Title

We Asked for Workers, But Families Came: Time, Law, and the Family in Immigration and Citizenship

Journal

Virginia Journal of Social Policy and the Law, 17

Author

Motomura, Hiroshi

Publication Date

2006

WE ASKED FOR WORKERS, BUT FAMILIES CAME: TIME, LAW, AND THE FAMILY IN IMMIGRATION AND CITIZENSHIP

Hiroshi Motomura [*]

INTRODUCTION

My title echoes what the Swiss writer Max Frisch wrote a generation ago about guestworkers in his own country: "we asked for workers, but people came."[1] The chronic failure to account for this gap in the perception of immigrants—between the stark austerity of their imagined lives as guestworkers and the rich texture of their real lives as immigrants—is the source of much of the trouble with immigration and citizenship laws throughout the world.

Social scientists have consistently shown how migration is in large part a social process of network building,[2] so it shouldn't surprise anyone that immigrants are husbands and wives, and sons and daughters, and brothers and sisters—or that they form these relationships over time. This, of course, complicates the nature of their interaction with their new country and its laws.

It is customary to analyze the role of the family in U.S. immigration and citizenship law by evaluating the various forms of legal recognition of the family. For example, the vast majority of lawful immigrant admissions are based on family ties.[3] Having a close family member who is a citizen or lawful permanent resident of the United States may save noncitizens from deportation, even if their stay in the United States was never lawful.[4] Family ties are relevant in these and similar ways to

[*] Kenan Distinguished Professor of Law and Associate Dean for Faculty Affairs, University of North Carolina School of Law. I would like to thank Ariela Dubler for her perceptive and helpful comments on an earlier version of this article, which I presented at the 2006 conference at the University of Virginia Center for Children, Families, and the Law.

[1] MAX FRISCH, ÜBERFREMDUNG I, IN SCHWEIZ ALS HEIMAT? 219 (1990).

[2] *See, e.g.*, Douglas S. Massey, Luin Goldring & Jorge Durand, *Continuities in Transnational Migration: An Analysis of Nineteen Mexican Communities*, 99 AM. J. SOCIOLOGY 1492, 1496-1502 (1994); Alejandro Portes & József Böröcz, *Contemporary Immigration: Theoretical Perspectives on Its Determinants and Modes of Incorporation*, 23 INT'L MIGR. REV. 606, 607-14 (1989).

[3] For an analysis of lawful immigration by category and country of origin, *see* RUTH ELLEN WASEM, CONG. RESEARCH SERV., U.S. IMMIGRATION POLICY ON PERMANENT ADMISSIONS 7-12 (2006).

[4] *See infra* text accompanying notes 42-44.

the statutes that govern immigration and citizenship, and to the constitutional aspects of immigration law.

Why is a major role for the family in immigration and citizenship law so widely accepted? Or is it? It turns out that any consensus on the role of the family tends to dissipate as we reach specific provisions of law. And digging more deeply, what choices about the role of the family in immigration and citizenship law lurk beneath any consensus? This article tries to answer this last question, to see what is at stake when the convenient temptation to think about immigrants as individuals is tempered by the reality of the family.

This article is based on two key ideas. First, the family adds the dimension of time to immigration and citizenship law. Second, the time dimension poses crucial choices concerning the role of law not only in immigration, but also in the integration of immigrants into American society. To explain these two ideas, I'll proceed as follows. Part I surveys the issues that arise when immigration and citizenship law takes the family into account. Part II examines what the rules for citizenship based on birth in the United States tell us about the role of the family in immigration and citizenship law. Part III shows how the family's role poses important choices regarding the relevance of time. And Part IV explains how the relevance of time in turn poses choices regarding the role of law itself, in both immigration and the integration of immigrants.

I. WHAT IS AT STAKE?

Over ten years ago, I published an essay that tried to identify the major questions that any system of immigration and citizenship law must answer if it takes the family into account. The essay's premise was to advise the legislature of an imaginary, newly formed country, hence the subtitle: *A Roadmap for the Ruritanian Lawmaker*.[5] Ruritania, I said, would face at least ten basic questions:

1. Which family relationships will count?

2. Will the number of family-based immigrants be limited?

[5] Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker,* 43 AM. J. COMP. L. 511, 511 (1995) [hereinafter *Roadmap*].

