Stefan Schlegel

Selective Enclosure: An Institutional Approach to the History of Immigration Law

Abstract

This article reconceptualizes the history of immigration law as an ongoing and ever more sophisticated enclosure of sets of institutions. It lays out how the right to decide over one's migration to a given place, or rather into given institutions, is a property right that grants control over access to these institutions. Sets of institutions are composed of public institutions (like courts and parliaments) and private institutions (like companies). The ability of private institutions to provide opportunities depends on the quality of public institutions. If the right to control one's migration is a property right, then the history of immigration law can be conceptualized as an ongoing enclosure: the delineation and concentration of these property rights. I argue that pressure to delineate these property rights in more detail, to reallocate them, and to change transaction rules stems from changes in the value of the underlying resource (access to institutions) and changes in the costs of the transaction of this property right. This insight sheds light on possible future developments of immigration law.

Keywords

Enclosure, history of immigration law, theory of property rights, citizenship premium, new institutional economics

Dr. iur. Stefan Schlegel
Institute for Public Law, University of Bern, Switzerland

Zeitschrift für Migrationsforschung – Journal of Migration Studies (ZMF) 2022 2 (2): 61–92,
DOI: https://doi.org/10.48439/zmf.171

Selektive Einhegung: Eine institutionelle Perspektive auf die Geschichte des Migrationsrechts

Zusammenfassung

Dieser Beitrag analysiert die Geschichte des Migrationsrechts westeuropäischer Zuwanderungsstaaten durch die konzeptionelle Linse der »Einhegung« (»enclosure«). Er geht davon aus, dass die Geschichte des Migrationsrechts sinnvoll verstanden werden kann als eine immer selektivere Einhegung von Sets von Institutionen. Mit Sets von Institutionen sind verbundene öffentliche Institutionen (wie Parlamente, Gerichte etc.) gemeint und die privaten Institutionen wie Unternehmen und Märkte, deren Funktionieren von öffentlichen Institutionen abhängt. Der Beitrag beschreibt zunächst das zentrale Gut, das Migrationsrecht zuteilt, das Recht über die Mitbenutzung eines solchen Sets von Institutionen durch eine bestimmte ausländische Person als ein »Handlungsrecht« (»property right«), das im Verhältnis zwischen einem Zielstaat und einer (potentiell) migrierenden Person tradiert werden kann, wobei das Migrationsrecht nicht nur die initiale Zuordnung (an den Staat oder an eine potentiell migrierende Person) vornimmt, sondern auch die Regeln für Transaktionen festlegt. Wenn nun das Recht über die Teilhabe von Menschen an diesen Institutionen sinnvollerweise als property right beschrieben werden kann, dann kann die Entstehung eines selektiven Migrationsrechtes als Einhegung beschrieben werden und Entwicklungen im Migrationsrecht in der Regel sinnvoll auf Veränderungen im Wert der unterliegenden Ressource (Kontrolle über den Zugang zu Sets von Institutionen) zurückgeführt werden. Entsprechend wird die Entwicklung des Migrationsrechts westeuropäischer Zuwanderungsgesellschaften in diesem Beitrag als eine Serie von Reaktionen auf die Wertveränderung des Zugangs zu Institutionen und der Kosten für die Transaktion der entsprechenden property rights erklärt, wobei die property rights zunächst durch gesetzgeberische Leistung definiert werden mussten und im weiteren Verlauf dann tendenziell selektiver zugeteilt wurden. Diese Perspektive zur Entwicklung des Migrationsrechtes wirft ein Licht auf dessen künftige mögliche Entwicklung. Sie konzipiert das property right über den Zugang zu Sets von Institutionen als Komplementärgut zu menschlicher Arbeitskraft und als Surrogat zu Glück in der Bürgerrechtslotterie. Sie stimmt daher insbesondere skeptisch, ob der Wert dieses property right abnehmen werde, wenn sich Wohlstandsunterschiede zwischen Herkunfts- und Zielstaaten verringern.

Schlagwörter

Einhegung (»Enclosure«), Geschichte des Migrationsrechtes, Theorie der property rights, Bürgerrechts-Rente, neue Institutionenökonomik

* * * * *

1 Introduction

Immigration law is a uniquely dynamic field of law. Its frequent reforms in many countries of immigration highlight the constant pressure it is exposed to. This article examines the drivers behind these frequent reforms. Its underlying hypothesis is that the varying value of the right to control migration of given individuals into given institutions, which will be qualified as a property right, is an important explanatory factor for the evolution of immigration law. To substantiate this hypothesis, the article applies two distinct but complementary concepts to the history of immigration law: the concept of enclosures and the concept of property rights. The genesis of immigration law is thus analyzed from the perspective of the underlying resource, which it allocates and reallocates, namely, the control over the access to sets of institutions.

The term *enclosure* is used mainly to describe the hedging and fencing of previously commonly used agrarian land in England, starting in the early 1500s. The underlying driver of this development was a rapid increase in the potential value of land when used for commercial agriculture, such as wool production. The term can, however, usefully be applied to the process of delineation and concentration of property rights and restriction of access to any resources that were formerly used as commons and that increased in value.[1] In the following, *value* refers to the degree of needs-satisfaction obtainable through the control of a resource. Examples include the degree by which income can be enlarged, security can be gained, and opportunities for social upwards mobility can be realized. Given that the property rights over migration are transferrable, their value for would-be immigrants influences their value for the state. States forgo a potential ›prize‹ in the form of fees, taxes, network effects, etc. when they opt not to transfer the property right. They incur opportunity costs. The term *institution* is used here for all »systems of established and prevalent social rules that structure social interactions« (Hodgson 2006, p. 2), among them public institutions such as constitutions, parliaments, and courts, but also markets and companies. Sets of institutions are a plurality of institutions that rely on each other. While much of the literature on property rights underemphasizes the instrumental role institutions play to render property rights fully operational (Hodgson 2015, p. 700), the property right over migration precisely gives control over the

1 See, for example, Boyle (2003), who applies the concept to the genesis of intellectual property law. See also Rifkin (2000), pp. 137–146.

access to institutions, which is why the role of institutions is especially important to emphasize in this context.

