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WHY LIBERAL STATES ACCEPT UNWANTED IMMIGRATION

By CHRISTIAN JOPPKE*

ONE of the more popular watchwords of our time is that the nation-state is in decline—"too big" to solve regional problems, "too small" to solve global problems, as the topographical metaphor goes. A related argument is often made regarding an increasing incapacity of states to control immigration. "Strangers at the gate" was the alarmist cry heard in the wake of 1989 and all that. *The Economist* (March 15, 1991) showed a ramshackle border guardhouse being overrun by a giant bus bursting with all sorts of foreign-looking (and strangely cheerful) characters. Such hyperbole has since disappeared, partially as a result of tightened procedures for asylum across Western states. But there still seems to be a gap between a restrictionist control rhetoric and an expansionist immigration reality. An influential comparative volume on immigration control argues: "[T]he gap between the *goals* of national immigration policy . . . and the actual results of policies in this area (policy *outcomes*) is growing wider in all major industrialized democracies."¹ Why do the developed states of the North Atlantic region accept more immigrants than their generally restrictionist rhetoric and policies intend?

The phenomenon of unwanted immigration reflects the gap between restrictionist policy goals and expansionist outcomes. Unwanted immigration is not actively solicited by states, as in the legal quota immigration of the classic settler nations. Rather, it is accepted passively by states, either for humanitarian reasons and in recognition of individual rights, as in asylum-seeking and family reunification of labor migrants, or because of the states' sheer incapacity to keep migrants out, as in illegal immigration. The gap hypothesis can thus be reformulated as the question, Why do liberal states accept unwanted immigration?²

* This article was first presented at the conference "Effects of Policy on Migration Patterns and the Integration of Immigrants," Humboldt University of Berlin, November 1-2, 1996. My thanks to Rainer Münz for the invitation.

¹ Wayne Cornelius, Philip Martin, and James Hollifield, eds., *Controlling Immigration* (Stanford, Calif.: Stanford University Press, 1994), 3.

² While frequently used in the literature—see, for example, Gary Freeman, "Can Liberal States Control Unwanted Migration?" *Annals of the American Academy of Political and Social Science* 534 *World Politics* 50 (January 1998), 266-93

That states accept unwanted immigration contradicts one of their core prerogatives: the sovereignty over the admission and expulsion of aliens. As Hannah Arendt wrote with an eye to its totalitarian aberrations, "Sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality, and expulsion."³ Does the acceptance of unwanted immigration indicate a decline of sovereignty? A quick "yes," as in David Jacobson's *Rights across Borders*, is premised on a simplistic and static notion of sovereignty, thus denying its historical variability and chronic imperfection.⁴

To answer the question fully, two things should be considered. First, it is important to distinguish between two separate aspects of sovereignty, formal rule-making authority and the empirical capacity to implement rules. The former belongs to international relations theory, in which sovereignty is the defining characteristic of individual states as the units of the international state system;⁵ the latter falls within the domain of political and historical sociology, which has preferred the notions of state strength, capacity, or autonomy to investigate the historically varying embodiments of the modern state.⁶ Gary Freeman has demonstrated that in both aspects there is little evidence for a decline of sovereignty regarding immigration control:⁷ the decision to accept or reject aliens has not been relegated to actors other than the state, and the infrastructural capacity of modern states has not decreased, but increased, over time. Second, whether seen as judicial authority or empirical capacity, sovereignty has rarely been as absolute as conveyed by Arendt's characterization. Internationally, the exigencies of state interdependence have always put the brakes on erratic expulsion or non-admittance practices because hostility against an alien might be

(1994), 17–30; Cornelius, Martin, and Hollifield (fn. 1), 5—the notion of "unwanted" immigration may be criticized on analytical and normative grounds. Analytically, it reifies states as collective individuals with clear-cut preferences. Normatively, it endows a political fighting term with academic respectability. Against such objections, I wish to point out that "unwanted" is used here in a purely descriptive sense, denoting immigration that occurs despite and against explicit state policies. Qualifying illegal immigration in the United States, the first case discussed here, as "unwanted" requires no further elaboration. Family immigration in Europe, the second case, is rendered "unwanted" by uniform zero-immigration policies since the early 1970s.

³ Hannah Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt Brace Jovanovich, 1973), 278.

⁴ David Jacobson, *Rights across Borders* (Baltimore: Johns Hopkins University Press, 1996). See Stephen Krasner, "Westphalia and All That," in Judith Goldstein and Robert Keohane, eds., *Ideas and Foreign Policy* (Ithaca, N.Y.: Cornell University Press, 1993).

⁵ See Janice Thomson, "State Sovereignty in International Relations," *International Studies Quarterly* 39 (1995), 213–33.

⁶ See Peter Evans, Dietrich Rueschemeyer, and Theda Skocpol, eds., *Bringing the State Back In* (New York: Cambridge University Press, 1985).

⁷ Gary Freeman, "The Decline of Sovereignty?" in Christian Joppke, *Challenge to the Nation-State: Immigration in Western Europe and the United States* (New York: Oxford University Press, 1998).

interpreted as hostility against her state. In addition, international law prohibits both expulsion or nonadmittance on grounds of race and the *refoulement* of the victims of political persecution in other states. Not only states, but also individuals, are legal subjects under international law—a novelty of the postwar era—and states are increasingly obliged to respect an emergent “law of migrants.”⁸ Domestically, Western states qua constitutional states are bound by the rule of law, which in important respects protects the rights of persons and not just of citizens.⁹

Various authors have argued that global constraints force states to accept unwanted immigration. Saskia Sassen has identified two such external constraints on state sovereignty: economic globalization and the rise of an international human rights regime.¹⁰ The penetration of peripheral countries by multinational corporations has created the push of an uprooted and mobile labor force seeking entry into the core countries of the world system. In addition, the secondary labor market in the receiving countries provides a powerful pull for immigrants. An emergent international human rights regime protects migrants, independent of their nationality, limiting the discretion of states toward aliens and devaluing national citizenship. Echoing the work of Jacobson, Sassen argues that the basis of state legitimacy has undergone a shift “from an exclusive emphasis on the sovereignty of the people and right to self-determination . . . to rights of individuals regardless of nationality.”¹¹ Taken together, economic and political globalization “reduce[s] the autonomy of the state in immigration policy making,”¹² despite the state’s desperate attempts to renationalize this policy area under the sign of populist restrictionism.

The diagnosis of globally diminished sovereignty indicates that the West has partially created what it seeks to contain—international migration. But it does not answer the question as to why Western states accept unwanted immigrants. First, the space-indifferent logic of globalization cannot explain why some states, such as the immigrant-receiving states of the oil-producing Middle East, are very efficient at

⁸ R. Perruchoud, “The Law of Migrants,” *International Migration* 24 (1986), 699–715.

⁹ Luigi Ferrajoli decimates T. H. Marshall’s identification of individual rights with citizenship rights, from which a new postnational “logic of personhood” is then construed as a departure. Instead, Ferrajoli shows that most individual (legal and social) rights in liberal states had *never* been invested in national citizenship and had *always* revolved around universal personhood. Ferrajoli, *From the Rights of the Citizen to Rights of the Person* (Manuscript, European Forum on Citizenship, European University Institute, Florence, 1995–96). On the logic of personhood, see Yasemin Soysal, *Limits to Citizenship* (Chicago: University of Chicago Press, 1994), chap. 8.

¹⁰ Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996), chap. 3.

¹¹ Jacobson (fn. 4); Sassen (fn. 10), 95.