3. What delays in family-based immigration will be considered unacceptable, and what remedies will be adopted?
4. In sponsoring immediate relatives, will citizens be preferred over resident aliens?
5. Will different perspectives on the "family" be accommodated?
6. What will be the procedures for deciding eligibility?
7. Will family ties affect the application of exclusion or expulsion grounds?
8. What share of total legal immigration will be family-based?
9. How will family-based immigration affect the ethnic composition of Ruritanian society?
10. How will family-based immigration affect the integration of immigrants into Ruritanian society?[6]

The essay used examples from U.S. and German law to illustrate possible answers to these questions.[7] Revisiting those examples is not my purpose here, but rather to think in more basic terms about these ten questions, and about what the answers might imply about the overall role of family in immigration and citizenship law.

I'll start by observing that the first seven questions all lead to various legal rules. Take the first question—which family relationships will count? The answer for the United States is in three provisions of the Immigration and Nationality Act.[8] Section 201 defines the spouses and minor unmarried children of U.S. citizens—plus the parents of citizens if the citizens are 21 years of age—as the "immediate relatives" of U.S. citizens, and therefore able to obtain permanent resident status in the United States without a waiting period for an immigrant visa to become available.[9] They only need to wait as long as it takes for the paperwork to be processed. Section 203(a) defines certain "preference" categories that admit—but only after a waiting period—other immigrants with close relatives who are U.S. citizens or permanent residents.[10] The

[6] *Id.* at 511-12.
[7] *Id. passim.*
[8] Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 (2006).
[9] *Id.* § 201(b), 8 U.S.C. § 1151(b).
[10] *Id.* § 203(a), 8 U.S.C. § 1153(a).

immigrants who qualify in these categories are the sons and daughters (regardless of age or marital status) of citizens, the siblings of citizens, and the unmarried sons and daughters (regardless of age) and spouses of lawful permanent residents.[11] Section 203(d) sometimes allows lawful immigrants to bring their spouses and children with them to the United States.[12] These are the three principal ways for immigrants to come lawfully on the basis of family ties.

In like fashion, various provisions of the Immigration and Nationality Act answer questions two through seven for the United States.[13] For example, sections 202 and 203 limit the number of immigrants who can be admitted in certain categories.[14] This answers question two. To answer question five, what counts as "family" is found in Section 101(b) and cases that establish, for example, that a "child" can sometimes include a stepchild or an adopted child.[15]

Questions eight, nine, and ten are different, for they can't be answered simply by examining the Immigration and Nationality Act, regulations, and cases. The least complex of the three may be question eight—what share of total legal immigration will be family-based? *Roadmap* observed that family-based admissions were between seventy-five and eighty percent of lawful immigrants to the United States.[16] This percentage is higher than the immigrants in the family-based immigration categories alone, since an accurate count of family-based admissions should also include the spouses and children who accompany or follow immigrants who are admitted on some basis other than family, such as employment, refugee or asylee status, or success in the visa lottery.[17] A legislator might conclude that the current system overemphasizes family ties. This may prompt proposals to raise the percentage of lawful immigrants who are chosen for their education or skills.

Less straightforward is question nine—how will family-based immigration affect the ethnic composition of Ruritanian society? But

[11] *Id.*
[12] *Id.* § 203(d), 8 U.S.C. § 1153(d). This provision does not allow the spouses and children of immediate relatives to accompany or follow to join them.
[13] *See Roadmap*, *supra* note 5, at 519-34.
[14] Immigration and Nationality Act, §§ 202-203, 8 U.S.C. §§ 1152-1153.
[15] *Id.* § 101(b)(1)-(2), 8 U.S.C. § 1101(b)(1)-(2); *see*, *e.g.*, Medina-Morales v. Ashcroft, 371 F.3d 520, 531-32 (9th Cir. 2004) (stepchild); Matter of Marquez, 20 I & N Dec. 160, 164-65 (BIA 1990) (adopted child).
[16] *Roadmap*, *supra* note 5, at 535-37.
[17] *Id.*; *see* Immigration and Nationality Act, §§ 203(d), 207(c)(2), 208(b)(3), 209(b).