The usefulness of a property rights approach to immigration law has been previously explored (Brown 2011; Casella and Cox 2018; Schlegel 2018a; 2018b). The present article is therefore limited to examining its explanatory value for the historical development of this field of law. The general conceptual argument is as follows: If control over somebody's migration to a given place is a property right, then its delineation by the legal system, its allocation, and the definition of transaction rules can be expected to react in a contingent way to changes in the value of this property right and changes in the cost of its transaction (Libecap 1986, p. 231).

Following through on this argument has the potential to correct an overly state-centric perspective, a lack of appreciation of the transferability of the control over this resource, and an underestimation of the role of technology in immigration law. It strengthens the perspective of would-be migrants in that it demonstrates the changing value of migration – and therefore the changing value of the right to control one's migration – for migrants rather than solely for states. By highlighting the interests of migrants and countries of origin, a property right approach challenges a common implicit idea about the future of the regulation of migration, namely, that the pressure to migrate, and therefore the pressure on the regulation of migration, will ease once differences in economic wealth between countries of immigration and countries of origin diminish (de Haas et al. 2020, p. 56; Massey et al. 1993, p. 434). Additionally, this approach takes transaction costs into consideration. These costs are subject to change over time, just like the value of the property right (e.g., due to technical innovations making it easier to verify the identity of migrants and the information they provide, facilitate communication over distances, and facilitate the enforcement of the law). Therefore, these costs are just as important an explanatory factor for the development of immigration law as the changing value of the good it allocates. What is more, analyzing sets of institutions as former commons that now are enclosed »takes to a higher level of abstraction a set of individual fights« (Boyle 2003, p. 73). Individual fights for a permit or visa are revealed as part of a larger fight for the degree of openness of potential commons, a fight that has enormous distributive repercussions. Treating the control over someone's migration as the control over a good – an important one, but a good among others – facilitates the integration of the analysis of immigration law into the larger discussion of global distribution of access to resources.

The article is organized into four parts. The first part sets out the two concepts of enclosures and property rights and establishes that the control over someone's migration is a property right that grants control over access

to institutions. The second part posits that the legal order, in its delineation and allocation of this property right, is likely to react in a contingent way to changes in the value of the underlying resource. The third part provides a fresh analysis of the history of immigration laws of continental European countries of immigration as a series of ever more sophisticated enclosures. The fourth part assesses the implication of this approach for the future of immigration law.

The article aims to provide a general insight into the genesis of immigration laws. However, it is limited to case studies from European countries of immigration. While this geographic focus limits the degree to which findings may be generalized, it was chosen for good reasons: These countries look back on a longer history of immigration law and created a denser system of rules than most other countries besides the ›new world countries‹ like the US, Canada, and Australia. What distinguishes them even from the ›new world countries‹ and makes them a more suitable object of study is that they were already densely populated at the start of the period under scrutiny here. Therefore, it was never access to underused land that they had to offer, but rather access to sets of institutions.

2 Conceptual Elements: Enclosure and Property Rights

2.1 Sets of Institutions

Enclosures refer to the restriction of access to resources previously governed as commons. It is therefore useful to start by conceptualizing the resource to which access is normally sought through migration. Because the imagery of migration is so heavily influenced by the idea of access to territory, the imagination that territory is the resource to be gained through migration remains overly influential. This might have been so in the past, where mobile people sought arable land. With contemporary migration, however, gaining access to territory almost exclusively fulfills an auxiliary function. In almost all cases in a modern context, access to territory is necessary to gain access to sets of institutions, which form modern states and their markets. The control over space, in turn, is a means for the control over people, things, and relationships (Mau 2021, p. 26, 79). These sets are comprised of both public institutions (e.g., parliaments, courts, public registers) and private institutions (e.g., companies). If these sets function comparatively well, they provide a wide range of individual goods, such as safety, future income, and future self-fulfillment. The value of access to a given set of institutions increases in tandem with its relative ability to provide these goods. The following sections are therefore based on the observation that access to relatively well-

functioning sets of institutions is the primary ambition behind modern migration (Schlegel 2020).

Sets of institutions are pool resources like fishing grounds or grazing land for cattle. Similar to these resources, it is costly to exclude potential co-users of sets of institutions. Likewise, external effects of the regulation of access to them is reciprocal. Granting access has external effects on those who already enjoyed access, and restricting access has external effects on those seeking access. However, unlike fishing grounds and pastures, sets of institutions are not a directly rival resource. Co-use of the resource by C does not diminish its utility to A and B etc. to the same extent as C benefits. However, additional users indeed do create external effects, and controlling these effects through access restriction becomes a valuable capability, as co-using the institutional set becomes a valuable opportunity to a large number of potential co-users.

2.2 The Concept and the Theory of Property Rights

Property rights encompass the notion of property in a traditional legal sense, referring to any lawful capacity to use a good in a certain way. The term property right may be replaced by »entitlement« or a similar term to avoid confusion with property in a property law sense.[2] The *theory of property rights* understands the control over goods in each society as the control of *rights over these goods*. The transaction of goods in society – either between individuals or between an individual and a state – is explained as the transaction of *rights over goods* (Demsetz 1967, p. 347). The sum of social and economic relationships in a society and the position of each individual within society may then be described as the bundle of rights each individual holds and the rules by which these property rights may be transferred. The relationship between an individual and a state may be described as the relationship of two bundles of rights. An individual has certain rights towards a state (e.g., fundamental rights), and a state has certain rights towards an individual (e.g., a right to taxes). Some of these rights can be transferred, e.g., when the state issues or withdraws a license or permit to an individual, as the state does when granting or withdrawing a visa to an immigrant.

Where transactions occur voluntarily, they usually do so with the aim of internalizing external effects to a greater degree (Demsetz 1967, p. 348). Imagine ranger A with a property right to let his cattle roam on the land of farmer B. If A voluntarily transfers this right to B so B can now prevent the cattle

2 The term »property rights« is used in this article despite this potential misunderstanding, since as a technical term, it is well established and developed. See Anderson and Hill (1975); Alchian and Demsetz (1973); Pejovich (1972); Demsetz (1967).

from roaming on his land (in exchange for some prize), the externalities imposed by farmer B on ranger A are usually smaller than in the previous arrangement.