¹² Sassen (fn. 10), 98.

keeping out, or sending back, unwanted immigrants.¹³ Only liberal states are plagued by the problem of unwanted immigration. Second, globalists operate with a hyperbolic notion of strong sovereignty that never was. In terms of economic transactions, the world of the late nineteenth century was no less global than the world one hundred years later.¹⁴ If the Bonn Republic allowed its guest workers to stay, while Wilhelmine Germany practiced resolute rotation and mass expulsions, a state weakened by economic globalization cannot be the explanation. The state always had to vindicate itself within and against an inherently globalizing capitalism. Third, and related to this, the very reference to economic factors is insufficient to explain why states accept immigrants, wanted or unwanted. Economic globalization explains the mobilization of potential immigrants in the sending societies, as well as the interest of domestic employers in acquiring them, but not their actual acceptance by the receiving states. Unless one subscribes to the questionable view that the state is always a tool of capitalism, the task would be to identify the domestic processes by which, say, expansionist employer interests cancel out the restrictionist interests of the public in specific times and places. But then sovereignty would turn out to be internally, not externally, diminished. Fourth, the international human rights regime is not so strong as to make states fear and tremble. Jack Donnelly characterized it as a “relatively strong promotional regime,” which rests on widely accepted norms and values, but lacks implementation and enforcement powers.¹⁵ Devoid of hard legal powers, the international human rights regime consists of the soft moral power of discourse.¹⁶ This is better than nothing. But globalists have been content with listing formal treaty and convention titles, avoiding the “detailed process-tracing” by which their soft power may become domestically effective.¹⁷ Perhaps there would be little process to trace. For instance, the recent tightening of asylum law and policy across Western states demonstrates that these states have been extraordinarily inventive in circumventing the single strongest norm of the international human rights regime, the non-refoulement obligation.¹⁸

¹³ Myron Weiner, *The Global Migration Crisis* (New York: HarperCollins, 1995), 80–83.

¹⁴ Janice Thomson and Stephen Krasner, “Global Transactions and the Consolidation of Sovereignty,” in Ernst-Otto Czempiel and James Rosenau, eds., *Global Changes and Theoretical Challenges* (Lexington, Mass.: Lexington Books, 1989).

¹⁵ Jack Donnelly, “International Human Rights: A Regime Analysis,” *International Organization* 40, no. 3 (1986).

¹⁶ Soysal (fn. 9).

¹⁷ Martha Finnemore, “Norms, Culture and World Politics: Insights from Sociology’s Institutionalism,” *International Organization* 50, no. 2 (1996), 339.

¹⁸ Christian Joppke, “Asylum and State Sovereignty,” *Comparative Political Studies* 30, no. 3 (1997).

In the following, I propose an alternative explanation. The capacity of states to control immigration has not diminished but increased—as every person landing at Schipohl or Sidney airports without a valid entry visa would painfully notice. But for domestic reasons, liberal states are kept from putting this capacity to use. Not globally limited, but self-limited sovereignty explains why states accept unwanted immigrants.

Gary Freeman identified the political process in liberal democracies as one major element of self-limited sovereignty.¹⁹ In contrast to the globalist diagnosis of vindictive yet ineffective restrictionism in Western states, Freeman starts with an opposing observation that the politics of immigration in liberal democracies is, in fact, “broadly expansionist and inclusive,”²⁰ for which he gives two reasons. First, the benefits of immigration (such as cheap labor or reunited families) are concentrated, while its costs (such as increased social expenses or overpopulation) are diffused. That poses a collective action dilemma, in which the easily organizable beneficiaries of concentrated benefits (such as employers or ethnic groups) will prevail over the difficult-to-organize bearers of diffused costs, that is, the majority population. Borrowing from J. Q. Wilson, Freeman argues that immigration policy in liberal states is “client politics . . . a form of bilateral influence in which small and well-organized groups intensely interested in a policy develop close working relationships with officials responsible for it.”²¹ Taking place out of public view and with little outside interference, the logic of client politics explains the expansiveness of liberal states vis-à-vis immigrants. Second, the universalistic idiom of liberalism prohibits the political elites in liberal states from addressing the ethnic or racial composition of migrant streams. Freeman calls that the “antipopulist norm.” Its most potent expression is the principle of source country universalism in the classic settler nations, which no longer screen potential immigrants for their ethnic or racial fitness. The antipopulist norm will induce elites to seek consensus on immigration policy and to remove the issue from partisan politics.

As I shall argue, a domestic political process under the sway of client politics is one reason why liberal states accept unwanted immigration. But I suggest two modifications to Freeman’s model.

¹⁹ Gary Freeman, “Modes of Immigration Politics in Liberal Democratic States,” *International Migration Review* 29, no. 4 (1995).

²⁰ *Ibid.*, 881.

²¹ *Ibid.*, 886. James Q. Wilson’s notion of client politics is built upon Mancur Olson’s theory of collective action dilemmas, which states that the organized and active interest of small groups tends to prevail over the nonorganized and nonprotected interest of large groups. The premise of this expected outcome is rational, self-interested action on part of the individual. Wilson, ed., *The Politics of Regulation* (New York: Basic Books, 1980); Olson, *The Logic of Collective Action* (Cambridge: Harvard University Press, 1965).

First, Freeman ignores the legal process as a second source of expansiveness toward immigrants in liberal states. In fact, the political process is chronically vulnerable to populist anti-immigrant sentiments—even in the United States, as the Congressional anti-immigrant backlash in the wake of California's Proposition 187 testifies. Judges are generally shielded from such pressures, as they are only obliged to the abstract commands of statutory and constitutional law. The legal process is crucial to explaining why European states continued accepting immigrants despite explicit zero-immigration policies since the early 1970s. In open opposition to a restrictionist executive, which switched from elitist client politics to popular national interest politics, courts invoked statutory and constitutional residence and family rights for immigrants. In Europe, the legal rather than the political process explains why states accept unwanted (family) immigration.

In a second modification to Freeman's model, I suggest that there are important variations in the processing of unwanted immigration not just between the United States and Western Europe but within West European states themselves. Freeman lumps together guest-worker- and postcolonial-based immigration regimes and thus overlooks their different logics. In a guest-worker regime, such as Germany's, the state at one point actively lured (*de facto*) immigrants into the country, and thus is morally constrained not to dispose of them at will once it decides upon a change of course. In a postcolonial regime, such as Britain's, immigration was never actively solicited but passively tolerated for the sake of a secondary goal—the maintenance of empire. Immigration policy is thus by definition a negative control policy against immigration that at no point has been wanted. Differently developed moral obligations toward immigrants in both regimes (among other factors) help explain variations in European states' generosity or firmness toward immigrants.

Discussing the two cases of illegal immigration in the United States and family immigration in Europe,²² I suggest that liberal states are internally, rather than externally, impaired in controlling unwanted immigration. The failure of the United States to control illegal immigra-

²² Comparing state responses to illegal immigration and family immigration may seem odd. Why not compare state responses to only one form of immigration, be it illegal or family-based? Illegal immigration in Western Europe is too recent and protean to warrant a comparison with the U.S., where it has been a recurrent stake of political debate for two decades. Family immigration in the United States is not unwanted immigration, in the sense of occurring against the backdrop of explicit zero-immigration policies. Rather, family reunification in the U.S. is the major principle of selecting wanted new quota-immigrants, having precedence even over the criterion of skills. It would have been possible to compare state responses to mass asylum-seeking, the third major source of unwanted immigration in liberal states, but it raises additional issues of refugee law and politics. I have discussed asylum policy separately; see Joppke (fn. 18).

tion, particularly from Mexico, is due primarily to the logic of client politics and a strong antipopulist norm that feeds upon America's emphatic self-description as a universal "nation of immigrants" and upon the civil rights imperative of strict nondiscrimination. In Europe, legal and moral constraints kept states from pursuing rigorous zero-immigration policies after the closing of new postcolonial and guest-worker immigration in the late 1960s and early 1970s, respectively. Juxtaposing the extreme cases of Germany and Britain, I further suggest that these constraints were most unevenly distributed across Europe, partially reflecting the different logics of guest-worker and postcolonial regimes.

ILLEGAL IMMIGRATION IN THE UNITED STATES

America's enduring incapacity to control illegal immigration is the root cause of its heated immigration debate today. Before investigating this incapacity, it is first necessary to destroy the public myth that the United States has lost control over its borders. This myth, shared by policymakers and academics alike, was powerfully established by the 1981 report of the U.S. Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy in the National Interest*. It stipulated that immigration policy was "out of control," and that the containment of illegal immigration had to be the first step in regaining control.

