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Introduction

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SYMPOSIUM: *IMMIGRATION: TO ADMIT OR DENY?*

INTRODUCTION

SUSAN JOHANNE ADAMS*

We Americans tell our nation's extraordinary story with no small amount of pride—the Patriots' pluck, the rhetorical grace and boldness of the *Declaration of Independence*, and the foresight and wisdom of the Framers. When Jefferson was composing the *Declaration of Independence*, the colonies looked West, at once terrified by its vastness and danger, and eager to populate it. In fact, the *Declaration* itself included among its litany of King George's "repeated injuries and usurpations" that he "has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither."

For many decades post-Independence, we proceeded enthusiastically with the "population of these States," powered by the explicit charge to Congress to "establish an uniform Rule of Naturalization," which secured an important right of the new sovereign nation.¹ But American immigration was to become messy as early as 1798 with the infamous Alien and Sedition Laws.² When, however, in the late Nineteenth Century, Congress decided to single out for harsh treatment the Chinese laborers whom we had so eagerly sought to mine gold and build railroads, the reach of Congress' immigration power came under judicial scrutiny. In addressing the Chinese Exclusion Acts, the United States Supreme Court cobbled together enumerated and extra-constitutional powers, enunciating Congress' plenary power over a broad range of immigration issues and reserving to the courts a very limited role.³ The Eighteenth, Nineteenth, and Twentieth Century natives did not always relish the succession of foreign immigrant groups with their different languages, food, and religions—as well as perceived disease, simplemindedness, and criminal propensities—but the land could, and did, absorb them.

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1. U.S. CONST. art. I, § 8, cl. 4.

2. In the Alien Act of 1798, which remained in effect for only two years, the President was empowered to expel any alien whom he deemed to be a danger. *See* Act of June 25, 1798, ch. 58, 1 Stat. 570, 571.

3. *See* *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

In 2008, this American tradition of xenophobia thrives. The target groups are always in flux (currently Latinos and, perhaps, Muslims); the complaints take on alarming specificity (terrorist threat, usurpation of jobs meant for Americans, perceived drain on state resources); and all too often, our message to foreigners who would come to our country is that we are full to the brim, and to foreigners who are here—that they are not welcome. When Professor Samuel Huntington sent up the alarm about the bifurcation of United States culture, he warned that “[t]here is no Americano dream. There is only the American dream created by an Anglo-Protestant society.”⁴ And it is clear that many Americans share his concerns.

The articles in this volume expand on several of the modern complexities of American immigration law and policy:

- The escalating struggle between the federal and state governments to exert control over immigration, most especially in reducing the “pull” factor of unauthorized employment;

- The political stalemate that has prevented Congress from undertaking comprehensive immigration reform and resulted in administrative tweaking and re-tweaking, including high-profile ICE raids designed to ferret out document fraud, undocumented workers, and non-compliant employers;

- Unsettled questions and inconsistencies in our developing asylum law that often fail to take account of special circumstances such as persecution on account of gender and sexual orientation and changed conditions in war-ravaged countries;

- America’s unwillingness to grant favored immigration benefits to same-sex spouses of American citizens or legal permanent residents, even when the same-sex marriage has been legally solemnized; and

- The continuing hope of the large Cuban-American immigrant community that a changed regime in Cuba may restore their confiscated property.

Oscar Romero has provided a primer for the development of American immigration law, arguing that a contract model is a more useful way to conceptualize our relationship with foreigners than a focus on human rights. In fact, during the first 100 years of American independence, the deal that was struck with the immigrant had to do simply with opportunity in exchange for hard work. So eager were we for workers and so preoccupied with getting on with the job of making a country, we saw little need to act in any systematic way to define the relationship. But we soon made up for lost time in clarifying our side of the bargain.

4. Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POL’Y, Mar./Apr. 2004, available at <http://cyber.law.harvard.edu/blogs/gems/culturalagency1/SamuelHuntingtonTheHispanicC.pdf>.