When a state A (voluntarily) transacts the control over someone's migration to potential migrant B, the external effects created by B will generally be smaller than in the previous arrangement. Whether such externality-reducing transactions can happen depends on transaction costs. More externality-reducing transactions may happen when transaction costs become lower. A well-functioning contract law is a means to lower transaction costs among private actors. A well-functioning immigration law is a means to lower transaction costs between individuals and the state, as it makes it easy to identify particular migrants and assess whether they have a right to migrate,[3] and to easily enable the transaction of the property right where it is not yet with the would-be migrant (by granting a permit). Immigration laws that are too complicated may frustrate potential migrants with an actual right that proves prohibitively complicated to claim.

2.3 The Concept of Enclosure

The concept of *enclosure* not only describes the concentration of property rights that were formerly widely dispersed, it also refers to the *delineation* of formerly only loosely defined and merely customarily protected rights into well-defined, formal property rights, often backed up by written legal rules (Boyle 2003, p. 34).[4]

Even if enclosures, such as the hedging and fencing of agrarian land in early modern England, may ultimately be beneficial, in the sense that they allow for the more intensive and efficient use of a resource, they can have devastating effects on those excluded from co-using a resource to which they previously had access (Polanyi 2010 [1944], p. 36). Commonly, enclosures are associated with the creation of a market (such as a labor market, a market for real estate, or a market for patents). It is sufficient, however, to associate them with the creation of *transferability* of a good, or more precisely, the transferability of rights over goods. Whether such transactions are performed through the market or the state (or a mix of both), is – for such transformations to qualify as an enclosure – of secondary importance. Of primary

---

3 For the enhanced pressure to be able to identify individuals, see Torpey (2000), p. 92. Torpey describes passports as »an expression of the attempt by modern nation-states to assert the exclusive monopoly over the legal means of movement.« See also p. 159.

4 This article relies on the legal rather than the factual or economic concept of property rights (since it is interested in the evolution of immigration law). Legal property rights may be defined as »what a government delineates and enforces as a person's right to exclusively use a good« (Barzel 1997, p. 3, 90).

importance is the fact that rights over resources were immobile before the enclosure but are transferrable afterwards. The delineation and allocation of property rights is a precondition for the transferability of these resources.

The concept of enclosures is typically used to describe the concentration of privately held access rights. However, the hallmark of enclosures is the concentration of access rights. Thus, it is still an enclosure if access rights are concentrated with a public administration. State-ownership of property rights does not imply that property rights are in the »public domain« (in the sense of Barzel 1997, p. 9, 148) or that the underlying resource is freely accessible.[5] The rights are still enclosed, defined, and allocated (Schäfer and Ott 2020, p. 659). They are just allocated to the state, rather than to private agents. They are also allocated *by* the state.

Even though enclosures are commonly associated with the restriction of access, they are really about the delineation of access, which implies they may enhance selectiveness rather than overall restrictiveness.

2.4 The Property Right over Migration

If sets of institutions are a valuable good, there is likely a derivative good to them, one that relates to sets of institutions in the same way a ticket relates to a ride: a good that grants legally backed access to the underlying good. This derivative good is the right to use a good (i.e., a set of institutions) in a certain way (i.e., by controlling the access of a given person X to certain aspects of it). It is this ticket that can be usefully described as the property right over migration. The property right over migration is therefore defined as *the control over the access to a set of institutions,* access to public space that is the necessary auxiliary good for access to institutions, and to at least some public services. The property right over migration is therefore a right to control access.

Just as the enclosure of a good does not necessarily entail its commodification (i.e., allocating it via a market), the conceptualization of the control over access to this resource as a property right does not imply a normative argument that the property right should be allocated via a market. The important insight is that property rights, once defined, ought to be allocated. Whether they are allocated via commodification in a market or via »commandification«[6] by an administration is a question to be answered subsequently. Creating rules that delineate control of access and allow transferring it via an administrative decision also mobilizes the resource (Barzel 1997,

5 For the crucial distinction between common property (every resource is freely accessible for everybody) and collective property, see Waldron (1985), p. 329.
6 For this terminology, see Calabresi (2016), p. 31.

pp. 128–129). In the context of the property right over migration, administrations are far more important allocators than markets.

2.5 Internalization of External Effects

Like the use of any given good, the control over migration creates external effects, either for those who are excluded from migration or for those who must share sets of institutions. This is not to imply that migration – if enabled – may not have positive external effects. This will generally be the case. Here, the emphasis is on negative external effects because these are the ones the regulation of immigration aims to internalize. External effects are reciprocal. If the property right is allocated to the state, would-be migrants have to bear the external effects of the restriction of immigration. If the property right is allocated to migrants, societies in countries of destination bear the external effects of immigration. It is a question of the allocation and the transferability of the property rights whether external effects can be internalized to a greater or lesser degree. One way by which a property rights approach to immigration law can overcome an overly state-centric perspective on immigration law is its emphasis on this reciprocity, its observation that not only migrants impose external effects on societies of destination, but that the restriction of migration imposes (often greater) external effects on would-be migrants (and many more who might profit from the legal migration of others).

2.6 The Property Right in a Hohfeldian Perspective

The property right over migration has essentially the nature of a veto over one's migration to a given place, or rather, into given institutions. The property right is allocated to a receiving state if its administration can veto a given migratory event. This veto is a *state prerogative* as long as it lies with a state, but it turns into an individual *right* to migrate if it lies with the (would-be) migrant. Citizens of the European Union who fulfill the conditions for free movement are an example of holders of their own property right to migrate to other member states. In the terminology of Wesley Hohfeld (see Hohfeld 1913), an important forerunner of the concept of property rights (Johnson 2007, p. 251), the central aspect of this property right is a *privilege*. Those endowed with it have the privilege to remain in a country of immigration or immigrate to this country (Cassee 2016, p. 23) and enjoy the »negation of a duty to stay off« (Hohfeld 1913, p. 32). If the state is endowed with it, the privilege consists in not having to permit someone to immigrate or stay. As is essential to Hohfeldian thinking, this privilege has as its correlate a negative right, the absence of an entitlement, a no-right. In the case of a privilege allocated to would-be migrants, it is the no-right of a would-be receiving state to

block the immigration of the individual in question. In the reverse allocation, it is a no-right to immigrate or stay for the would-be migrant in question.