this, like question eight, first invites an empirical inquiry and a policy assessment of the current scheme. *Roadmap* explained that the increased opportunities for family-based immigration in the 1965 amendments to the Immigration and Nationality Act accommodated new immigration demand from Asia and Latin America.[18] The ultimate result was to permit the dramatic post-1965 shift in the ethnic composition of the immigrant flow.[19]

Most complex is question ten—how will family-based immigration affect the integration of immigrants into Ruritanian society? This is the major piece of unfinished business from *Roadmap*. I wrote "[f]amilies can provide the social and economic support [that is] crucial for 'integration' into the receiving society" and immigrants without families "tend to remain sojourners [who] never consider themselves permanent residents or potential citizens."[20] With regard to how legal rules might help or hinder the integration of immigrants, I wrote that the rules that grant citizenship to anyone born on U.S. soil can assure the next generation of the legal equality that citizenship provides.[21] Both of these observations require much more explanation, which I'll now try to provide.

II. *JUS SOLI* CITIZENSHIP, FAMILY TIES AND REMOVAL FROM THE UNITED STATES

Citizenship law is the logical place to resume my analysis of the family and immigration, and to add what was implied but fuzzy in *Roadmap*—the dimension of time. Countries around the world have adopted blends of two approaches to the acquisition of citizenship by birth.[22] One is called *jus sanguinis*, a Latin phrase that literally means law of blood.[23] *Jus sanguinis* ties citizenship to descent; the children of citizens generally become citizens at birth no matter where they are born.[24] *Jus sanguinis* plays a role in U.S. citizenship law, in that persons born outside the United States may be citizens at birth, if one or both of

[18] *See* Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965); HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES, 132-35 (2006).
[19] *See Roadmap*, *supra* note 5, at 540-42.
[20] *See id.* at 542.
[21] *Id.* at 543.
[22] *See* Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 17 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).
[23] T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 15 (5th ed. 2003) [hereinafter AM&M].
[24] *Id.*

their parents are citizens.[25] But the core principle of U.S. citizenship by birth is *jus soli*, or literally law of land or ground, which makes citizenship depend on place of birth, no matter who the child's parents are.[26] *Jus soli* is embodied in the first sentence of the fourteenth amendment to the U.S. Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[27]

Citizenship law based on *jus soli* strongly influences immigration law, for it means that noncitizens in the United States often have close family members who are U.S. citizens—typically their children born in the United States. The reality that immigrants have families would complicate immigration law even without the legal badge of citizenship. But citizenship for U.S. born children establishes the vehicle for immigration law to acknowledge officially that immigration is a matter of multiple generations. In this way, the family—especially through *jus soli* citizenship—introduces the element of time.

To illustrate, consider the law governing removal from the United States. (I'll use the term "removal" because it has been the precise technical term in the INA since 1996, encompassing what is sometimes called "exclusion" and "deportation."[28]) Noncitizens, even lawful immigrants, have no absolute guarantee that they will be allowed to stay in the United States. Of course, noncitizens who are unlawfully present may be removed for that reason alone.[29] But even lawful immigrants may be removed if, for example, they become deportable on national security grounds, or for certain criminal convictions.[30]

Such grounds for removal are only half of the scheme. Even removable noncitizens may ask the government to waive some grounds and let them stay as a matter of administrative discretion, exercised by an immigration judge (an employee of the Executive Office for