The federal immigration system has been a work in progress, and as Professor Romero points out, the states enjoyed only limited controls on immigration through the so-called “alienage law.” The federal courts stepped in regularly to circumscribe a state’s attempt to limit aliens’ access to state benefits in ways that would directly discourage the aliens from remaining in the state.⁵

The Romero piece also establishes the doctrinal backdrop to a very significant new wave of state legislation aimed at regulating the influx of undocumented migrants. This trend has been driven by the perception that the federal government has failed both to exercise its immigration power to stop unauthorized migration, and to reimburse the states for the economic burden they shoulder as a consequence of this failure. Perceiving that the undocumented have taken jobs more properly given to legal residents and have drained welfare, education, penal, and medical resources, this new wave has met with more success than previous attempts. Current state initiatives, aimed largely at exercising state power over business licensing, have sprung up at an astonishing rate.⁶ As of mid-November 2007, the National Conference of State Legislators reports that “1563 immigration-related state bills had been introduced. Of this total, 244 were enacted in 46 states, which was double the rate in 2006.”⁷ And other states have been emboldened by the growing success of challenges to these “immigration” bills.

The federal district court struck down the Hazleton, Pennsylvania, city ordinance that proposed sanctions on local landlords and businesses for renting to or employing undocumented migrants.⁸ However, shortly thereafter, a federal district court in Missouri refused to find that the community’s regulation of employment of unlawful workers was preempted by federal law or violated either due process or equal protection.⁹ Unlike the Pennsylvania court, the Missouri judge determined that the Immigration Reform and Con-

5. For example, in *Plyler v. Doe*, an attempt by Texas to deny public education benefits to the children of undocumented aliens was struck down, as was California’s Proposition 187, which, in 1994, proposed harsh cutbacks on public benefits to the undocumented. 457 U.S. 202 (1982).

6. Scholars have weighed in on the states’ growing role; notable among those who welcome this new role is Professor Peter H. Schuck, who rejects the conventional wisdom that states are more anti-immigrant than Congress, and he would encourage states to adopt provisions that “reflect a legitimate state interest and do not interfere with the goals of federal immigration policy, properly and conventionally understood.” Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 58 (2007).

7. Immigration Reform Law Inst., State and Local Legislation Bulletin: Law-suits/Legislation of 2007 (Dec. 2007), www.irli.org/bulletin1207.html.

8. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

9. See Memorandum and Order, *Gray v. City of Valley Park*, No. 4:07CV00881ERW, 2008 WL 294294, at *31 (E.D. Mo. Jan. 31, 2008).

rol Act's (IRCA) express preemption section provided an exception for state licensing laws, and that the ordinance at issue was such an exempt law.¹⁰ Central to these cases was *DeCanas v. Bica*,¹¹ which acknowledged the exclusive power of the federal government in immigration matters, but advised that "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power."¹²

Arizona's Legal Arizona Workers Act, which took effect on January 1, 2008, has apparently had the desired effect: in an already slowing economy dependent on a Latino workforce, the state has seen school enrollment drop and the threat of local law enforcement officials exercising federal immigration power has reportedly driven many out of state.¹³ This provision, which also requires that state employers use E-Verify, survived a preemption challenge.¹⁴ In addition, Oklahoma has passed perhaps the most restrictive of state bills and faces a legal challenge by the United States Chamber of Commerce.¹⁵

This piecemeal attempt to regulate immigration by shifting populations of undocumented migrants from state to state underscores the failure of the federal government to take charge of immigration policy. In addition, the increasing popularity of federal delegation of federal immigration authority

10. *Id.* at *12; *see also* 8 U.S.C. § 1324a(h)(2) (2000).

11. 424 U.S. 351 (1976).

12. *Id.* at 355.

13. Randal C. Archibold, *Arizona Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008, at A1. On the other hand, Arizona's success may cause unintended consequences for the state economy: a proposal has been introduced in that state to institute its own "guestworker" program patterned on a federal model. Such a blatant attempt to usurp federal prerogatives will likely meet with Department of Homeland Security (DHS) disapproval. In addition, there is some indication that even documented Latinos are finding life in Arizona to be inhospitable, further exacerbating the labor issue. Mary Jo Pitzl, *Guestworker Proposal Gains Friends*, ARIZ. REPUBLIC, Apr. 6, 2008, available at <http://www.azcentral.com/news/articles/2008/04/06/20080406temporary0406.html>. Nor is the labor shortage limited to Arizona: the combination of employer sanctions, the exodus of labor, and the failure of the H2A agricultural visa program has meant that many produce farmers are reluctant to commit to a new growing season with no assurance that the crop can be harvested in a timely fashion. *See* Paul Vitello, *Immigration Issues End a Grower's Season*, N.Y. TIMES, Apr. 2, 2008, at A21 (detailing the plight of a Pennsylvania tomato farmer who has been put out of business).