2.7 The Property Right as a Bundle of Rights

It is a simplification to speak of a property right over migration. What was treated as a single entity so far really is a *bundle of rights*. In the hands of a migrant, the bundle is composed of aspects, like the privilege to enter a country and the privilege to stay for a certain time. Regularly, but not in all cases, the bundle also contains the privilege to access a countries' labor market, its market of services, the right to some social transfers, the privilege to bring family members, and eventually the privilege to become a citizen. In the categories of Charles Reich's »New Property« (Reich 1964, pp. 734–737), the property right over migration would be a bundle of rights that typically contains a sort of occupational license (the privilege to offer one's human capital), a sort of franchise (a partial monopoly, since the number of competitors in this specific market is limited by immigration law), and some public resources (e.g., public education for children, etc.).[7] In that sense, it is comparable to a taxi license that also grants access to a restricted market and some public resources, the value of which also is highly responsive to technological disruption and structural economic shifts. The difference from a taxi license is the degree of personalization and the much broader spectrum of market activity to which the property right over migration grants or restricts access. Like in the case of many taxi licenses, transactions are often only possible towards the state. The exact composition of the bundle an immigrant holds varies from immigration status to immigration status and often from one individual situation to another.

It is useful to imagine those different bundles on a spectrum. On one end might be a very thin bundle that does not actually contain a right to enter or a right to stay, but still some human rights guarantees that benefit even irregular migrants, such as a right to basic health care or a right to attend elementary school. Somewhat thicker bundles may contain a right to enter the country, but just a very short-term right to stay and access only to some markets, not to others (i.e., service providers who have no access to the labor market). At the other extreme of the spectrum are bundles that grant denizenship, an unconditional and unlimited right to stay, only distinguishable from the citizenship bundle through certain aspects like political rights. Such

7 See also Casella and Cox (2018), who describe visas to the US explicitly as property rights and use the concept of the bundle of rights to unbundle visas to obtain certain policy goals. Brown refers to visas to the US as »quasi property rights« (Brown 2011, pp. 1084–1087).

bundles are a rather perfect surrogate good for citizenship (Mau 2021, p. 87) and a meaningful second-best solution for bad luck in the citizenship lottery.

In many immigration systems, employers play a vital role as facilitators or as a precondition for a transaction of a bundle of rights between a state and migrants. While the transfer occurs between a state and a migrant, employers play a vital role as matchmakers. Where the access to a labor market is conditional to a specific employer or specific working conditions, it is useful to think of an attenuated bundle of rights that grants access only to a thin slice of the labor market.

2.8 Relation to Theories of Migration

The approach put forward here diverges from existing theories of migration in several important regards. First, it aims to provide an understanding of the *regulation* of migration, rather than explain the factors that drive migration itself. It primarily challenges tendencies in legal history that assume that the history of regulation follows the history of ideas, rather than reacting to structural developments (Hesse 1983, p. 109). Nevertheless, it relies on certain assumptions regarding what drives migration, namely that technological and economic transformations are among these essential drivers. The closest relative to a property rights approach is the theory of migration transition that identifies (global) social transformation as the main driver of migration, a theory that draws heavily – like the scholarship on enclosures – on the work of Polanyi (de Haas et al. 2020, p. 57). Enclosures are one typical pattern of such transformations. Analyzing sets of institutions as a resource that underwent enclosure highlights that access to this resource is a necessary precondition for individuals to benefit from such transformations. The theory of property rights provides the analytical framework to understand how this access to an enclosed resource is granted in an increasingly selective manner.

3 Enclosures of Institutional Sets as a Reaction to Changes in the Value of Access

This section examines the question of how the economic concepts described above (i.e., enclosure and property rights in the context of immigration law) may be imported into the analysis of the historical development of immigration law.

The effort to bridge legal and economic history with the help of the theory of property rights is as old as the theory itself. The economic historian Douglas North stated for the economic school of new institutional economics (of which the theory of property rights is a subfield), »[the new institutional approach] sees change in relative prices as a major force inducing change in

institutions« (North 1993, p. 2). The economist Harold Demsetz observed that property rights are created and redistributed in response to new economic forces that increase the value of the right (Barzel 1997, p. 91).

3.1 The Premium of Citizenship and the Premium of Access to Lawful Migration

Economic history is replete with examples of the creation and allocation of property rights that essentially give access to a well-functioning set of institutions: professional licenses, rights for merchants to access certain markets, rights for citizens of given cities (Pejovich 1972, p. 315; see also Strahm 1955, p. 117; Torpey 2000, p. 158). These access rights have long been understood as valuable property rights (Hollenstein et al. 2018, p. 30)[8], and therefore, the mobility of people hoping to gain access to such institutions has been a concern of organized societies from their inception (Scott 2008 [1998], p. 1). Today, labor is the most important revenue-producing asset. It is very often practically the only asset over which people dispose (Sen 2001, p. 162). Therefore, the question of who has membership in or is excluded from an institutional set in which labor is highly productive has become the single most important predictor of someone's lifetime income (Milanović 2016, p. 133). The current age is one of large ›citizenship premiums‹ or ›citizenship rents‹, meaning one's citizenship is an important factor in determining one's lifetime income (Milanović 2016, p. 5). The same is true for the ›rent‹ of those with legal immigration status rather than full membership, which comes with a bundle of rights not quite as strong as the bundle of citizenship. Because reform of sets of institutions tends to be very difficult and slow, access to mobility might well be the only meaningful surrogate to membership in a relatively well-functioning set.