That perspective, stating a sequence of loss and recovery, is misleading; there had never been a golden age of control. The problem of illegal immigration is a by-product of the attempt to build a unified, national system of immigration control, which no longer exempted Western hemisphere immigration. The three-step effort entailed: (1) stopping (under the pressure of domestic labor unions) the Bracero guest-worker program in 1964, which for more than two decades had provided Western growers with cheap foreign fruit pickers; (2) establishing through the 1965 Immigration Act a ceiling of 120,000 immigrant visas for the Western hemisphere, which had formerly been exempted from numerical restrictions; and (3) applying, in 1976, the Eastern hemisphere individual-country limit of twenty thousand annual visas to Western hemisphere countries, which resulted in Mexico instantly developing a severe visa backlog. Not a loss of control, but the nationalization and standardization of U.S. immigration control is the proper premise for understanding the origins of illegal immigration. Tellingly, apprehension figures—widely used as indicators of the stock and flow of illegal immigrants—rose steeply after the end of Bracero in

1964. They first crossed the one million mark in 1976, at the very moment the first national immigration regime, which applied the same control criteria to Eastern and Western Hemisphere countries, was completed. Without belittling the physical dimension of a two thousand mile land border that divides the First from the Third World, the problem of illegal immigration is quite literally a social construction.

Given this caveat of a control that never was, and bracketing the physical problem of policing an inherently difficult border, the incapacity of the U.S. to stop illegal immigration is due to the logic of client politics, as predicted by Gary Freeman. I will illustrate this, first, through the career of the 1986 Immigration Reform and Control Act (IRCA), and, second, through the failure of the U.S. to establish effective immigration controls in the 1990s.

IRCA carried its restrictionist intention in its name. It turned out, however, to be vastly expansionist, legalizing the status of three million illegal immigrants in the United States, while failing to establish effective measures against the inflow of new illegal immigrants. The influence of two client groups is responsible for this outcome: ethnic and civil rights groups, who argued and mobilized effectively against allegedly discriminatory employer sanctions; and employers, particularly Western growers, who pushed for a guest-worker program that became acceptable only through adopting the features of a second, small amnesty for temporary workers.

In a settler nation, where nation building has coincided with immigration, immigration policy is a highly institutionalized process, in which pro-immigrant interests have a legitimate, entrenched role in policy-making. During the first round of the six-year IRCA saga, which ranks among the more embattled legislations of recent times, the opposition of Hispanic interest groups to the introduction of employer sanctions was key to preventing temporarily any legislation on illegal immigration. As recommended by the Select Commission in 1981, the stick of employer sanctions was to accompany the carrot of amnesty. Unless it was illegal for employers to employ illegal workers—so reckoned the Select Commission—the legacy of the infamous Texas Proviso was not to be beaten.²³ But because Hispanics formed the majority of illegal immigrants in the U. S., any measure against illegal immigrants must have appeared as anti-Hispanic. As Republican senator Alan Simpson of Wyoming, a congressional leader of immigration re-

²³ Inserted in the 1952 Immigration and Nationality Act at the behest of Texan growers, the so-called Texas Proviso stated that employing illegals did not constitute the criminal act of "harboring." Accordingly, it was legal to employ illegal immigrants, although they were still subject to deportation.

form throughout the 1980s and 1990s, put it, "Any reference to immigration reform or control turns out, unfortunately, to be a code word for ethnic discrimination."²⁴ In their opposition to the "anti-Hispanic" employer sanctions, the Hispanic lobby skillfully exploited the fact that even the slightest hint of ethnic or racial discrimination was anathema in the era of civil rights. In fact, in the battle over employer sanctions, Hispanics first emerged as a unified national force capable of blocking legislation detrimental to their perceived interest. Twice, in 1982 and 1983, the Hispanic lobby succeeded in stalling the House version of the Simpson-Mazzoli (immigration reform) bill after it had won comfortable majorities in the Senate. Democratic House majority leader Thomas P. (Tip) O'Neill caustically defended his refusal to hold a vote on the second Simpson-Mazzoli bill in October 1983: "[I]t has to be acceptable to the Hispanic Caucus."²⁵

The Hispanics were joined by civil rights groups, who feared that the introduction of an employment verification system (dubbed a "national ID card") would be detrimental to civil liberties in general, and lead to a "culture of suspicion."²⁶ This perception was shared across the ideological spectrum. A leading conservative columnist branded the introduction of an ID card as "this generation's largest step toward totalitarianism," concluding that "it is better to tolerate the illegal movement of aliens and even criminals than to tolerate the constant surveillance of the free."²⁷ In his refusal to have a vote on the second version of the Simpson-Mazzoli bill, O'Neill struck a similar chord: "Hitler did this to the Jews, you know. He made them wear a dog tag."²⁸ Against such wide opposition, which linked the civil rights imperative of nondiscrimination with traditional American antistatism, the plan of a standardized employment verification scheme had to be dropped. A first severe crack in the control dimension of IRCA had been inflicted.

During the second round of IRCA, compromise-seeking agricultural employers broke their initial alliance with the less compromise-prone ethnic and civic groups, but demanded a guest-worker program as the price for their support of an immigration control law. The growers' insatiable appetite for cheap immigrant labor was equally disliked by Simpson, whose honest but quixotic mission was to craft immigration law and policy in the national interest: "The greed of the growers . . . is

²⁴ *New York Times*, August 16, 1982, A12.

²⁵ *New York Times*, October 5, 1983, 1.

²⁶ Rick Swartz, interview with author, Washington, D.C., March 26, 1994.

²⁷ William Safire, "The Computer Tattoo," *New York Times*, September 9, 1982, A27.

²⁸ Ellis Cose, *A Nation of Strangers* (New York: Morrow, 1992), 167.

insatiable. There is no way they can be satisfied. Their entire function in life is that when the figs are ready, the figs should be harvested and they need four thousand human beings to do that.”²⁹ A third, more drastic version of the Simpson Senate bill, introduced in spring 1985, brought the moderate part of the Hispanic lobby aboard by threatening to drop the amnesty provision altogether. In this “final inning” of the Simpson-Mazzoli saga,³⁰ the joint energy of immigration control advocates and of the ethnic and civil rights lobby focused on neutralizing the growers’ initiative for a guest-worker program. This initiative was spearheaded by the later immigration foe Pete Wilson, then a Republican senator from California, who asked for an annual contingent of 350,000 foreign workers to harvest perishable fruits for up to nine months a year.

Interestingly, the idea of guest workers was liked by no one except the growers, with the European negative experience firmly in mind. The inevitable compromise with the growers thus had to consist of beefing up the civil rights of the workers they asked for. Mediated by liberal Congressman Charles Schumer, the eventual compromise transformed the guest-worker program into a second amnesty. The so-called Schumer proposal, which became a part of IRCA, provided permanent-resident status, and eventually citizenship, for illegal aliens who had worked in American agriculture for at least ninety days from May 1985 through April 1986, while granting the same possibility to “replenishment” workers in the future. “For the first time in American history,” said an exuberant Lawrence Fuchs, “outsiders brought in to difficult, temporary jobs would be given the full Constitutional protections and many of the privileges of insiders.”³¹

Signed into law in early November 1986, the Immigration Reform and Control Act was certainly a “left-center bill,”³² in which the control aspect was barely visible. Putting to an end the Texas proviso, IRCA imposed a sanction scheme on employers who knowingly hired illegal immigrants. But in a concession to Hispanics and employers, sanctions would be abolished if the General Accounting Office were to find discrimination or undue burdens on employers in the future. Most importantly, IRCA included a far-reaching antidiscrimination provision that

²⁹ Lawrence Fuchs, “The Corpse That Would Not Die: The Immigration Reform and Control Act of 1986,” *Revue Européenne des Migrations Internationales* 6, vol. 1 (1990).