14. *Ariz. Contractors Ass'n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008).

15. The trend seems to favor restrictions although none of the cases has yet to reach the intermediate appellate courts. *See* Julia Preston, *In Reversal, Courts Uphold Local Immigration Laws*, N.Y. TIMES, Feb. 10, 2008, at A22.

to state and local law enforcement agencies under 8 U.S.C. § 1357(g)¹⁶ completes the squeeze play; this provision both encourages Latino profiling and, at least in the immigrant communities, discourages appeals to law enforcement in times of distress.¹⁷

Laurence Krutchik's article traces twenty years of immigration law and policy reform. The clear watershed in this saga was September 11, which prompted a complete re-structuring of the immigration functions as well as hastily enacted statutory provisions ensuring that immigration policy and anti-terrorism provisions will be forever intertwined. The currently mired attempts at comprehensive immigration reform reveal a Congress that is hopelessly paralyzed, largely because members are unwilling to displease approximately half of their constituencies, which are deeply divided on undocumented migration and especially the possibility of another "amnesty."¹⁸ Ironically, President Bush's hopes for a "path to citizenship" for some of the undocumented migrants and a guestworker program that would keep agricultural interests happy found support largely outside his own party. But even after a brief hopeful period following the 2004 election, immigration policy for the foreseeable future seems to be limited to tinkering with the status quo, for example, the 700-mile Great Wall along the Mexican border, interior enforcement largely in the form of ICE raids and document verification strategies, and the enlistment of state and local law enforcement in immigration functions.

Congressional attempts at comprehensive reform foundered in both 2006 and 2007, but Krutchik traces the executive and agency directives that have nonetheless attempted to put in place some of the proposed changes. While reform is "evolving," it does so at a glacial pace, arguably nibbling at

16. This provision was first introduced as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), effective September 30, 1996, but has gained an enthusiastic following only in the last few years. In addition, under the same provision, states are encouraged to report criminal aliens who are incarcerated in state or local correctional facilities to report to DHS and see to it that removable aliens are not released into society when they have served their sentences.

17. See, e.g., Julia Preston, *Fearing Deportation but Clinging to Life and Homes in U.S.*, N.Y. TIMES, Jan. 18, 2008, at A14. Ms. Preston describes panic in Waukegan, Illinois, following the institution of this federal/community cooperative scheme. She reports that Latinos avoid reporting crimes to police and live in a state of siege. Concerns about racial profiling and ineffective law enforcement have led a number of communities around the country to reject adoption of this program.

18. Among other provisions, IRCA provided a scheme for granting legal permanent resident status for some undocumented aliens who had been residing in the United States since January 1, 1982.

the edges rather than taking the bold steps that may be necessary to address the complex issues.¹⁹

Among the enforcement schemes that have found favor since 2005 are the highly publicized, unannounced Immigration and Customs Enforcement (ICE) sweeps of places of employment. The Immigration Reform and Control Act of 1986 initially mandated sanctions against employers who knowingly “hire, recruit, or refer for a fee”²⁰ workers who are not properly authorized; at that time, the employer was obliged to give only a cursory examination to employee documents offered to fulfill the I-9 Employment Eligibility Verification Form. For many years, this provision was enforced infrequently and only with the imposition of fines.²¹

Lashus, Loughran, and Candler provide a profile of these ICE raids, which commanded considerable public attention after the Swift raid in December 2006 resulted in over 1000 arrests. Prior to this, Walmart had made the headlines when it reached an \$11 million civil settlement that came about after ICE determined that the company had been hiring undocumented cleaning staff via independent contractors.²²

The authors quite properly focus on the employers’ central dilemma: they cannot quickly and accurately verify prospective employees’ documents, and they may not request additional documentation; nor can they risk falling foul of the discrimination provision if they attempt to circumvent potential problems by declining to hire applicants on the basis of their national origin.²³ The authors point out that, to make matters worse, the only scheme that may offer some protection, E-Verify (formerly known as Basic Pilot), is notoriously inaccurate and may be implemented only after the hire. E-Verify, which informs the enrolled employer whether a new employee’s social security number matches the employee’s name, is fraught with problems. The result of a mismatch, post-hire, will be disruption of the work place

19. Congress has pushed measures that purport to address security concerns, such as the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). See *DHS Secretary Chertoff Discusses Final Rule Regarding State Driver’s Licenses and ID Cards*, 85 INTERPRETER RELEASES 185, 199 (2008). A number of states have balked at what they view to be the excessive expense of the measure.