The body of literature that emphasizes the quasi-proprietary character of citizenship and the important distributional effects of citizenship rents often overlooks this distributive effect of immigration law. In contrast, Torpey, an author focusing on the regulation of the movement of people, calls the »monopolization of the legitimate means of movement« an expropriation comparable »to those [expropriations] identified by Marx when he analyzed the monopolization of the means of production by capitalists, and by Weber when he discussed the modern state's expropriation of the legitimate use of violence« (Torpey 2000, p. 167). Rogers Brubaker describes the institution of citizenship as a »powerful instrument of social closure« (Brubaker 1994,

8 For the legal rights of refugees in early modern cities, see the overview at Kaplan (2018), p. 4. See further Schäfer and Ott (2020), p. 674; North (1978), p. 696; Reich (1964), p. 735.

p. 230). Steffen Mau describes the selective function of modern borders as »a generator of inequality like there is probably no other« (Mau 2021, p. 163).[9]

If access to legal migration is the one conceivable surrogate to a lucky strike in the citizenship-lottery, it is also the most important complementary good to human capital (often the only capital that people dispose of). Whether that human capital can be combined with a set of institutions in which it can unfold its potential is decided by immigration law. A property rights approach to immigration law, therefore, not only helps to better understand the historical genesis of immigration law but also its distributional implications. It allocates the closest possible surrogate (legal access to foreign countries [read: sets of institutions]) to the most important predicter of life outcomes (citizenship) and the most important complementary good (access to a well-working set of institutions) to the widest distributed resource (human capital).

3.2 Factors for the Creation of the Property Right over Migration

According to Gary Libecap, »[p]roperty rights exist as a continuum. They range from open-access conditions at one extreme to limited and vague rights definitions, and specific, exclusive property rights at the other extreme« (Libecap 1986, p. 235). When underlying resources gain value over time, this typically also leads to more specific and exclusive property rights over time. Thus, an enclosure develops. Given that it is costly to create, implement, and enforce any kind of property rights regime – including any given form of immigration[10] – there must have been a time when the costs of the specification and enforcement of the property right were higher than their utility (Waldron 1985, p. 319). Because the property right over migration consists of the control over access to public institutions, some sort of statehood must exist to delineate and allocate the control over access to it.

None of the argument so far implies that the process of the specification and allocation of property rights – over a certain good in general or the control over migration specifically – automatically leads to an overall efficient situation. This approach is not an attempt to discover a »rationality of history« (Hesse 1983, p. 84).[11] Both the specification and the allocation of the property right are the product of politics. If power is the ability to impose costs on others (Barzel 2012, p. 18; see also Hesse 1983, p. 99), the distribution of the property right over migration is a function of the distribution of economic

9 My translation.
10 One aspect of these costs consists in the considerable effort to be able to identify people. This has been termed the »revolution identificatoire«. See Torpey (2000), p. 121.
11 My translation.

and political power, and its reallocation is likely when power relations shift (Libecap 1986, p. 232; Richter and Furubotn 2010, p. 134). Would-be migrants and their countries of origin are not normally included in the delineation and allocation of property rights over migration. On the other hand, those who potentially lose out from migration, fear they might lose out, or figure they can win elections by demonizing migration tend to be part of the process. In addition, their losses or perceived losses are typically concentrated, while the potential gains are widely dispersed. It would be surprising, therefore, if that process would lead to an efficient allocation (Hatton 2007, p. 364). However, the delineation, allocation, and enforcement of a property right over migration is costly even for the powerful. Not allocating it to those who value it highest comes with opportunity costs even for them. The contingency of the degree of formalization of the property right system upon the value of the property right thus remains, even if there is no natural tendency towards efficiency.

4 Rereading the History of Immigration Laws

4.1 The Regulation of Mobility

This section turns to specifics and reexamines the history of immigration law through the lens of enclosures and property rights in an attempt to enrich our perspectives on this field. James C. Scott noted that »people who move around (…) have always been a thorn in the side of states. Efforts to permanently settle these mobile people (sedentarization) seemed to be a perennial state project – perennial in part, because it so seldom succeeded« (Scott 2008 [1998a], p. 1). With this in mind, this article does not seek to reproduce the overly simplified notion of a »mobility transition« (Lucassen and Lucassen 2009, p. 348; see also de Haas et al. 2020, p. 52), depicting populations in pre-industrial times as sedentary and their mobility therefore as unregulated. Early forms of the control of access to particularly valuable sets of institutions, such as cities, date far back and are an early manifestation of property rights over mobility. As the number of unemployed and mobile ›vagrants‹ increased in the 16th century, the public administration intervened in many European regions to regulate and restrict their mobility, in large part to regulate the price for labor (Ocobock 2008, p. 8). Another aim of these regulations was to ensure that social support could only be obtained from the vagrants' home parishes (Ocobock 2008, p. 11). Such regulations, therefore, enclosed the access to institutions that provided a degree of social security, excluding potential co-users of pool resources. Modern immigration laws allocate

access to nation-states, their markets, and their systems of social welfare.[12] While the regulation of international migration often serves similar regulative goals as the regulation of internal mobility, it relies on the institutional achievement of a nation-state, a set of institutions within which mobility is generally enabled. It is crucial, therefore, to keep in mind that the underlying resource evolved as its enclosure progressed and that its enclosure – to a degree – was a necessary condition for its evolution into a nation-state (Thym 2010, p. 51).

4.2 The Delineation of the Property Right over Migration in the 19th Century

Before immigration laws existed and foreigners could be excluded from institutional sets in a more discriminatory way than locals, national sets of institutions were commons, in the sense that they were »within the reach of members of the relevant community without the permission of anyone else« (Lessig 2002, p. 1788). This was still largely the case in the second half of the 19th century, marked by the phenomenon of massive international migration within Europe and across the Atlantic, as well as by a sharp increase in global inequality driven by soaring inequality *between countries* (since inequality within countries was in decline, O'Rourke 2001, pp. 15–18). The number of people to whom migration was a viable option expanded at the same time as the value (in the form of expected income) that could be accessed through migration, sharply increased. Restrictions were introduced for people of certain origins. For example, in eastern Prussia, Polish rural workers were seen as distorting wages and undermining the local culture. When landlords successfully fought back against these enclosures because they had an interest in cheap labor, early experiments with seasonal migration schemes were conducted. Those schemes gave employers access to cheap labor while denying those laborers access to a labor market. During the season for which they were allowed to work, the Polish workers remained tied to specific employers and farms in eastern Prussia (de Haas et al. 2020, p. 108).