[25] Immigration and Nationality Act § 301, 8 U.S.C. § 1401; *see id.* at 32-34.
[26] AM&M, *supra* note 23, at 15.
[27] U.S. CONST., amend. XIV, § 1; *see* Immigration and Nationality Act § 301(a), 8 U.S.C. § 1401(a); *id.* at 15-32.
[28] *See* Immigration and Nationality Act § 240, 8 U.S.C. § 1229a; AM&M, *supra* note 23, at 625-28.
[29] *See* Immigration and Nationality Act §§ 212(a)(6)(A), 237(a)(1)(B), (C), 8 U.S.C. §§ 1182(a)(6)(A), 1227(a)(1)(B), (C); AM&M, *supra* note 23, at 428, 553.
[30] *See* Immigration and Nationality Act §§ 237(a)(2), (a)(4), 8 U.S.C. §§ 1227(a)(2), (a)(4); AM&M, *supra* note 23, at 552-80, 1209-26. For the number of removals by deportability ground, *see* Office of Immigration Statistics, U.S. Dep't of Homeland Sec., *2004 Yearbook of Immigration Statistics*, 161, tbl.42 (2006).

Immigration Review in the Department of Justice) or by an official in the Department of Homeland Security or in the Department of State.[31]

Even if a waiver is unavailable—or available but denied in the exercise of discretion—an immigration judge may still allow a noncitizen to stay in the United States under a form of discretionary relief called cancellation of removal.[32] The first precursor of cancellation came into use in the 1930s, when advocates for case-by-case leniency cited the human cost of deportation in broken families and economic hardship.[33] These advocates argued that many deportable noncitizens were part of American society and had committed only minor or technical immigration law violations, or that these noncitizens were deportable only for minor crimes for which they had already served a prison term and thus paid their debt to society.[34] Immigration officials responded to these arguments by providing relief from deportation under a previously obscure statute.[35] This form of relief assumed several legislative incarnations, eventually becoming what is now called cancellation of removal.[36]

An immigration judge's decision on cancellation of removal has two parts. First, the noncitizen must be eligible to apply for cancellation. A minimum residence period in the United States is required, and a criminal record may disqualify.[37] Second, if a noncitizen is eligible to apply for cancellation, an immigration judge may actually cancel removal as a matter of discretion.[38] Cancellation allows noncitizens to retain permanent resident status that they were in jeopardy of losing, or

---

31 *See, e.g.*, Immigration and Nationality Act §§ 103, 104, 212(h), (i), 237(a)(1)(H), 8 U.S.C. §§ 1103, 1104, 1182(h), (i), 1227(a)(1)(H); Homeland Security Act §§ 441, 451, 6 U.S.C. §§ 251, 271 (2006); AM&M, *supra* note 23, at 600-06.

32 *See* Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b.

33 MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 76-82 (2004).

34 THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION: PROCESS AND POLICY 689-97 (West 3d ed. 1995) (1985); *id.*

35 Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 878 ("[A]liens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor"), *repealed by* Act of Jun. 27, 1952, Pub. L. No. 414, ch. 477, § 403(13), 66 Stat. 163, 279.

36 *See* Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c); *id.*; ALEINIKOFF ET AL., *supra* note 34, at 689-97; NGAI, *supra* note 33, at 76-82.

37 Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b.

38 *Id.*

even to become lawful permanent residents for the first time.[39]

Waivers and cancellation are not the only forms of discretionary relief that may be available to a noncitizen,[40] but they show that having close family members who are U.S. citizens greatly enhances the chances that a noncitizen will successfully avoid removal. Family ties have this effect in two ways. First, family ties are often required for the noncitizen to be eligible to apply for a waiver or cancellation of removal. For example, noncitizens are eligible for the waiver in section 212(h) for certain crime-related grounds of inadmissibility if they are the spouse, parent, son, or daughter of a U.S. citizen or a permanent resident.[41] Second, statutes and administrative case law have established that the exercise of discretion to grant or deny a waiver or cancellation of removal depends in large part on family ties.[42]

I've sketched this area of immigration law in just enough detail to make the general point that family ties make a difference as a means not only to gain admission, but also to avoid removal. This role for family ties is significant as a prominent example of immigration law's recognition of U.S. ties in general. In turn, the recognition of ties is significant because it adds the dimension of time to immigration law. In cancellation of removal, for example, what counts are the ties that noncitizens develop over time. Some of these ties are family ties, but the length of residence in the United States also makes a difference. For example, cancellation of removal for permanent residents requires seven years of continuous residence in the United States after having been lawfully admitted, including five years as a permanent resident.[43] If eligible, a lawful immigrant can ask the immigration judge to exercise her discretion to cancel removal based not only on family ties, but also community ties, work history, and a clean criminal record.[44]