20. 8 U.S.C. § 1324a(a)(1)(A) (2000).

21. U.S. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: PRELIMINARY OBSERVATIONS ON EMPLOYMENT VERIFICATION AND WORK SITE ENFORCEMENT EFFORTS 2 (2005), available at <http://www.gao.gov/new.items/d05822t.pdf>.

22. See Press Release, U.S. Immigration & Customs Enforcement, Wal-Mart Stores, Inc. Agrees to Pay a Record \$11 Million to ICE to Settle Nationwide Worksite Enforcement Investigation (Mar. 18, 2005), <http://www.ice.gov/pi/news/newsreleases/articles/walmart031805.htm>.

23. 8 U.S.C. § 1324b(a)(1).

while the employer attempts to verify the worker's status; in addition there is real risk of an erroneous report.²⁴ Meanwhile, the raids continue across the country and Lashus warns that even if they employ E-Verify, employers will continue to be subject to such surprise visits.²⁵

The E-verify program, which is still largely voluntary, is beginning to play an important role in state legislation. For example, effective January 1, 2008, the Legal Arizona Workers Act requires that all employers check eligibility through the system. On the other hand, the DHS has brought suit to prevent implementation of Illinois' H.B. 1744, which bars Illinois employers from registering for the verification program until the DHS can ensure greater accuracy.

Gender and sexual preference issues are increasingly taking international center-stage in immigration and asylum matters. Payal Salsburg's article focuses on the DHS' failure to issue detailed guidelines to determine what constitutes the "substantial change in circumstances" grounds for denying asylum to Afghan and Iraqi women. To some extent, this failure may reflect political wishful thinking about the effectiveness of United States military initiatives in those countries and an inability to recognize that the condition of women will not inevitably improve following political change and anti-discrimination rhetoric.

In some cultures, mistreatment of women is removed from public scrutiny and considered, in any case, to be of no consequence. Just as deeply-engrained practices such as honor killings and female genital mutilation often take place below international radar, the very notion that women who have fallen foul of oppressive Iraqi or Afghani governments could return to the embrace and protection of "new" and "reformed" governments is unrealistic. The overthrow of Saddam Hussein and the reduced profile of the Tali-

24. Under this system, an employer has ninety days to correct the error or discharge the employee before being subject to sanctions. A *New York Times* editorial recently decried the DHS's insistence on pushing the program, arguing that such a "Social Security crackdown would lead to countless unjust firings and discrimination against lawful immigrants by companies that cannot be bothered to help clear up their bureaucratic entanglements," and that such a program would be "a boon for the unscrupulous businesses that hire off the books and have no use for W-2s" Editorial, *A Foolish Immigration Purge*, N.Y. TIMES, Mar. 27, 2008, at A26.

25. In a related issue, ICE raids on private homes have been on the increase, and at least in one New Jersey community, gave rise to a suit recently filed in the United States District Court for the District of New Jersey. This suit, brought by ten plaintiffs (including two United States citizens and two lawful residents), alleged Fourth and Fifth Amendment violations as a consequence of warrantless pre-dawn raids between August 2006 and January 2008. A copy of the complaint can be found at <http://law.shu.edu/cs/ice/complaint.pdf>.

ban, while significant advances, are unlikely to reverse many generations of gender persecution.

Fortunately, in recent years the plight of women has received considerably more attention.²⁶ The United Nations Convention on the Elimination of All Forms of Discrimination Against Women and the Guidelines on Gender Related Persecution under refugee law of May 7, 2002, and the 1995 guidelines for asylum officers on questions of gender express welcome aspirations. While the directives seek to inform and sensitize the asylum process, they lack the kind of specificity that is essential to asylum officers and immigration judges. Absent such detailed and regularly updated DHS directives, the immigration judge must be briefed extensively through available sources, including but not limited to expert testimony, press reports, Amnesty International reports, Human Rights Watch, and the Country Reports.²⁷ Staying abreast of country changes is hard work, and uninformed assumptions can spell disaster for the asylum-seeker.