However, the primary preoccupation in the second half of the 19th century was the regulation of *emigration* (Czaika et al. 2018, p. 3; Zolberg 2007, p. 34; Torpey 2000, p. 59). There was a great need for both highly qualified and less qualified laborers. At the same time, social transfers to the poor or unemployed by the nation-state remained practically nonexistent. Industrializing nation-states were therefore a rather typical situation for a stable com-

12 There are exceptions to this. In China, access to cities remains a precious and scarce right that is often not granted or only partially granted to domestic migrants from rural areas (Gálvez 2016, p. 2).

mon-pool resource: The resource governed as a common is abundant, and very little of its use is rival. It is not surprising, therefore, that the emerging rules of the era tended to reinforce and consolidate the governance of the underlying resources as commons rather than move to an enclosure.

The second half of the 19th century was marked by the increasing number and importance of bilateral treaties that mutually assured migrants equal footing with citizens, except for political rights (Bast 2011, p. 84). The access protected by these treaties was similar to the homesteading of land that marked frontier economies in the American West around the same time. In both cases, a resource would be underused in the hands of the state, and given that the good in question was not scarce at the time, its free allocation distributed wealth in the population without much distortion. The flipside of this high accessibility of the commons was a weak protection of this access. These treaties did not grant individual rights in the contemporary sense that individuals could enforce them with the help of courts. Rather, they were conceptualized as guarantees towards the country of origin (Bast 2011, p. 85; Schlegel 2018a, p. 120; see also von Frisch 1910, p. 91). If anything, the violation of such bilateral treaties amounted to an infringement of the legal position of the country of origin, not of the migrant. This is typical for a pre-enclosure resource: weak delineation of rights paired with weak restriction *and* weak protection of access. An enclosure perspective on the genesis of immigration law helps highlight this interplay between weak restriction of access and weak protection of the possibility to access and the later shift to much stronger restriction and then gradually to better protection of the rights of those who were selected to keep access.

4.3 The Enclosure of Sets of Institutions

The interwar period was marked by the emergence of the first forms of overarching immigration laws in many European countries.[13] With the outbreak of the war, it was easy for the administrations of these countries to legitimize the need for control of entries, an obligation to hold passports, and the possibility to expel undesired foreigners (Torpey 2000, p. 111–112). The failure to return to a liberal regulation of migration after the end of the war turned war-motivated travel restrictions into increasingly permanent enclosures (Torpey 2000, p. 116). The advent of passport requirements during the war laid the technical foundation for these restrictions. Economic downturns and perceived competition in already strained labor markets by immigrants com-

13 In Britain, such a law already passed in 1905 (von Frisch 1910, p. 98). For the so-called ›new world economies‹, see the overview over their tendency towards more restrictive immigration laws in the period from 1870 to 1930 in Timmer and Williamson (1998), p. 743.

pounded the pressure to control access. Trade unions were instrumental in establishing permanent restrictions on immigration. The fact that restrictive immigration laws became widespread led to a type of arms race, wherein remaining an open set of institutions quickly became more expensive when neighboring sets were increasingly sealed off. To the degree that social welfare programs were established in this period, they were sure to exclude immigrants (Goldin et al. 2011, pp. 78–80). Thus, a targeted enclosure of a directly rival resource occurred.

The bulk of the instruments to regulate migration, and thereby enclose sets of institutions, were developed in these years. Germany led the way with »strict state control of labor recruitment, employment preferences for nationals, sanctions against employers of illegal immigrants, and unrestricted police power to deport unwanted foreigners« (de Haas et al. 2020, p. 110). By 1932, France, which had a more urgent demand for labor immediately after the war, followed suit with maximum quotas of foreign workers per employer (de Haas et al. 2020, p. 111). Switzerland amended its constitution in 1925 and created its first legal framework to curb migration in 1931. While on the surface obsessed with ›Überfremdung‹ (the notion of losing one's collective identity because of the presence of too many foreigners), there was also a clear understanding that labor market needs drive immigration. Therefore, the main aim of the newly created legal framework was to allow for some labor mobility while preventing permanent residence as strictly as possible (Schweizerische Eidgenossenschaft 1924, p. 510).

The controllability of inward mobility had become more valuable than the control of outward mobility. The interwar period durably shifted the focus of the regulation of international mobility from emigration to immigration (de Haas et al. 2020, p. 109). Therein lies the key move to an enclosure of sets of institutions.

4.4 The End of the Era of the Guest Worker and the Enclosure of Family and Humanitarian Migration

After WWII, with a very high demand for labor in northern Europe, bilateral treaties between sending and receiving countries enabled and sustained the recruitment of guest workers (de Haas et al. 2016, p. 16; Herbert 2001, p. 232; Rass 2010, pp. 355–357; Schönwälder 2001, p. 251). However, it became clear that the turnover system thus established would not work in practice once economic growth slowed (Farahat 2018, p. 339; Herbert 2001, p. 232; Schönwälder 2001, p. 257, 550). The mere lending of thin bundles of property rights over time, which granted access to labor but to nothing else, turned out to have a series of hidden and unintended costs (e.g., lack of integration, high vulnerability of unemployment, belated family reunification). The oil crisis of

1973 marked the beginning of a rapid enclosure of labor opportunities. With direct access to labor markets increasingly fenced off, other forms of immigration (Hollifield 1992, p. 92) took center stage of the political agenda.[14] Access to family reunification and access to humanitarian migration risked (in the eyes of receiving states) becoming substitute goods in place of access to a labor market. Hence, pressure grew to enclose access to these potential detours to labor opportunities.