³⁰ Aristide Zolberg, 1990. “The Immigration Reform and Control Act of 1986 in Historical Perspective,” in Virginia Yans-McLaughlin, ed., *Immigration Reconsidered* (New York: Oxford University Press, 1990), 326–35.

³¹ Fuchs (fn. 29).

³² Congressman Charles Schumer, quoted in the *New York Times*, October 12, 1984, 17.

added the concept of “alienage” to Title VII of the Civil Rights Act, prohibiting employment discrimination on the basis of citizenship. This amounted to the “only expansion of civil rights protection in the whole Reagan era.”³³

Of IRCA’s dual amnesty-sanctions agenda, only the amnesty component worked as intended. Nearly 1.8 million illegal immigrants applied for legal status under the general legalization program, and 1.3 million under the small amnesty of the Special Agricultural Worker (SAW) program. But IRCA failed to reduce the stock and flow of illegal immigrants. After a temporary drop of apprehension figures in 1987 and 1988—attributable less to the effectiveness of sanctions than to a wait-and-see response among potential immigrants—by 1989 the illegal flow was back to pre-IRCA levels.³⁴ In 1993 the size of the illegal population in the U.S. was estimated to be as high as ten years ago—between three and four million persons.³⁵

Why did IRCA fail to control illegal immigration? A major reason is a toothless sanctions scheme, which resulted from the “odd coalition” pressure by Hispanics and employers.³⁶ From early on, a good-faith clause had been inserted into the Simpson-Mazzoli bill, which released employers from any obligation to check the authenticity of employees’ documents: a document check conducted in good faith constituted an “affirmative defense” that the respective employer had not committed the “knowing hire” misdemeanor.³⁷ In effect, employers were immune from punishment if they filled out and filed away routine I-9 forms that attested to the document check. Because the introduction of a national ID card had been blocked, some twenty-nine documents—including easily faked U.S. birth certificates, so-called breeders—served to satisfy the control requirement. The positive affirmative-defense incentive was complemented by a negative antidiscrimination incentive: demanding a specific ID constituted an “unfair immigration related employment practice.” So employers were better off accepting the document passively offered by the prospective employee. As David Martin put it,

³³ Swartz (fn. 26).

³⁴ See Frank Bean, Barry Edmonston, and Jeffrey Passel, eds., *Undocumented Migration to the United States* (Washington, D.C.: The Urban Institute, 1990).

³⁵ Demetrios Papademetriou, “Illegal Mexican Migration in the United States and U.S. Responses,” *International Migration* 31, nos. 2–3 (1993), 314–48.

³⁶ Another reason for IRCA’s failure is that it does not even touch the problem of visa overstayers, which account for over 60 percent of the undocumented population. David Martin, “The Obstacles to Effective Internal Enforcement of the Immigration Laws in the United States” (Paper presented at the AAAS/GAAC Conference on German-American Migration and Refugee Policies, Cambridge, Mass., March 23–26, 1995), 3.

³⁷ Kitty Calavita, “U.S. Immigration and Policy Responses,” in Cornelius, Martin, and Hollifield (fn. 1), 71.

IRCA's sanctions scheme "tells employers that it is more important to avoid even an appearance of discrimination than it is to wind up employing unauthorized workers."³⁸ The civil rights imperative of nondiscrimination has obviously stood in the way of effective immigration control.

As I would like to argue in a second step, even the anti-immigration movement of the 1990s has been unable to do away with expansive client politics. The inability of political elites to deal effectively with illegal immigration provoked the biggest anti-immigrant backlash in seventy years. In November 1994, Californian voters overwhelmingly passed Proposition 187, dubbed the "Save Our State" (SOS) Initiative, which would bar illegal aliens from most state-provided services, including health care and education. This was no less than a political earthquake. Transmitted by the most conservative Congress in half a century, with both houses falling to Republican control in the same November elections, the aftershock was immediately felt in Washington. A sweeping overhaul not only of illegal, but also of legal immigration seemed to be in the making, turning the clock back before 1965, the legislative opening of America to mass immigration. Two years later, the earthquake is reduced to a tremor. The planned restriction of legal immigration has been shelved, perhaps indefinitely. Until it was signed into law as the Immigration Control and Financial Responsibility Act of 1996, an initially drastic proposal to combat illegal immigration was watered down significantly. Once again, client politics came in the way of "put[ting] the interests of America first."³⁹

It is no accident that the anti-immigrant earthquake had its epicenter in California. Initially rural and peopled by the white farmers' flight from the dust-bowl misery of 1930s Oklahoma, California not only lacks the "nations of immigrants" nostalgia of the East Coast cities, with the Statue of Liberty and other new world symbols, but more importantly, it also is the residence of almost half of the estimated national total of four million illegal immigrants. The Urban Institute calculated that they cost the state close to \$2 billion per year in education, emergency medical services, and incarceration. Against this, the \$732 million in state revenues from sales, property, and income taxes on illegal aliens appear paltry.⁴⁰

³⁸ Martin (fn. 36), 6f.

³⁹ Lamar Smith, Republican representative from Texas, used this phrase to characterize his sweeping House bill that dealt jointly with legal and illegal immigration. "House G. O. P. Moves to Cut Immigration," *New York Times*, June 22, 1995.

⁴⁰ Peter Schuck, "The Meaning of 187," *The American Prospect* 85 (1995).

California epitomizes three problems of contemporary immigration to the U.S.: its extreme regional concentration; the disproportionate costs incurred by some state governments, while the main benefits in terms of federal taxes and social security payments are reaped by the federal government; and the increasing focus on immigration's negative welfare rather than labor-market implications. Accordingly, the leaders of SOS and their staunchest supporter, Republican governor Pete Wilson, went out of their way to stress that Proposition 187 was not about immigration control (which is the prerogative of the federal government), but about a squeezed budget. The budget crunch was real, given that California was just undergoing its most severe economic recession since the first oil crisis, which resulted from the post-cold war restructuring of the U.S. defense industry.

It was clear up front that Proposition 187, which openly defied the Supreme Court ruling in *Plyler v. Doe*,⁴¹ would get stuck in local and federal courts. However, also supported by one-third of Latino and the majority of Asian and black voters, Proposition 187 was essentially a symbolic measure to the political elites who had so recklessly evaded realities and responsibilities for years. And if Congress picked up the ball at the national level (this was the more than symbolic reasoning of the initiative leaders) the Supreme Court might reconsider *Plyler v. Doe* and eventually uphold the restrictionist state law.

Congress indeed picked up the ball without delay. A federal Commission on Immigration Reform immediately proposed drastic changes of existing immigration law and policy. Headed by Barbara Jordan, the former black Congresswoman from Texas, and spiked by liberal pro-immigrant politicians and academics, the commission in its final report in March 1995 recommended that legal immigration should be cut by one-third, the extended family categories should be scrapped altogether, and employers should find it more difficult and costly to hire foreign professionals. Interestingly, the commission did not touch the nation-of-immigrants myth, but stated that "the U.S. has been and should continue to be a nation of immigrants."⁴² But this proposal, supported also by the Clinton administration, went even further than Proposition 187 and Governor Wilson, who had targeted only illegal immigration.

⁴¹ In its *Plyler v. Doe* decision (1982), the Supreme Court ruled that the children of illegal immigrants have the constitutional right to a public school education. *Plyler* indicates that, in addition to a political process under the sway of client politics, the legal process has bolstered the position of illegal immigrants in the U.S. For the lack of space, I cannot discuss this further here, but see Peter Schuck, "The Transformation of Immigration Law," *Columbia Law Review* 84, no. 1 (1984).

⁴² Barbara Jordan, "The Americanization Ideal," *New York Times*, September 11, 1995.

