

The University of Chicago Law Review

Volume 80

Winter 2013

Number 1

© 2013 by The University of Chicago

SYMPOSIUM

Immigration Law and Institutional Design

There are few more sprawling and unruly areas of academic inquiry than the law of immigration policy in the United States and around the world. Three reasons readily come to mind for explaining the inherent difficulties in this area.

The first is the sprawling nature of the problem. Immigration into any country comes in a large number of different forms. Unlawful immigrants cross national borders to take low-paying jobs that are still better than those available to them back home. Highly trained workers in great demand are enticed by countries because they possess specialized skills, often in very technical disciplines, that are not easily filled by domestic workers. Family members living across borders often want to reunite, and those who are living in the same country often want to remain together, even though frequently some family members do not have permission to remain. Refugees fleeing repression and civil war seek asylum across borders. States must decide what to do about each of these complex situations. The diversity and intricacy of the problems helps explain why there is so little consensus in the United States—or in nearly any other advanced western democracy for that matter—about who should get to enter, and on what terms.

The second is that there is no consensus as to the general approach to immigration issues. For starters, there is no serious policy analyst who thinks that an open immigration policy is workable in modern times. Whatever the situation a century ago, under that open immigration policy today, tens of millions

of persons could move to the United States simply by walking across a border checkpoint or buying a one-way ticket to any one of dozens of points of entry into the United States. These migrants would put tremendous pressure on the public goods provided by the modern welfare state. Even were they denied citizenship, the burdens on the educational and healthcare system would be great. And were they granted citizenship as of right, it would dramatically reshape the American polity in unpredictable ways. Consequently, neither equilibrium seems stable.

As radical as open borders would be, certainly today no one is in favor of the opposite extreme—a *per se* ban on immigration that could easily result in vast dislocations of its own by depriving the United States of much-needed specialized labor, keeping families apart, and so forth. Yet ruling out the extremes of the policy space does little to tell us which of the many different positions on immigration and naturalization should be adopted. So the purpose of all the articles within this Issue is to search for some viable middle ground. That search in turn raises serious questions of institutional design.

This leads to the third challenge. In all legal settings, policy makers are forced to choose between a set of *ex ante* restrictions that they apply in order to forestall harm and a set of *ex post* sanctions against antisocial behavior. Immigration law is no different. At a basic level, the challenge of system design is to decide whether to concentrate *ex ante* on the entry of immigrants into the United States or instead to try, *ex post*, to control and sort among immigrants after they have arrived. The first approach asks how to structure border control and the application process for new arrivals in order to pick desirable migrants. The second approach asks how to identify these migrants (as well as encourage desirable behavior) after entry, using some combination of civil and criminal sanctions, as well as the threat of apprehension, detention, and ultimately deportation. It is well understood that each of these systems of social control are likely to have unforeseen and complex interactions with the other systems that are in place, which in turn requires delicate judgments on how best to run the immigration system from a holistic and integrated perspective.

The articles that are found in this Issue all address at least one of these issues. What follows are brief summaries, in alphabetical order, of the articles included in this Issue. Taken together, the articles themselves are ample evidence of the durable intractability of the underlying issues.

In her article, *What Makes the Family Special?*, Professor Kerry Abrams notes that family reunification in the United States is a strong pillar of national policy, which accounts for over 80 percent of the immigrants who receive green cards in the United States. She then explains why these rights-based claims might well take priority over a more instrumental immigration policy that targets for admission into the United States those persons with essential economic and technical skills needed by the nation.

Professor Anu Bradford in her article, *Sharing the Risks and Rewards of Economic Migration*, begins with the observation that immigration has consequences not only for the nations who receive new immigrants but also for the nations who lose citizens to emigration, especially after investing extensive national capital in their education. She then asks whether and how it is possible to develop a “migration fund” to make transfer payments that allow both nations to receive some portion of the gain from any private individual’s decision to immigrate. The revenues in that fund could supply unemployment compensation if the immigrant loses employment in his or her new country, or money to cover the cost of the immigrant’s voluntary repatriation to his or her homeland.

Professor Eleanor Brown addresses the difficult question of emigration from developing countries in her article, *Outsourcing Criminal Deportees*. In it, Professor Brown discusses the possibility that the United States could develop a “bid” or “auction” system in which developing countries could seek to secure preferred placement for their own nationals by guaranteeing that they will compensate the United States in the event that one of their nationals commits a crime. One possibility has the nation of origin bear the costs of incarceration in its own country.