Evidence for this growing pressure is the advent of the term »Migrationspolitik« in the German-speaking countries in the second half of the 1980s, beginning to replace the former »Ausländer-« and »Asylpolitik«. The shift in terminology reflected a shift in paradigm. Policymakers understood that their goals for the regulation of the labor market were in peril if they did not take the policies towards refugees into account as well (Espahangizi 2022, p. 279). In Switzerland, a strategic report on the future of immigration policies by an official commission, which was met with great interest in Germany (Espahangizi 2022, p. 293), proposed to fuse the Foreigners Act and the Asylum Act to better be able to take account of the interferences refugees created for the labor market. While the merger of the two acts ultimately failed, there was a consensus on the risk that refugees might disturb the equilibrium aimed for on the labor market. »We observe that the mixture of politics regarding foreigners and the politics regarding refugees is imposed on us by people entering our country. For them, unlike for us, it is of little importance under which title they can obtain some years of residence, even if precarious«, one regional immigration office responded to the report.[15]

An enclosure perspective is helpful to highlight this ›backdoor argument‹, which itself makes use of the metaphorical language of fencing and closing. It highlights the extent to which the regulation of family unification and humanitarian migration is shaped by the attempt to avoid backdoor access to a set of institutions, the value of which is determined largely by its labor market.

While immigration laws were rudimentary at first and left a great deal of discretion to the competent authority of the receiving state, the second half of the 20th century is marked by the increasing degree of detail of these laws. This development towards a tighter-knitted net of rules regarding migration, many of which protected migrants' rights and therefore created a more detailed delineation of property rights over migration, can be observed in many countries in the second half of the 20th century (for Germany, see Thym 2010,

14 For an overview of such policies, see de Haas et al. (2016), pp. 25–27; Freeman (2007), p. 94.

15 Quoted according to Espahangizi (2022), p. 288. My translation.

p. 59; for Switzerland, see Uebersax 2012, p. 15; for the US, see Hollifield 1992, p. 891). For a long time, German law operated with a general clause as its central device which provided that immigrants could be admitted, as long as their admission was not detrimental to the interests of the German State.[16] However, the number of immigrants living and arriving in Germany made it both impractical and problematic to leave the governance of the immigration system to the broad discretionary powers of the administration. Pressure increased to regulate migration in a more detailed fashion (Schönwälder 2001, p. 247). When a new bill was passed in 1990, its marked difference compared to its predecessor was that under certain conditions, it guaranteed rights, including the right to become a citizen, to migrants (Thym 2010, pp. 61–63; Joppke 1998, p. 287). The selective access rights to a valuable resource became more sharply delineated and better protected.

The treaties negotiated in the second half of the 19th century formally remained in force. However, the treaty parties typically agreed on a subsequent restrictive interpretation.[17] In some cases, treaties were explicitly amended to that effect (Stoffel 1979, pp. 114–132; see also Hollifield 2011, p. 236). Walter Stoffel stresses the revolution in transportation and communication that could not have been foreseen before WWI[18] and the many thousands of individuals that thus could consider migrating. Given these unforeseeable disruptions, he claims that the threshold of a *clausula rebus sic stantibus* would have been fulfilled for a unilateral reduction of the scope of these treaties to reclaim control over migration by the states. In this enclosure, as in others, technological disruption turns out to be a decisive driver.[19] Stoffel also identifies a direct link between the creation of the welfare state and the decline in the number of treaties that enabled migration (Stoffel 1979, pp. 76–77). This is a striking example in which property rights have been delineated and claimed by the states due to the rapidly enhanced value of the underlying resource and the rapidly expanding pool of potential migrants. Both developments led to soaring potential costs for not being able to control migration (Herbert 2001, p. 335).

If the attempt to fence off alternative routes into the labor market was the main project of immigration laws in the last quarter of the 20th century, making the access more tailored to the needs of receiving states is the main project of immigration law in the 21st century. Policies to attract highly skilled

---

16 See § 2 Abs. 1 AulsG 1965; Sammlung des Bundesrechts, Bundesgesetzbl. II 2600–1.

17 For the declining importance and observance of those treaties in Germany, see Bast (2011), p. 87. For Switzerland and its partner countries, see Piguet (2013), p. 14.

18 A very similar argument was made by von Frisch (1910), p. 94.

19 Technology (like train travel) also tended to undermine the ability to effectuate border checks; see Torpey (2000), p. 77.

migrants became increasingly common after 2000 (de Haas et al. 2016, p. 24; Meyers 2007, p. 183).[20] This effort stems from an increasing awareness of an ongoing ›war for talents‹. European countries feel growing pressure to offer attractive bundles of rights to the internationally sought-after chosen few (for Germany, see Herbert 2001, p. 333). It marks the development from an initially indiscriminate enclosure against foreigners in general to a much more selective allocation of access. The most general large-scale attempt for such an explicit turn to selectiveness is the EU Blue Card Directive. It is designed to help the EU become the most competitive economy worldwide[21] and at the same time flags awareness of the risk of the brain drain it might trigger.[22] Besides, the Blue Card Directive vividly demonstrates how challenging selectiveness in the enclosure of competitive economies can be, how difficult it is to be attractive for some while inaccessible to others. The Directive is by now widely regarded as a failure, including by the European Commission (Lange 2020, p. 276), and subject to a major overhaul and liberalization, which again demonstrates the challenges of selectiveness.

However, the main selective effect of this period was created through an increasingly common set of institutions, the single market and the European institutions to uphold it. Creating a much larger institutional roof makes the fences underneath this roof ever more obsolete. As the pool resource is becoming much larger, the gates are moved outwards and reinforced there (Mau 2021, p. 134; Parusel 2010, p. 26, 231). This development creates a strong distinction between foreigners from Europe and those from outside of it.

4.5 The Role of Courts and International Human Rights Protection

As with the enclosure of land in England, courts played a significant and nuancing role in the enclosure of sets of institutions. Often, courts have a clearer understanding than lawmakers of the value of the property right over migration in specific cases. They therefore tend to grant access in a more nuanced way, protecting the bundle of rights of potential migrants more generously than initially foreseen by the positive law. In some cases, this creates case law that challenges and sometimes frustrates the efforts of the legislature to rearrange property rights over migration. An example of such a

---

20 In Germany, a shortage of qualified IT workers was an important trigger to consider a new immigration law in early 2000; Bast (2012), p. 64.