Family ties also affect other aspects of enforcement beyond the explicit immigration law contexts for the exercise of discretion such as

---

[39] *Id.*
[40] On other forms of discretionary relief, *see* AM&M, *supra* note 23, at 606-09, 616-20.
[41] Immigration and Nationality Act §§ 212(h), 8 U.S.C. §§ 1182(h).
[42] *See, e.g.*, *id.*; *In re* C-V-T-, 22 I. & N. Dec. 7, 10-11 (Bd. of Immigration Appeals Feb. 12, 1998) (cancellation); *In re* Tijam, 22 I & N Dec. 408, 412 (Bd. of Immigration Appeals Dec. 10, 1988) (waiver); AM&M, *supra* note 23, at 592-94.
[43] Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b(a).
[44] *See id.*; *In re* C-V-T-, 22 I. & N. Dec. 7, 10-11 (Bd. of Immigration Appeals Feb. 12, 1998); *In re* Marin, 16 I. & N. Dec. 581, 584-85 (Bd. of Immigration Appeals Aug. 4, 1978).

waivers and cancellation of removal. Members of a single immigrant household often include one parent who is a permanent resident and one parent who is undocumented, plus some children who are undocumented, some who are permanent residents, and some who are U.S. citizens. Such mixed families complicate the politics of immigration law enforcement.[45] The fact that removing noncitizen breadwinners amounts to the de facto removal of children who are U.S. citizens through *jus soli* is part of the tacit consensus that prevails in the United States to enforce immigration laws in ways that are knowingly ineffective and sometimes just for the sake of symbolism and political show.[46] Total enforcement may require, among other things, that we ignore Max Frisch and imagine workers without families.

One obvious question is whether *jus soli* citizenship in its current form is a good idea. In recent years, Congress has considered but rejected proposals to amend the Constitution so that children born on U.S. soil would be citizens only if their parents are here lawfully.[47] The arguments against *jus soli* citizenship for the children of the undocumented are based, directly or indirectly, on the idea that the Constitution adopts a consent-based approach to citizenship, and that this consent is absent when a child is born to parents who are here unlawfully.[48] More pragmatically phrased, this argument is that *jus soli* rewards illegal immigrants by giving citizenship to their children, and that its repeal is essential for effective immigration law enforcement.[49]

One standard defense of *jus soli* is based on the idea that noncitizens' ties to this country should be recognized by conferring citizenship on their U.S.-born children, regardless of the noncitizen-

---

[45] Related to the recognition of ties is the idea that courts should view constitutional challenges to the government's immigration decisions from the perspective of harm to U.S. citizens, not harm to noncitizens. *See* Adam B. Cox, *Citizenship, Standing and Immigration Law*, 92 CAL. L. REV. 373, 390-403 (2004); Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1946-48 (1996).

[46] *See* PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE, 85-90, 92-96, 106-12 (2000); Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1046-55, 1057, 1060 (1990).

[47] *See, e.g.*, H.R.J. Res. 46, 109th Cong. (2005); H.R.J. Res. 42, 108th Cong. (2003).

[48] *See* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 4 (1985).

[49] *See id.*; *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents*: *Joint Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 84 (1995) (statement of Rep. Lamar Smith, Chairman, House Subcomm. on Immigration and Claims).

parents' immigration status. To deny citizenship to these U.S.-born children will limit the cohesion—and even promote the disintegration—of American society by literally alienating a large resident population and inevitably encouraging the growth of anti-foreigner sentiments in a self-reinforcing circle of separatism.[50]

Jus soli citizenship thus is based largely on the perceived need to recognize ties in the United States, including, but not limited to, family ties. In turn, *jus soli* lays the foundation for discretionary relief from removal based on the fact that the children of even the undocumented are U.S. citizens. Interacting in this way, both *jus soli* citizenship and discretionary relief from removal not only legally recognize family ties and the multi-generational nature of immigration, but also endorse the general relevance of time.