Professors Adam Cox and Tom Miles switch focus from admission structures to the institutional design of immigration enforcement. In *Policing Immigration*, they study the growing use of local police as an instrument of federal immigration enforcement. The integration raises critical questions about the role of both delegation and discretion within the immigration bureaucracy. Evaluating empirically the way that discretion has been wielded, Professors Cox and Miles demonstrate that the government’s explicit crime-control rationale cannot explain its new enforcement efforts. Instead, the best predictor for the deployment of resources under the new initiative is the size of a local community’s Hispanic population.

Professor Alina Das in her article, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, addresses yet another aspect of the American enforcement system—the rules for detaining during the removal process immigrants who are thought to pose either a flight risk or a danger to the public at large. In her article, she argues that the expansion of these detention programs over the past twenty years has hurt the ability of the United States to make accurate predictions about those persons who should be kept in the detention and those who should be released. She then asks further whether judicial review should be invoked to guard against constitutional violations during the removal process.

Professor John Eastman in turn writes about the arc of American immigration law in his article, *From Plyer to Arizona: Have the Courts Forgotten about Corfield v Coryell?* Accordingly, he notes that over the course of American history, three positions—open, closed, and controlled borders—have struggled to gain control of the immigration debate. Eastman notes the inconclusive nature of this debate and points out that today's central challenge is to decide as both a policy and an institutional choice how best to formulate the middle ground. What permutation of these three approaches should dominate American law, and which political institutions should be entrusted with the execution of that policy?

In his article, *Free Trade and Free Immigration: Why Domestic Competitive Injury Should Never Influence Government Policy*, Professor Richard Epstein attacks the strong protectionist elements that dominate the current law on the admission of highly skilled immigrants to the United States. Noting that the case for free trade in goods is far easier than the case for free immigration of human beings, he urges that American immigration policy be revised so that it no longer takes into account any protests against permanent or temporary immigration based on the fear that skilled domestic workers will be displaced from their current positions. Those private losses should be disregarded for the simple reason that the economic costs to the nation of a protectionist regime are too high.

Professor Stephen Lee's article, *Screening for Solidarity*, tracks themes addressed by Professor Abrams by examining the tension between an immigration law that seeks to weed out unauthorized workers and a labor law that seeks to offer them the same job protection made available to American citizens and other authorized workers. Professor Lee criticizes efforts to de-

fend this regime as a means to reduce the flow of illegal aliens into the United States but claims that the practice is justified as a way to protect immigrant workers who have developed strong affective bonds in the workplace and in the larger social community.

Professor Hiroshi Motomura addresses the vexing question of what rules should be used to admit temporary workers into the United States in his article, *Designing Temporary Worker Programs*. The design choices in these programs involve the decision on entrance, the duration of the stay, the possibilities for extension, and the rules for securing exit from the United States. In light of the conflicting interests at stake, Professor Motomura advocates a balanced policy that coordinates policies for temporary workers with other social programs in the United States.

In his article, *The Institutional Structure of Immigration Law*, Professor Eric Posner poses a more generalized version of Professor Motomura's question—how best to decide which immigrants to admit into the United States and how to police their behavior once here. Using the economic theory of contracting in cases of asymmetrical information, he examines controversies over the criminalization of immigrant conduct and the general unwillingness of courts to extend the legal protection of the labor and employment laws to undocumented aliens in the United States.

Finally, Professor Alan Sykes's article, *International Cooperation on Migration: Theory and Practice*, also examines the free trade and free immigration issues addressed by Professor Epstein. The touchstone for his argument is the high levels of international cooperation that have led to a reduction of tariffs under first the General Agreement on Tariffs and Trade and today as part of the World Trade Organization (WTO), the coordination of exchange rates under the Bretton Woods system, and the harmonization of intellectual property under the WTO's Trade Related Agreement on Intellectual Property. He then explores the question of why agreements of similar scope have not emerged in labor markets, notwithstanding the potential for substantial gains from trade that might under ideal circumstances be realized in that market.

The articles included in this Issue cover all three topics alluded to above, dealing as they do with the basic design features of immigration law, the relationship of free trade to free immigration, and the design and operation of an immigration law, both as a stand-alone system and as part of the larger institu-

tions of social control. We hope that the symposium articles prove of interest both to the specialists in immigration law and to the many public officials, private practitioners, and academics who are likely to find that immigration issues play an ever-larger role in their own professional work.

Adam B. Cox
Richard A. Epstein
Eric A. Posner