Leonard Birdsong's thesis, like Salsburg's, deals in part with inconsistencies in the court precedents and the paucity of precedent decisions in the area of asylum law.²⁸ His specific focus in this piece is on the lack of consis-

26. In *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999), a Guatemalan woman sought asylum, arguing that she had endured persecution at the hands of her husband on account of her imputed political opinion or membership in a particular social group of women who object to male domination. The immigration judge granted asylum and the BIA reversed; although the BIA agreed with the immigration judge that the woman had been persecuted and that any appeal to the Guatemalan government would have been futile, the persecution was not on account of a protected characteristic. Attorney General Janet Reno vacated the BIA's decision and remanded to reconsider the case in light of proposed asylum regulations that were being introduced. In fact, the case remains in limbo as the regulations were never finalized.

27. The Department of State Country Reports on Human Rights Practices 2006, which is dated March 6, 2007, leaves little doubt that Afghani women are at risk. The report cites rape and sexual abuse in detention, and women were detained at the request of families for behavior that the families found unacceptable such as defying family wishes or attempting to escape domestic violence. Finally, while women are taking on a more visible role in the Kharzai government, "[w]omen active in public life faced disproportionate levels of threats and violence from the Taliban." U.S. Dep't. of State, Country Reports on Human Rights Practices - 2006: Afghanistan (Mar. 6, 2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm>. Some federal judges, however, including Judge Easterbrook of the Court of Appeals for the Seventh Circuit, are deeply skeptical of excessive reliance on Country Reports. See *Gomes v. Gonzales*, 473 F.3d 746, 756 (7th Cir. 2007) (collecting cases to this effect). He calls for a system of "country specialists" to be employed, analogizing to vocational experts employed in the Social Security disability system. *Banks v. Gonzales*, 453 F.3d 449, 454 (7th Cir. 2006).

28. *But see* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 473 (2007) (arguing that complete consistency in asylum adjudication might be neither desirable nor attainable because "[i]n asylum cases, the unavoidable abstractness, complexity, and dynamism of the relevant legal language make it inevitable that the human adjudicators will bring their diverse emotions and personal

tent guidance on subjects of gender violence and sexual identity or preference, and the insensitivity of immigration judges in these matters. The good news is that the trend is to expand rights based on these characteristics, but Birdsong suggests that the failure of the DHS to issue clear and uniform policies, as well as the lack of precedent and published opinions, have led to a patchwork of decisions.²⁹ Of course, many denials are not appealed, so immigration court is the forum of last resort for many applicants, and the immigration judges are given little to rely on in making difficult calls. In some cases, when the Attorney General and the Board of Immigration Appeals (BIA) were called upon to reach a reliable decision, they have not done so. For example, in the notorious *In Re R-A*-³⁰ case, the immigration judge's grant of asylum to a victim of domestic violence in Guatemala, finding that she was a member of "a particular social group," was reversed by the BIA; the Attorney General then vacated the BIA decision, in light of proposed regulations regarding domestic violence cases that have never found their way into the *Code of Federal Regulations*.³¹

To underscore the lack of clear direction on key issues like "persecution," "particular social group," and "punitive intent," asylum statistics reveal something that immigration watchers have long realized—it matters where you are when you make your application. The largest percentage of persons granted asylum in 2006 was in Florida (41%), while only 10% in New York were successful, and even fewer in Maryland, Virginia, and Georgia. Birdsong's appeal to the ALI and the ABA to assemble and regularize our immigration laws and policies regarding asylum is a good one.

In recent years, the performance of immigration judges and the "streamlined" BIA³² has met with open disapproval from Circuit Court of Appeals

values to bear on their decisions."'). In his article, Professor Legomsky reacts to the study of 60,000 asylum decisions in Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007), which identified striking variations among adjudicators at several levels of the process.