Regarding illegal immigration, the commission already in late 1994 had advocated a national employment verification system, which would compile the names and social security numbers of all citizens and legal aliens authorized to work in the U.S. and make it mandatory for employers to call it up before hiring new workers. The proposal stopped short of introducing a national ID card, which continues to be anathema in the U.S. But, predictably, it was seen by a plethora of ethnic, civil rights, and business organizations as being just that: a national ID card in disguise. The commission's recommendations were incorporated in similar House and Senate bills, introduced by Lamar Smith, a Republican congressman from Texas, and Senator Alan Simpson. Both bills centered around three measures: cut legal immigration by slashing the nonnuclear family categories and reducing skilled immigration; combat illegal immigration by screening the workplace more tightly and fortifying the borders; and, in a windfall from the parallel congressional effort of welfare reform, making illegal and legal aliens ineligible for most public services.

Hardly had the ink dried, when the machine of client politics was set in motion. An unusually broad "Left-Right Coalition on Immigration" included not just the usually odd immigration bedfellows of employers and ethnic and civil rights groups, but also the Home School Network, a Christian fundamentalist group rallying against the antifamily measures to curtail legal immigration; Americans for Tax Reform, who disliked—along with Microsoft, Intel, and the National Association of Manufacturers—to have employers pay a heavy tax on each foreign worker they sponsored; and the National Rifle Association, upset by the employment verification system (If you're going to register people, why not guns? they shouted).⁴³ Richard Day, the chief counsel to the Senate Judiciary Subcommittee, characterized this unusual line-up as "Washington groups" against "the American people," who had asked for "some breathing space" from immigration.⁴⁴ Such is the logic of immigration as client politics.

The first success of the client machine was to split the omnibus bill in two. The machine was helped in this by divisions within the Republican Party. A large section of free-market and family-value Republicans (such as Jack Kemp, William Bennett, and Dick Arney) favored legal immigration. In addition, Republicans from California, where the problem of illegal immigration was most pressing, feared that rifts over

⁴³ "The Strange Politics of Immigration," *New York Times*, December 31, 1995.

⁴⁴ "Unlikely Allies Battle Congress over Anti-Immigration Plan," *New York Times*, October 11, 1995.

legal immigration would improperly delay the impatiently awaited crackdown on illegal immigration. In March 1996, the Senate Judiciary Committee, with the parallel House committee following suit, decided to postpone legislation on legal immigration and to concentrate on illegal immigration first. The “big one” had suddenly shrunk to a smallish immigration tremor. Only a few months earlier, Republican Lamar Smith had boasted that “the question is no longer whether legal immigration should be reformed, but how it should be reformed.”⁴⁵ Now he lay flattened by the client machine. “Congress has listened to lobbyists more than public opinion,” wrote an angry immigration foe.⁴⁶

After cracking the omnibus bill, the effort of the pro-immigration lobby concentrated on smoothening some drastic features of the remaining bill on illegal immigration. One target was the proposal for a mandatory, nationwide, employment verification system, denounced by a libertarian critic as “dialing ‘1-800 Big Brother.’”⁴⁷ An amendment by Senator Edward Kennedy watered down the proposal, which was to be in place within eight years, to a variety of voluntary pilot programs in high-immigration states, to be reviewed by Congress after three years. The weakened proposal meant that without new legislation, there would be no nationwide employment verification system. This was an important step away from the recommendation of the Commission on Immigration Reform, which had called a mandatory national verification system the linchpin of combating illegal immigration. In addition, an amendment by Senator Orrin Hatch, a pro-immigration Republican from Utah, eliminated a hefty increase in fines against employers who knowingly hired illegal aliens—a victory for small business owners.

When signed into law by President Clinton in early October 1996, the “Maginot line against illegal immigration”⁴⁸ looked more like a Swiss cheese, with big holes eaten into it by America’s clients of immigration policy. The drastic Gallegly amendment in the House (named after its sponsor, California Republican Elton Gallegly), which would allow states to bar the children of illegal immigrants from public schools and thus would turn into national law California’s Proposition 187, was dropped from the final bill, also because of a safe presidential veto.

A watered-down employment verification system is unlikely to fix the biggest deficit in illegal immigration control, ineffective workplace

⁴⁵ “Congress Plans Stiff New Curb on Immigration,” *New York Times*, September 25, 1995.

⁴⁶ Roy Beck, “The Pro-Immigration Lobby,” *New York Times*, April 30, 1996.

⁴⁷ “House Panel Approves Plan to Register Immigration Status,” *New York Times*, November 22, 1995.

⁴⁸ Quoted in “Senate Votes Bill to Reduce Influx of Illegal Aliens,” *New York Times*, May 3, 1996.

screening and employer sanctions. The control impetus in the new law thus boils down to stricter border enforcement; doubling the number of border patrol agents to ten thousand by the year 2000: requiring the Immigration and Naturalization Service (INS) to build a fourteen-mile long, ten-foot high, triple-steel fence south of San Diego; and imposing stiff penalties on the flourishing business of smuggling aliens into the U.S. This only reinforces existing policy. As in its various border operations, "Gatekeeper" or "Hold the Line," the Clinton administration had cleverly preempted Republicans from monopolizing the immigration-control discourse during the 1996 Presidential election campaign. It must be conceded that, whatever means it chooses, the United States can perhaps never expect to reduce illegal immigration to zero. As Peter Schuck correctly noted, "A vast, prosperous nation with strong due process and equal protection values and a 2,000-mile border with the Third World cannot eliminate illegal migration; it can only hope to manage it."⁴⁹ Chances are that the Immigration Control and Financial Responsibility Act of 1996 will not be of much help in accomplishing this task.

FAMILY IMMIGRATION IN EUROPE

Whereas America's debate about illegal immigration is alive and evolving every day, Europe's debate about family immigration is historically closed, reflecting a fundamental difference in immigration on both sides of the Atlantic. In the United States, immigration is a recurrent process. Not even the most severe anti-immigrant backlash in the last seventy years has managed to slam the Golden Door, and mass immigration (legal and illegal) continues unabated. By contrast, Europe closed its doors to new immigration over twenty years ago. Postwar immigration to Europe has been a nonrecurrent, historically unique process, with immigrants acquired not by will, but by default.

The family became the site for closing down guest-worker and post-colonial immigration, torn between the opposite vectors of the individual rights of migrants and the right of sovereign states to admit or reject aliens. In this, European family immigration differs from American family immigration, which is defined in the language of quotas, not rights, and has become the chief mechanism of acquiring new wanted immigrants. European states did not actively solicit the belated arrival of the spouses and children, not to mention the extended family, of its labor migrants. They had to accept family immigration, recognizing the

⁴⁹ Schuck (fn. 40), 91.

moral and legal rights of those initially admitted. In this sense, European family immigration is unwanted immigration. As I shall argue, its acceptance can not be understood in terms of client politics. There is no entrenched pro-immigration lobby in Europe comparable to the United States. After the shift to zero-immigration policies from the late 1960s to early 1970s, the European politics of immigration became national interest politics. States now uniformly disregarded their single strongest client, employers interested in cheap foreign labor, and acted on behalf of collective goals such as social integration or the integrity of nationhood. The immigration that still occurred was as of right or morally tolerated immigration. It pitted a state that would rather not see it happen against the immigrant who only sought what liberal states cannot deny—family unity.

In handling family immigration, European states accepted a language of primary and secondary immigration that is unknown in the United States. Primary immigration is actively recruited, as in a guest-worker regime, or passively tolerated in the absence of restrictions, as in a postcolonial regime. Secondary immigration occurs after the recruitment stop or the introduction of restrictions, in recognition of the family rights of primary immigrants. In each European state there is a historically particular core of primary immigrants, such as South Asians or Afro-Caribbeans in Great Britain or Turks in Germany, for whom a specific, elaborate discourse of rights and moral obligations evolves. This approach has allowed European states to act humanely and generously toward those once admitted, while slamming the door to everyone else. In this sense, the principle of source-country universalism and the norm of not addressing the ethnic composition of migrant streams, which Freeman saw universally established across liberal states, has not established itself in Europe.⁵⁰ Primary immigrants were simply subjected to the exigencies of nation building as usual; they did not transform Europe into self-conscious nations of immigrants. Thus, toward the outer layers of secondary (or even tertiary) immigration, the sense of moral obligation and the family rights of migrants had to become successively weaker. In the absence of such gradations, primary immigration would have forever spun off new immigration, and nonrecurrent immigration would have turned into recurrent immigration, U.S. style.