III. THE MEANING OF TIME

It is a policy choice to recognize ties and time, even if this choice isn't deliberate or even conscious. To understand this choice, compare it to a very different approach concerning the removal of noncitizens from the United States, namely that of removing noncitizens from the United States solely on the basis of having violated their terms of admission. The most obvious violation is surreptitious entry, but automatic removal—without access to discretionary relief—would also be justified if a noncitizen overstays a lawful period of temporary admission or violates the condition that permanent residents not be convicted of certain crimes.

This is a way of thinking about immigration and citizenship that I have elsewhere called immigration as contract.[51] By "contract" I don't mean a formal, legally binding document marked by the parties' signatures. Nor do I mean an agreement after back-and-forth bargaining in the marketplace between two sides that both have enough power to negotiate over terms. Nor do I mean the more modern view of a contract among legal scholars, as a set of social obligations that may evolve well beyond the parties' original understanding. Rather, by contract I mean a certain way of making immigration decisions that adopts ideas of fairness and justice often associated with contracts.[52] The core idea is viewing immigration as a set of expectations and understandings that

---

[50] *See* David A. Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L L. 278, 282-84, 291-96 (1987).
[51] *See* MOTOMURA, AMERICANS IN WAITING, *supra* note 18, at 29-37, 42-51, 54-58.
[52] *See id.* at 36-37, 57-58.

newcomers have upon entering their new country, and, correspondingly, expectations that their new country has of newcomers.[53]

In thinking about the role of the family in immigration and citizenship, the key aspect of immigration as contract is its static nature. It looks to a fixed reference point for assessing claims of justice. What matters is providing notice and protecting reliance and expectations, but not necessarily determining the contours of justice based on the unfolding of events, including events in the lives of the immigrants themselves. Disregarding time in immigration and citizenship law means, among other things, disregarding the family.

In contrast, the recognition of ties that develop over time—the essence of what I have called immigration as affiliation[54]—is a persuasive basis for both *jus soli* and discretionary relief from removal, even if these two aspects of immigration and citizenship law benefit noncitizens who have violated the conditions of admission or were never admitted at all. Recognizing ties that develop over time is also the basis of an influential strand of court decisions that address the application of the U.S. Constitution to immigration and immigrants. Consider this passage from the U.S. Supreme Court's 1976 decision in *Mathews v. Diaz*:

> Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence.[55]

Similar is this oft-quoted sentence from the Court's 1950 decision in *Johnson v. Eisentrager*: "The alien, to whom the United States has been

[53] *See id.*
[54] *See id.* at 88-94.
[55] 426 U.S. 67, 80 (1976).

traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."[56]

To establish that the family matters in immigration and citizenship—and therefore that time matters—only begins the inquiry. The next question is *how* time should matter. The most important feature of the role of time in *jus soli* citizenship and discretionary relief from removal is that it is largely (though not exclusively) a retrospective sense of time. The law takes time into account by acknowledging and giving legal meaning to what has already occurred. An immigrant's time in the United States can yield the family or other ties that can avoid removal or justify *jus soli* citizenship for her U.S.-born child. Put more generally, immigrants—even if here unlawfully—acquire ties over time that deserve some form of recognition through law.

The alternative to retrospective recognition of ties is a prospective sense of time that focuses on immigrants' future lives in the United States. We could evaluate how immigration and citizenship law can best take into account the prospect that immigrants may develop family ties. Once we look prospectively at time, a subtle but significant shift occurs in the role of the family, away from mere recognition and toward a more instrumental view of the family in immigration and citizenship. The family becomes not only an *object* of integration, but a *means* of integration through law.

IV. TIME AND THE LAW IN IMMIGRATION AND CITIZENSHIP

This prospective sense of time and the family implies a view of the function of immigration and citizenship law that differs from the view implied by the retrospective recognition of the ties that immigrants develop over time. According to this sense of time, the family can foster the integration of immigrants. Beyond the question of appropriate recognition of existing family ties, a new question emerges: How can the rules that recognize (or don't recognize) family ties help or hinder immigrant integration?