29. At least one scholar, David Martin, has welcomed selective use of the courts' power to remand to the BIA with instructions to clarify doctrines and reasoning. This procedure "helps to make sure that novel doctrinal questions receive complete BIA consideration and also helps signal which issues the courts regard as sufficiently novel or fundamental to require that kind of close agency look." David Martin, *Major Developments in Asylum Law Over the Past Year: A Year of Dialogue Between Courts and Agencies*, 84 INTERPRETER RELEASES 2069 (2007) (offering examples of this kind of beneficial dialogue).

30. 22 I. & N. Dec. 906 (B.I.A. 1999).

31. *Id.*

32. See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 282 (6th ed. 2008) (outlining the re-structuring of the BIA following the huge increases in their caseloads). "Streamlining" in 1999 and again in 2002 reduced the three-person panels to one, reduced the total members of the Board, permitted AWO (affir-

judges who acknowledge that these bodies have heavy dockets but also stress that much more care must be exercised given the interests that are at stake.³³ Dissatisfaction with the administrative process has given rise to a sharp increase in appeals to the circuit courts, swelling the immigration docket in the Ninth Circuit from 8% in 2002 to 48% in 2005.³⁴ Some judges in the Seventh Circuit have been especially vocal about what they see as shoddy and sometimes biased performances.³⁵

Immigration law and policy has always been values-driven and hence slow to undergo change. Nowhere is this better demonstrated than in issues surrounding homosexuality. Jim Wilets has assembled a very interesting comparative study of a number of industrialized democracies that illustrate different approaches to the question of immigration rights for same-sex partners. Currently, the United States' position is explicit: federal law does not recognize same-sex partnerships or marriages as conferring the same advantages (including immigration benefits and preferences) as heterosexual marriage.³⁶ This means, of course, that when an American citizen enters into a same-sex marriage in, say, Canada, the American cannot bring in his or her spouse as an immediate relative or under a first preference.

What emerges from this collection is the fact that the United States, which only eighteen years ago eliminated homosexuality as grounds for inadmissibility,³⁷ is behind the curve among countries with whom we most

mance without opinion) in cases where the BIA member found the immigration judge to be correct and any errors to be harmless or immaterial, and mandated greater deference to the immigration judge's factual findings.

33. Significantly, Attorney General Alberto Gonzalez announced that the DOJ would undertake reforms to the immigration courts and the BIA, including performance evaluations, improved training, a practice manual, and a Code of Conduct. See *Attorney General Orders Review of Immigration Courts*, 83 INTERPRETER RELEASES 122, 138 (2006).

34. ALEINIKOFF ET AL., *supra* note 32, at 283.

35. Judge Richard Posner of the Circuit Court of Appeals for the Seventh Circuit has been especially outspoken on this subject, voicing chagrin at the plight of the alien and laying the blame largely at the feet of policymakers. For example, writing in dissent in *Apouviép-seakoda v. Gonzales*, Judge Posner said:

[e]nough about [the immigration judge's] appalling handling of this serious case. The failure is more an institutional than a personal one. One cannot but sympathize with the difficulty under which the immigration judges labor quite apart from their horrendous workloads, which Congress and the Justice Department have done nothing to try to alleviate.

475 F.3d 881, 898 (7th Cir. 2007) (Posner, J., dissenting); see also David Martin, *Major Developments in Asylum Law Over the Past Year*, 84 INTERPRETER RELEASES 2069 (2007) (detailing the criticism coming from the courts and noting that Attorney General Gonzales is implementing reforms to attempt to address some of these ills, including increased funds, training of new immigration judges, and performance evaluations).

36. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (section 3 defines marriage as a union between one man and one woman).

37. See Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978.

often compare ourselves. And the six countries that do not themselves recognize full marital rights—Australia, Brazil, France, Germany, Israel, and Switzerland—nonetheless will recognize the validity of the foreign union for purposes of immigration. This “de-coupling” of the granting of an immigration benefit to foreign same-sex marriages from the federal recognition of same-sex unions under federal law has much appeal. Equally inspiring is the position of the EU, which welcomes the immigration of foreign partners of EU citizens even though all EU countries do not confer full marital rights.