⁵⁰ A second example for the absence of source-country universalism in European immigration policy is the phenomenon of ethnic-priority immigration, such as the "patrials" in Britain or the "Aussiedler" (ethnic German resettlers) in Germany, for which there is no parallel in the U.S.

GENEROUS IN GERMANY

A tiresome tendency in scholarly writings about German immigration is to chastise the state for its “not a country of immigration” philosophy, which so patently denies the country’s immigration reality.⁵¹ No immigration reality could ever contradict the state’s philosophy, because it is a normative statement reflecting the Bonn Republic’s self-description as a homeland of the subjugated German diaspora in communist Eastern Europe.⁵² In fact, the not-a-country-of-immigration formula was introduced when four million foreigners already resided in (West) Germany and showed no signs of leaving. Only against this backdrop does the philosophy make any sense at all. Further complicated by its unresolved national question, Germany articulated, only more extremely, what all European countries were—not countries of immigration.

A second shortcoming of scholarly writings on German immigration is their fixation on the political process, drawing a grim picture of de facto immigrants as hapless victims of a repressive state. That perspective overlooks the pivotal importance of the legal process, which allowed guest workers to turn into settlers with permanent-resident rights and even to grow in numbers through constitutionally protected family immigration.

To be sure, the invocation of constitutional rights for guest workers occurred against the backdrop of an immigration law that enshrined unfettered executive discretion and conceded no rights whatsoever to the foreigner. Paragraph 2(1) of the Foreigner Law of 1965 stipulates: “A residence permit may be issued if the presence of the foreigner does not harm the interests of the Federal Republic.” Residence permits were issued for a year, on a renewable basis, but initially there were no provisions for more than temporary stays on German territory. Before the so-called “permanence regulation” (*Aufenthaltsverfestigung*) of 1978, long-term residence did not stabilize, but jeopardized the foreigner’s status because it contradicted the official “no-immigration” policy. Following the logic of a guest-worker regime, which conceived of the foreigner as a return-oriented, isolated carrier of labor power, devoid of family ties, no rules originally provided for family reunification. Detailed rules for reuniting foreign families were not devised before 1981, and their thrust was to close a major source of unwanted immigration after the recruitment stop.

⁵¹ See Thomas Faist, “How to Define a Foreigner?” *West European Politics* 17, no. 2 (1994).

⁵² Kay Hailbronner, “Ausländerrecht und Verfassung,” *Neue Juristische Wochenschrift* 36, no. 38 (1983), 2113.

For twenty-five years, the political branches of government managed to escape their responsibility to adjust an archaic Foreigner Law to the new reality of de facto immigration and to replace the rule by administrative decree by the proper rule of law. An activist judiciary stepped into this vacuum, aggressively and expansively interpreting and defending the rights of foreigners. They could do so on the basis of a constitution that drew two fundamental lessons from recent German history: first, to subordinate state power to the rights of individuals; and second, to grant the most fundamental of these rights without respect to nationality. The first seven articles of the Basic Law protect universal human rights, independent of national citizenship. Article 1 makes that point emphatically: "The dignity of the individual is untouchable." The article also introduces the principle of self-limited sovereignty, obliging the state to "respect" and "protect" the dignity of the individual. In a conscious departure from Germany's "strong" state tradition, the German Basic Law puts the individual first, the state second; it is conceived in the spirit of limiting state sovereignty by individual rights.

On these grounds, a series of Constitutional Court rules obliterated the official "not-a-country-of-immigration policy."⁵³ In the so-called Arab case of 1973, the court invalidated an immediate deportation order against two Palestinians accused of harboring contacts with terrorist groups, arguing that the plaintiffs had constitutional liberty rights that outweighed the public interest in their immediate removal. In the so-called Indian case of 1978, the court repealed a lower court rule that had affirmed the nonrenewal of a residence permit to an Indian who had lived in Germany continuously since 1961. Instead, the court argued that the previous routine renewal of residence permits had created a constitutionally protected "reliance interest" (*Vertrauensschutz*) on part of the plaintiff in continued residence. Against this reliance interest, the official no-immigration policy was moot: "For a rejection of the residence permit renewal it is not sufficient to point to the general maxim that the Federal Republic is no country of immigration."⁵⁴

Once the residence rights of guest workers were secured, the Constitutional Court turned to the issue of family reunification—a much trickier terrain. It did not involve the rights of established residents but the initial granting of new residence permits. Since the recruitment stop of 1973, the chain migration of families of guest workers was (next to asylum) one of the two major avenues of continuing migration flows

⁵³ See Gerald L. Neuman, "Immigration and Judicial Review in the Federal Republic of Germany," *New York University Journal of International Law* 23 (1990).

⁵⁴ *Decision of 26 September 1978* (1 BvR 525/77), 186.

to Germany, in patent contradiction to the official no-immigration policy.⁵⁵ Since December 1981, the federal government has recommended that the responsible states severely restrict the entry of foreign spouses of second-generation guest workers. Such family reunification was to be contingent upon an eight-year residence minimum of the resident spouse and a postmarriage waiting period of one year. By contrast, no restrictions were imposed on first-generation guest workers. The federal government defended this differential policy before the Constitutional Court on moral grounds: "Because of its recruitment of foreign workers the Federal Republic has accepted a special responsibility towards the recruited; but it has not obliged itself to accept a generation-spanning immigration of family members."⁵⁶ Typical of German federalism, the states (*Länder*) implemented the federal recommendations on second-generation marriage immigration highly unevenly. Liberal Hesse lowered the residence requirement to five years; restrictionist Bavaria increased the waiting period for spouses to three years; and hyper-restrictionist Baden-Württemberg broke the existing elite consensus of not limiting first-generation marriage immigration by extending the three-year waiting period from second- to first-generation guest workers.

In the Turkish and Yugoslav case of 1987, the Constitutional Court stopped short of recognizing a constitutional right of family reunification, according to Article 6 of the Basic Law.⁵⁷ In a complicated decision that betrayed a reluctance to restrict the state's capacity to control a major source of unwanted immigration, the court held that Article 6 (which protects the integrity of the family) did not imply a constitutional right of entry for nonresident spouses. But according to the principle of proportionality, nonresident family members still possessed family rights under Article 6 that foreigner law and policy had to respect.⁵⁸ In this light, the court upheld the challenged eight-year residence requirement and the one-year waiting rule, arguing that these measures were necessary to guarantee the social and economic integration of the resident

⁵⁵ Between 1973 and 1980, the number of foreign workers in West Germany fell from 2.595 million to 2.070 million; during the same period, the absolute number of foreigners increased from 3.966 million to 4.450 million. Ulrich Herbert, *A History of Foreign Labor in Germany, 1880-1980* (Ann Arbor: University of Michigan Press, 1990), 188. Because the number of asylum seekers was small before 1980, only family reunification can account for the increase.

⁵⁶ Quoted in *Decision of 12 May 1987* (2 BvR 1226/83, 101, 313/84), p.33f.

⁵⁷ The German Constitutional Court thus did not go as far as the French Conseil d'Etat, which (in effect) recognized a constitutional right of family reunification in a famous 1978 decision.

⁵⁸ The Court thus argued that even aliens not residing in Germany had rights under the Constitution. As Neuman (fn. 53) notes, this went far beyond the most generous rulings of the U.S. Supreme Court regarding the rights of aliens.

spouse and to prevent sham marriages, respectively. But the court struck down Bavaria and Baden-Württemberg's three-year waiting rule as disproportionate and destructive of young marriages. Interestingly, the court criticized especially Baden-Württemberg's extension of the three-year waiting rule to the first generation, because it violated the Federal Republic's "special responsibility toward the recruited guest-workers."