This question suggests that in addition to immigration as contract and immigration as affiliation, we can think about immigration as a transition to citizenship.[57] The underlying premise of immigration as

[56] 339 U.S. 763, 770 (1950), *quoted in* Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n.5 (1953).

[57] I've written elsewhere about immigration as transition in the context of U.S. law's historical and current treatment of lawful immigrants. Although this paper addresses unlawful immigrants as well, the idea that immigration can be viewed as a transition to citizenship can be generalized to all immigrants, lawful

transition is the need to integrate immigrants.[58] If we think of the family as a means of integration, then *jus soli* citizenship is justified for a reason beyond the oft-cited need to recognize the family and other ties that an immigrant has developed in the United States. This additional justification is that *jus soli* citizenship reflects transition for families, by assuring first-generation immigrant parents that their children born in the United States will be citizens.[59] Historically, this assurance was especially important for Asian immigrants, who were barred from naturalization but whose U.S.-born children became citizens under the U.S. Supreme Court 1898 decision in *United States v. Wong Kim Ark*.[60] *Jus soli* recognizes that transition can be a multi-generational process, so it is important that the United States has no second-generation or third-generation noncitizens, unlike countries where citizenship law relies principally on *jus sanguinis*.[61] Similar thinking explains why the U.S. Constitution counts all persons for constitutional redistricting regardless of their immigration status. This rule recognizes that legislators represent not just current residents, but also a district's future residents, many of whom will be citizens through *jus soli*.[62]

---

and unlawful, if we glean from immigration as transition its core idea—the need to integrate immigrants. *See* MOTOMURA, AMERICANS IN WAITING, *supra* note 18, at 116-19.

[58] This viewpoint assumes, of course, that integration of immigrants is a good idea and one that the law should foster. For further discussion, *see id.* at 144-45, 189-94.

[59] *See* MOTOMURA, AMERICANS IN WAITING, *supra* note 18, at 146-47. This argument, in addition to an affiliation-based argument, is also evident in Martin, *supra* note 50, at 282-84, 291-96.

[60] 169 U.S. 649, 694-96 (1898).

[61] On the U.S. second and third-generation, see TOMAS HAMMAR, DEMOCRACY AND THE NATION STATE: ALIENS, DENIZENS AND CITIZENS IN A WORLD OF INTERNATIONAL MIGRATION 73-74 (1990); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 165-87 (1996); Joseph H. Carens, *Who Belongs? Theoretical and Legal Questions About Birthright Citizenship in the United States*, 37 U. TORONTO L.J. 413, 414-30 (1987); Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 72-81 (1997). On noncitizen children in *jus sanguinis* countries, see ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 122-24 (1992); Gerald L. Neuman, *Nationality Law in the United States and the Federal Republic of Germany: Structure and Current Problems*, *in* PATHS TO INCLUSION: THE INTEGRATION OF MIGRANTS IN THE UNITED STATES AND GERMANY 247, 272-76 (Peter H. Schuck & Rainer Münz eds., 1998); Wolfgang Seifert, *Social and Economic Integration of Foreigners in Germany*, *in* PATHS TO INCLUSION, *supra*, at 83, 97-98, tbl.4.4 at 96.

[62] On reapportionment, *see* Garza v. County of L.A., 918 F.2d 763, 773-76 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991); H.R.J. Res. 53, 109th Cong. (2005) (proposing that only citizens be counted for apportionment of congressional districts). Here, too, the idea is relevant that courts should view

The next question is whether changes to current immigration and citizenship law are suggested by thinking about the family as not only an object but also a means of integration. The most logical target is the scheme for family-based admissions when the petitioner is a permanent resident of the United States. Currently, if a noncitizen becomes a permanent resident, his spouse and children may accompany and follow to join him under section 203(d) of the Immigration and Nationality Act.[63] But if a noncitizen marries or has children *after* becoming a permanent resident, the new spouse or children can't accompany or follow under § 203(d).[64] Instead, they must qualify for admission as immigrants in their own right, and this requires a long wait.