One of many fascinating aspects of this study is Wilets’ attempt to mine the cultural underpinnings of the various countries in order to better understand their motivations. Counterintuitively, European and Scandinavian countries with strong Protestant and Catholic affiliations were among the first to recognize same-sex unions, but Wilets argues that the critical distinction is the pervasive fundamentalist religious influence in the United States. Wilets also observes that most of the states where slavery, and later Jim Crow laws, were institutionalized are also the states that are most fundamentalist in their religious thinking and hence unsympathetic to same-sex issues.

Several American states have instituted legal civil unions and even same-sex marriages, and the question continues to be a live one in many state legislatures and courts. Significantly, in early February 2008, a New York appeals court³⁸ ruled that same-sex marriages validly performed in other jurisdictions are entitled to full recognition in New York. The court held that because the marriage was entered into validly in Canada and because New York has no “positive law” prohibiting such a marriage and the marriage does not involve incest or polygamy, it is entitled to recognition.³⁹ Unlike many states, New York declined to follow the lead of Congress in enacting legislation denying full faith and credit to same-sex marriages from other states. It remains to be seen whether this decision will survive appeal or subsequent enactments of the New York Legislature.

In an article exploring an issue with important implications for a large immigrant group, Cuban-Americans, Daniel Espino analyzes the possible disposition of property belonging to thousands of Cubans who fled after Fidel Castro came to power. Finding these takings to violate international law, human rights, and Cuba’s 1940 Constitution, he makes recommendations for

38. *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (Sup. Ct. 2008). Three weeks later, the court in *Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (Sup. Ct. 2008), relied on *Martinez* to determine that a same-sex marriage entered into in Canada was not void under New York law and that the trial court would determine custodial rights and support obligations following divorce for children born during that union.

39. *Martinez*, 850 N.Y.S.2d at 742.

righting these wrongs in a post-Communist Cuba. As it happens, even though Fidel Castro stepped aside in early 2008, the National Assembly elected his brother, Raul, to succeed him. At the moment Cuba appears to be establishing a succession rather than a transitional government, although several months into his presidency, Raul Castro appears to have undertaken some significant changes well short of democratization.⁴⁰

Central to Espino's thesis is that a new, non-Communist regime is inevitable, and that Cuba will be forced to negotiate regarding the confiscated properties in order to encourage investment and gain international credibility. The machinations of such a procedure are complex, beginning with the need for a treaty that will permit the settling of property claims, given the Cuban exiles' current lack of standing to do so. Drawing from the models provided by a number of different countries, the author recommends a Step-Down Restitution Policy that would consider the feasibility of restitution, but alternatively provide compensation, or some combination.

In theory, restitution is the preferred solution, but the assumption that the original owners will be eager to return with their "entrepreneurial talent and capital" should be tempered by the fact that, after a half century, many of the original owners will have passed away and their progeny may not share their zeal.⁴¹ Alternatively, compensation in lieu of restitution could be crippling to a Cuba trying to develop its ruined economy. But the conversation needs to continue and the various approaches laid on the table. Raul Castro is seventy-six years old and reportedly does not share the charisma of his older brother. There are some promising indications that conditions are changing in Cuba, but whether Cuba will return to the Western economic fold is far from clear.

John Jay's curious statement in the Federalist No. 2 that this country is comprised of "one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs" does not begin to describe the United States in the Twenty-First Cen-

40. James C. McKinley, Jr., *Taking the Helm as Cuba's President,, Castro's Younger Brother Holds the Course*, N.Y. TIMES, Feb. 25, 2008, at A10 (while Raul Castro has suggested that Cuba will need to make some changes to be effective in a new era, the government that was elected was comprised largely of old guard). However, on April 11, 2008, Raul Castro announced that the state wage system would be changed to permit workers to earn as much as they can, depending on their productivity. *Cuba: Wage Limits Removed*, N.Y. TIMES, Apr. 11, 2008, at A10.

41. Restitution of some property may have been complicated only two months into Raul Castro's presidency when he issued his first formal published decree permitting Cubans who are now renting houses and apartments from the government to take title. *Cuba to Allow Thousands to Own Homes*, N.Y. TIMES, Apr. 12, 2008, at A7.

ture. It is easy to criticize American immigration law and policy for lagging behind the times on certain sensitive issues and dragging its legislative feet. Perhaps, rather, we should be amazed that it does as well as it does, given the pace of globalization and the unprecedented movement of millions of people. This volume aptly illustrates some of these modern complexities.