The German political process regarding de facto immigration only caught up with positions that had been long established by the legal process. Its development may be read as the successive canceling out of drastic solutions, culminating in the liberalized Foreigner Law of 1990. This liberalization rested not just on a negative recognition of legal constraints but on an emergent moral consensus among the political elites to cope humanely with the consequences of the guest-worker recruitment. That consensus became forged and reinforced in three critical moments when drastic solutions emerged as competitors to a moderate and centrist foreigner policy.

Immediately after the recruitment stop of November 1973, the SPD-led federal government declared that "no legally employed foreign worker . . . shall be forced to return home," while rejecting the proposal to introduce a rotation system.⁵⁹ This set the terms for the strictly voluntary schemes of inducing the return migration especially of unemployed guest workers, schemes that were copied from France without much success in the early 1980s. A right-wing proposal for a "reasonable and humanitarian rotation system" emerged during the first society-wide guest worker debate in the early 1980s, allowing the minister of the interior to make the moral obligation toward the guest workers explicit: "[The foreign workers] have not come here spontaneously. Instead, we have brought them into this country since 1955 . . . Even if they are without jobs, we have obligations toward them."⁶⁰ A third critical moment was the conservative crusade against the family immigration of children above six years, fought by the hard-line interior minister under the new Kohl government, Friedrich Zimmermann (CSU). Aside from being constitutionally questionable, this drastic proposal crossed the threshold of the morally acceptable. "No comparable country in Europe or North America," said the outraged Commissioner for Foreigner Affairs Lieselotte Funcke (FDP), "would condone such a family-hostile proposition." Pointing at the moral impossibility

⁵⁹ *Frankfurter Allgemeine Zeitung*, November 9, 1974.

⁶⁰ Gerhard Baum (FDP), quoted in *Das Parlament* 32, no. 9 (1982).

of implementing this measure, her colleague Burkhart Hirsch (FDP) envisioned "with horror what would happen here if an older child who overstayed a visit was forcibly separated from its parents and thrown out of the country." An unusual veto by Hans-Dietrich Genscher, FDP chief and foreign minister for whom opposition to the interior minister's illiberal foreigner policy became a litmus test of party identity within the new coalition government, buried the proposal.

The new Foreigner Law of 1990 only put into law what administrative and constitutional court rules had long established. The not-a-country-of-immigration formula is nowhere to be found in its text. The objective of encouraging the return migration of foreigners has been dropped. The new law is conceived in the spirit of replacing executive discretion by individual rights to be held against the executive. Foreigners now have statutory (in addition to constitutional) residence and family rights. In several respects, the law went even beyond existing administrative and legal practice. The one-year waiting period for second-generation marriages, okayed by the Constitutional Court in 1987, was abolished. In addition, spouses and children were granted their own residence rights, independent of the head of family. Finally, second- or third-generation foreigners who had temporarily returned home were given the right to return. These measures indicate the independent workings of moral obligations, not just of legal constraints. The new Foreigner Law sticks to the old premise of wrapping up a historically unique immigration episode, while perhaps containing as much liberalization as possible within the inherently limited framework of "foreigner policy."

FIRM IN BRITAIN

In Britain also, family immigration has been subject to the two conflicting imperatives of controls and rights: closing down a historically unique immigration episode, while respecting the family rights of immigrants. But whereas in the German case the rights came to predominate over the controls imperative, in the British case the opposite happened.⁶¹ There are at least two reasons for this outcome: the peculiar character of postcolonial immigration and the absence of a written constitution protecting individual rights.

Postcolonial immigration has been, from the start, unwanted immigration. Accordingly, its political processing can at no point be under-

⁶¹This is recognized in the literature as the "exceptional" efficacy of British immigration control. Gary Freeman even argues: "The British experience demonstrates that it is possible to limit unwanted immigration." Freeman, 1994b. "Britain, the Deviant Case," in Cornelius, Martin, and Hollifield (fn. 1), 297.

stood in terms of client politics,⁶² as expressed in the widely noted (and criticized) absence of economic considerations in British immigration policy.⁶³ In contrast to Germany or France, the first oil crisis marks no turning point in Britain. Primary New Commonwealth immigration was effectively halted before 1973 for entirely political reasons. If Britain had acquired its colonial empire in a fit of absentmindedness, its initial approach to postcolonial immigration was strikingly similar. This immigration was at best passively tolerated by elites who stuck too long to the illusion of an empire in which the sun never sets. Until the passing of the first Commonwealth Immigrants Act in 1962, some 800 million subjects of the Crown, inhabiting one-fourth of the earth's landmass, had the right of entry and settlement in Britain. Only a hostile public, aggrieved by the most dramatic secular decline that a modern nation had ever gone through, shook the elites out of their complacency. As if to compensate for past inattention, successive Tory and Labour governments alike have since stuck to the stern imperative that New Commonwealth immigration had to be stopped. A sense of moral obligation, even guilt, has not been absent among British elites, but it has been channeled into the buildup of an elaborate race relations regime. British immigration policy has never known an active phase of recruitment; it has been from the start a negative control policy to keep immigrants out. Directed against unwanted immigration tout court, British immigration policy has been only weakly affected by moral considerations.

Nor has it been mellowed by legal-constitutional constraints, which is the second reason why the controls prevailed over the rights imperative in British family immigration policy. In Britain, which lacks a written constitution and the principle of legal review, there has been little blockading of the political branches of government by recalcitrant courts. Sovereignty is firmly and unequivocally invested in Parliament, which knows no constitutional limits to its lawmaking powers. In immigration policy, this institutional arrangement entails a dualism of extreme legislative openness and executive closure, which, in the absence of a client machine, is detrimental to the interests of immigrants. Parliamentary openness in the formulation of immigration policy keeps lawmakers within the confines of a pervasively restrictionist public opinion. Once a policy has been decided upon, there is executive closure in its implementation, with the Home Office firmly and uncontestedly

⁶² This processing contrasts the German guest-worker policy, which followed the logic of client politics before the oil crisis and the recruitment stop of 1973.

⁶³ See, for example, Sarah Spencer, ed., *Strangers and Citizens* (London: Rivers Oram Press, 1994).

in charge. In the orthodox view, Britain's "political constitution"⁶⁴ is good for democracy because it lets elected officials make decisions that, in other systems, unelected judges make. But in practice it entails executive, rather than parliamentary sovereignty, and it leaves minorities, with or without citizenship, extremely vulnerable to the whims of the majority.

The predominance of the controls over the rights imperative in British family immigration policy can be demonstrated along the fate of Section 1(5) of the 1971 Immigration Act—until its abolishment in 1988, the only family right in British immigration law. It secured for all New Commonwealth men legally settled in Britain before 1973 the right to be joined by their nuclear family from abroad, without any state interference.⁶⁵ Section 1(5) thus expressed Britain's special moral and legal obligations toward its primary immigrants. However, when it came into the way of controlling secondary immigration, Section 1(5) was simply abolished by a simple majority vote in Parliament.

The story of the slashing of Section 1(5) is a most extraordinary story because it demonstrates that for the sake of firm immigration controls the British elites have allowed the family rights not just of immigrants, but of all British citizens, to sink below the European standard. It all started with the campaign by the incoming Thatcher government against admitting the foreign husbands and fiancés of female immigrants to Britain. Such asymmetrical treatment of men and women is only a more drastic example of an immigration law shot through with sex discrimination, operating on the premise that the wife should be where the husband as head of the family was. But most importantly, husbands and fiancés were male immigrants, thus blurring the line between secondary and primary immigration. Husbands were perceived as stealth primary immigrants, crowding a strained labor market. Accordingly, the Minister of State defended his new immigration rules of 1979–80, which barred foreign husbands and fiancés from settlement in Britain: "We have a particular aim—to cut back on primary male immigration."⁶⁶

When the European Commission on Human Rights accepted for review the cases of three British immigrant wives harmed by the husband rule, the British government responded with a prophylactic rule

⁶⁴J. A. G. Griffith, "The Political Constitution," *The Modern Law Review* 42, no. 1 (1979).