In October of 2006, new spouses and unmarried children of permanent residents were being admitted as permanent residents only after a five year wait—since April of 2001.[65] And because only about 25,000 lawful immigrants from any single country may come each year in the combined family-sponsored and employment-based preferences, natives of Mexico were being admitted in October of 2006 only after waiting almost seven years—since October of 1999.[66] Anyone who applies in the fall of 2006 as a permanent resident's spouse or child almost certainly faces even longer waits, since every month the waiting list gets longer.

In contrast, a citizen can petition for a spouse and children as "immediate relatives" who must wait only for the paperwork to be processed (though this can take some time).[67] Citizens—but not permanent residents—can petition for siblings and for married and adult offspring.[68] Rather than wait in the line for the spouses and children of permanent residents, it may be faster for a permanent resident to wait the required five years to naturalize as a U.S. citizen and then petition as a citizen for his spouse and children as immediate relatives.

---

constitutional challenges to the government's immigration decisions from the perspective of harm to U.S. citizens, not just harm to noncitizens. The difference between the affiliation-based and transition-based versions of this idea is that the transition-based version considers not just current but also future family members who are citizens.

63 Immigration and Nationality Act § 203(d), 8 U.S.C. § 1153(d).

64 *Id.*

65 U.S. Dep't of State, 8 VISA BULL. NO. 98 (Oct. 2006).

66 *See* Immigration and Nationality Act § 202(a)(2), 8 U.S.C. § 1152(a)(2); *id.*

67 *See* Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i); AM&M, *supra* note 23, at 278.

68 *See* Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

This current system of family reunification for permanent residents reflects a retrospective recognition of ties. Lawful immigrants can petition for their spouses and children under the limited annual allotment with a long waiting period. Alternatively, they can satisfy the residency period for naturalization and petition as citizens. Both long waits are consistent with immigration as affiliation, which says that the law should recognize immigrants' ties but only after they develop over time. New lawful immigrants lack the ties to justify extensive opportunities to petition for close relatives.

The retrospective recognition of ties thus doesn't explain why long waits for a lawful immigrant's spouse and children are highly troubling. But the prospective sense of time reflected in immigration as transition tells us exactly why. These long waits seriously disrupt family life. Families have to do without everything that a missing spouse would bring to family life, from money to love. It is hard for a lawful immigrant to feel that she can establish much of a life in America if her husband and children aren't here. Or they come unlawfully, often at great physical risk en route. Once here, they live under threat of exploitation by employers and arrest and removal by the government. That is no way to live the sort of family life that integrates immigrants into American society. Immigration as transition suggests that immigration and citizenship law should take family ties into account, not only by recognizing existing ties, but also by promoting immigrant family life, especially by allowing immediate immigration by the spouses and children of permanent residents.[69]

CONCLUSION

As I explained in the Introduction, this article is based on two key ideas. First, the family adds the dimension of time to analysis of immigration and citizenship. Second, the time dimension poses choices concerning the role of law in the integration of immigrants into

[69] I don't mean to suggest that this view of family reunification would be the basis of a successful constitutional challenge to current law. Constitutional protection of family unity draws some support from U.S. Supreme Court decisions, see Moore v. City of E. Cleveland, 431 U.S. 494, 499-500 (1977); Stanley v. Illinois, 405 U.S. 645, 651, 656-58 (1972), but these were not immigration decisions. Much more on point is Fiallo v. Bell, 430 U.S. 787, 797-800 (1977), which rejected a constitutional challenge to the statutory definition of "child." At that time, the Immigration and Nationality Act recognized the relationship between a child born out of wedlock with her mother but never with her father. § 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D) (amended 1986). Congress has great latitude to regulate family-based immigration without regard to constitutional protections for family unity in the domestic context.

American society. My principal conclusion here is that an examination of the family in immigration and citizenship law discloses not only that the family introduces the element of time, but also that time can have different meanings. The prevailing sense of time in current law is retrospective. The alternative would be to think of time prospectively, and this would mean thinking of time's vehicle—the family—in more instrumental terms, especially by making sure that immigration and citizenship law promotes the immigrant family, so that immigrant families can in turn realize their potential in fostering the integration of immigrants.