like occupiers of land who acquire rights to property that was not initially theirs, the authors argue, undocumented immigrants should acquire the right to remain in the United States once various conditions are met.¹² While acknowledging the *initial* illegality of an entry into the United States without inspection, the authors in effect argue that the illegality is not perpetual. Rather than visualize the legalization debate as a tension between illegality and humanitarianism, they start with the premise that the illegality itself dissipates with time and eventually disappears.

How far the rights of property owners vis-à-vis trespassers can be analogized to a nation’s sovereign power to exclude or deport noncitizens is itself a complex question.¹³ But if one accepts the analogy, then certainly the historical and policy rationales for adverse possession are illuminating. After briefly applying the technical elements of adverse possession to the context of undocumented immigrants, the authors argue that, more importantly, both the historical underpinnings of, and the policy justifications for, adverse possession apply with equal force to what they call the “patriation” of undocumented immigrants.¹⁴

In *The Alchemy of Exile: Strengthening a Culture of Human Rights in the Burundian Refugee Camps in Tanzania*,¹⁵ Professor

11. Timothy Lukes & Mihn Hoang, *Open and Notorious: Adverse Possession and Immigration Reform*, 27 WASH. U. J.L. & POL’Y 123 (2008).

12. A similar argument appears in Monica Gomez, *Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States*, 22 GEO. IMMIGRATION L.J. 105 (2007).

13. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 33 (4th ed. 2005).

14. On this subject, terminology is contentious. Proponents normally refer to earned “legalization,” while opponents prefer the term “amnesty” regardless of whether the particular proposal includes the imposition of punishment. *See generally id.* at 607–12. The authors presumably use the word “patriation” instead of both legalization and amnesty because both of the latter terms assume current illegality, a premise the authors reject.

15. Jennifer Moore, *The Alchemy of Exile: Strengthening a Culture of Human Rights in the Burundian Refugee Camps in Tanzania*, 27 WASH. U. J.L. & POL’Y 139 (2008).

Jennifer Moore describes and analyzes the precarious status of the several hundred thousand Burundian refugees in Tanzania. Her Article highlights the physical violence that threatens these refugees' daily existence, coupled with the very real danger of refoulement to Burundi. Although the specifics relate to Burundians in Tanzania, the situation she describes is, sadly, a microcosm of the security issues prevalent in many refugee camps today, particularly in sub-Saharan Africa.

Without minimizing the essential protection roles played by international organizations and private humanitarian agencies, Professor Moore emphasizes the need for the refugees themselves to take steps that will safeguard their human rights. These include participation in educational programs that will enable them to support themselves and their families upon their eventual repatriation. They also include human rights training programs that stress peaceful conflict resolution, erasing sexual exploitation, and access to secondary and post-secondary education. Her accounts of tangible successes from these sorts of human rights training programs offer at least a glimmer of hope for measurable advances in international refugee protection.

And that, perhaps, suggests a fitting ending for this Introduction. In strikingly different ways, the five Articles that comprise this symposium only vindicate my long held view that, in the end, immigration is about civil (or human) rights. To be sure, there will always be debates over the content of those rights. They will be shaped and constrained by competing, legitimate, national interests. In these few Papers, the reservations expressed by Professors Hollifield and Tichenor concerning a "rights-based" theory of immigration contrast with the more robust embrace of rights by Professors Chacón, Family, Lukes and Hoang, and Moore, in the contexts of family reunification, access to court, legalization, and refugee protection, respectively. As it should be, readers are left to draw their own conclusions.