⁶⁵Section 1(5) of the 1971 Immigration Act stipulated: "The rules shall be so framed that Commonwealth citizens settled in the United Kingdom at the coming into force of this Act and their wives and children are not, by virtue of anything in the rules, any less free to come into and go from the United Kingdom than if this Act had not been passed."

⁶⁶Quoted in P. Thornberry, "Seven Years On: East African Asians, Immigration Rules and Human Rights," *Liverpool Law Review* 2 (1980), 146.

change in 1982–83. Whereas (in racially discriminatory intent) the old rules exempted from the husbands ban only (white) “paternal” women either born or ancestrally related to the U.K., the new rules allowed all female British citizens, irrespective of birth or ancestry, to be joined by their foreign husbands and fiancés. This could not be the end of the matter, because settled, noncitizen immigrant women still remained separated from their husbands. However, there has never been a concession in British immigration policy that was not offset by a new restriction elsewhere. Already the old immigration rules contained a number of “safeguards” applied to those paternal women who were exempted from the husband ban: most importantly, they and their spouses had to prove that the “primary purpose” of their marriage was not immigration. In the 1982–83 rules, these safeguards were tightened through shifting the burden of proof from the state to the applicant. Only now, the primary-purpose rule could unfold its venomous powers, providing the government with the perfect tool to close the loophole that had opened up at the sex equalization front.

Predictably, the European Court of Human Rights, in its *Abdulaziz, Cabales and Balkandali* landmark decision of May 1985, found that the 1980 immigration rules were discriminatory on the ground of sex. The Strasbourg rule forced the government to remove the last trace of sex discrimination from its immigration rules. As Home Minister Leon Brittan reckoned in the House of Commons, the government faced two sets of choices.⁶⁷ The first was between “narrowing” or “widening” the husbands rule: to prevent settled immigrant men from bringing in their spouses, or to permit settled immigrant wives to bring in theirs. Narrowing would imply dishonoring the government commitment to the family rights of settled immigrant men, enshrined in Section 1(5). Accordingly, the government opted for widening. But in that case, the additional annual intake of an estimated two thousand more immigrant husbands had to be offset by new safeguards. That decision predetermined the government’s second choice between “abandoning” or “extending” its marriage tests. To drop the tests currently applied to husbands only “would be to go back on our firm commitment to strict immigration control.” But if the tests were to be kept, the mandate of the Strasbourg rule was to apply them equally to men and women. As the home minister concluded his sharp syllogistic exercise, “[W]e cannot expect the European Court to endorse . . . the continuation of giving wives preferential treatment by not making them subject to

⁶⁷*Parliamentary Debates, Commons*, vol. 83 (1985), cols. 893–96.

the same requirements." While a Labour front-bencher railed against the government's "spiteful and vindictive course,"⁶⁸ one must admire the cleverness of turning a European court indictment into a means of even firmer immigration control.

As sharp as it appeared, the home minister's syllogism was faulty. The commitment to Section 1(5), which motivated his choice to widen the husband rule, was destroyed by his second choice to extend the safeguards. As long as Section 1(5) was in force, the marriage tests, including the primary-purpose rule, could not be used on immigrant men who had settled in Britain before 1973. If safeguards were to be maintained, the logic of the Strasbourg rule implied the removal of this privilege. Accordingly, even the one bit of generosity in the government's response to the Strasbourg rule was a chimera.

Because Section 1(5), which finally stood in the way of full sex equality in British policy on secondary immigration, had the status of a statutory right, it could be removed only through a change of statutory law. The 1988 Immigration Act successfully removed Section 1(5) in the first change of immigration law in seventeen years. Marked by little noise or protestation, the repeal of Section 1(5) was, nonetheless, an extraordinary event; it had been the only family right that had existed in British immigration law. Only under massive pressure, including from the House of Lords, had it been elevated from discretionary rule to statutory law in the 1971 Immigration Act. Successive governments had reaffirmed their commitment to honor this right.

But all rights are relative in British law, as the painless removal of Section 1(5) by a simple parliamentary majority epitomizes. In dropping it, the government also abandoned the one moral commitment it had undertaken vis-à-vis its primary New Commonwealth immigrants.⁶⁹ Now there was no limit to the sway of firm immigration control, affecting even ordinary Britons. Section 1(5) had so far protected white patril men from the excruciating marriage tests. Now they were subject to them too. The immigration tail came to beat the vast nonimmigrant rest.

CONCLUSION

"Can liberal states control unwanted migration", Gary Freeman recently asked.⁷⁰ His answer was: yes, but, it depends—yes, because

⁶⁸ Gerald Kaufman, quoted in *ibid.*, col. 901.

⁶⁹ Interestingly, Minister of State Timothy Renton sought to soften this break of commitment by pointing out that those who now profited from Section 1(5) had been infants in 1971: "Those who are receiving the benefit of section 1(5) are not those who were adult males at the time of the 1971 Act but the young children who had then just been born." Renton, quoted in *Ibid.*, col. 856.

⁷⁰ Freeman (*fn.* 2).

modern states dispose of considerable infrastructural powers that have not diminished, but increased over time; it depends, because capacity varies across states and across the type of migration subject to control. Such attention to context and detail precludes a quick and generic answer of the yes-or-no variety.

Turning Freeman's 1994 question around, this article explored why, in the cases that liberal states accept unwanted immigration, they actually do so. That liberal states do so on a large scale has been acknowledged in Cornelius, Martin, and Hollifield's "gap hypothesis," which identifies a growing gap between restrictionist policy intent and an expansionist immigration reality. A variety of globalist analyses explained this gap in reference to an externally conditioned decline of sovereignty. These analyses offered generic views of mobilized immigrants and paralyzed states, without identifying the actual mechanisms that make certain states accept certain types of unwanted immigration.

Against the diagnosis of globally limited sovereignty, this article suggested an alternative diagnosis of self-limited sovereignty, starting with Freeman's observation that the dynamics of interest group politics ("client politics") in liberal states makes them inherently expansionist vis-à-vis immigrants. But the political process is only one pillar of self-limited sovereignty, one that is fully entrenched only in a classic settler regime, like the United States. European guest-worker regimes had client politics only until the oil crisis, and a pure postcolonial regime (like Britain) never had it. Thus, other factors must be responsible if such states accept unwanted immigration. In European states, legal constraints in combination with moral obligations toward historically particular immigrant populations—not the logic of client politics—account for continuing (family) immigration despite general zero-immigration policies. But these legal and moral constraints are highly unevenly distributed across European states. Germany, with both a strong constitution celebrating human rights and the moral burdens of a negative history, is an extreme case of self-limited sovereignty, making it one of the most expansive immigrant-receiving countries in the world. Britain has managed to contain unwanted immigration more effectively than any other country in the Western world, but at the cost of trampling on the family rights of her own citizens.

At the risk of stating a tautology, accepting unwanted immigration is inherent in the liberalness of liberal states. Under the hegemony of the United States, liberalism has become the dominant Western idiom in

the postwar period,⁷¹ indicating a respect for universal human rights and the rule of law. At the same time, nationalist semantics were delegitimized because of their racist aberrations under Nazism. Only from their firm grounding in the key states of the West, could the liberal principles of human rights and the rule of law triumph as “global discourse” around the world. It is therefore strange that in globalist analysis these liberal principles now reappear as *external* constraints on Western states that are reduced to the nationalist, sovereignty-clinching caricatures they perhaps had been hundred years earlier, in the high noon of imperialism. Among the global factors either absent or ineffective in this discussion of the political and legal processing of unwanted immigration has been the “international human rights regime,” perhaps the single most inflated construction in recent social science discourse. Of course, its absence may be the flaw of this analysis. But that has to be demonstrated.

⁷¹ Building on John Ruggie’s analysis of “embedded liberalism,” James Hollifield has suggested that domestic, “rights-based liberalism” has undermined effective immigration controls in Western states. This is similar to the argument presented here. Hollifield, “Migration and International Relations,” *International Migration Review* 26, no. 2 (1992).