21 COUNCIL DIRECTIVE 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Blue Card Directive), recital 3.

22 COUNCIL DIRECTIVE 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Blue Card Directive), recitals 22-24.

development is that the right to free movement of persons has been interpreted so broadly by the European Court of Justice (ECJ) that it led to a successive emancipation of this right from its initial aim of a free circulation of workers (Wollenschläger 2007, p. 60). Another example is the slow but gradually extended protection of migrants against forced removal and the protection of a right to immigrate on grounds of the protection of the right to family life and private life by the European Court of Human Rights. Particularly, such a perspective is helpful in understanding how a well-working set of institutions that relies on a minimum of coherence (as courts do) *has* to grant rights to migrants that were never designed for them. Once these rights are stated and labeled as fundamental or universal, they cannot entirely be withheld from migrants. Having relatively coherent courts – a necessary precondition of a relatively well-functioning set of institutions – therefore leads to a certain inevitability to better defined, stronger rights of migrants.

4.6 Lobbying for Privileged Access: The Role of Countries of Origin

Another (underestimated) factor in the ever more selective access to the enclosed resource is the importance of the role of the country of origin. The growing competition among potential receiving countries led to improved leverage of countries of origin. Their threat to channel their citizens to destinations that granted better conditions gained credibility (Rass 2010, pp. 384–386). Initially, Italy was »the semi-periphery of a European regional economy dominated by Germany« (Torpey 2000, p. 125). However, it quickly became the most important sending state among the founding members of the European Community and played a decisive role in the establishment of the free movement of persons within the European Union (Schönwälder 2001, p. 278). In this role, Italy had a vital interest in gaining access to attractive labor markets for its citizens. However, Italy failed with its initial demand to assure priority to migrants from EC member states as opposed to third countries (Meyers 2002, p. 32).[23] Germany strongly opposed such a restriction (Schönwälder 2001, p. 280). Italy's demand, however, illustrates that the question of the extent of exclusivity of access to labor markets influences the value of the property right over migration. An Italian official went so far as to

23 This view is contested. Comte (2018, p. 179) admits that Italy played a certain role in the establishment of free movement in applying pressure to create legal paths of emigration for its citizens. However, he insists that the free movement of people was first and foremost a German project, pressed for by a West Germany anxious for opportunities to export its (at the time) quickly growing workforce, consistently reinforced by immigration from eastern Europe. A second strategic interest of Germany was the prevention of communism in allied countries through opportunities of migration to diminish social tensions. This strategic interest played out mainly concerning Italy.

claim that the right to free movement would remain ›theoretical‹ if access to the labor market of other EC member states would have to be shared with citizens of third countries (Meyers 2002, p. 32). With the expansion of the EU, this question lost relevance since the few countries of recruitment outside of it remained Turkey and Yugoslavia.

In Switzerland, some trade unions, in which guest workers from southern EC member states were strongly represented, lobbied the governments of Italy, Spain, and Portugal to pressure Switzerland to replace the seasonal-worker status with a scheme of free movement (Espahangizi 2022, p. 295). Eventually, countries associated with the European Single Market (EEA countries) had to concede to the pressure of the European Union to open their labor markets in exchange for (partial) access to its common market. Especially in the case of Switzerland, clear evidence shows that the free movement of persons with the EU/EFTA would have been politically impossible were it not for the ›carrot‹ of access to the single market Switzerland gained in return (Schweizerische Eidgenossenschaft 1999, p. 6156, 6309). Despite a successful referendum to amend the Swiss constitution to reintroduce caps (in February 2014), the threat of losing access to the single market was too great to put this constitutional obligation into practice. The reclamation of the property rights over migration from EU/EFTA failed due to the credible threat to enforce internalization of the damage done to European citizens if they were again enclosed from an attractive set of institutions.

A more recent example of an internalization of the external effects of immigration restrictions is the trade deal the UK hopes to achieve with India, partly to compensate for lost market access after Brexit. It is a widely held consensus that privileged access to the growing Indian market will only be possible in exchange for easier access to the UK for Indian workers (Wilkinson 2022). As long as the UK is unwilling to grant access to its labor market to (some) Indians, it has to bear a part of the negative effects of its exclusionary policies by losing out on trade. India, thereby, is capable of enforcing the internalization of a part of the negative externalities imposed by the UK's restrictive immigration politics.

The concept of internalization, closely related to the concept of property rights, is helpful to underline a mechanism easily overlooked otherwise: the capacity of imposing on states part of the negative effects of their own migration laws and the pressure to avoid these costs by choosing more permissive policies.

4.7 Resources with Decreasing Value

Theory predicts that property rights over resources with decreasing value will overgrow, fall in disrepair, and eventually be abandoned. Maintaining

and enforcing such property rights will become too expensive (Anderson and Hill 1990, pp. 175–176). A formerly enclosed resource will become free-floating again.

An example of a good with declining value is the control over *emigration*. With scarce populations, endowed with scarce skills, and the need to build up armies, the control over emigration once was of great value (Czaika et al. 2018, p. 3). As these factors waned and countries became more concerned with immigration from the interwar period on (Zolberg 2007, p. 33), rules that defined and enforced state-owned property rights over emigration vanished.[24] As Aristide Zolberg stated, »[t]he demographic revolution, which originated in Western Europe around the middle of the 18th century and rapidly spread to most of the region, had a fundamentally deflationary effect on the value of population from the perspective of elites concerned with economic production and military power« (Zolberg 2007, p. 53).

Another example of an overgrown property right is the control over earnings and their conversion into the currency of the country of origin. Capital was scarce immediately after WWII, and currencies were volatile. The concern that the income of guest workers might largely drain away to their countries of origin led to detailed rules on the transferability of earned income to home countries. By the 1960s, a drain of currency was a minor concern (yet costly to enforce)[25]; hence, these rules had vanished (Rass 2010, pp. 476–477).

4.8 Wrap-Up

To wrap up, the approach advocated in this article stresses how little the factual possibility of access was backed up by legal rights at the time when access was widely available, how urgent the delineation of that property right became as the value of the underlying resource grew, and how significantly this enclosure influenced the nature and value of the underlying resource itself. In addition, the approach proposed here is capable of highlighting the role of technology, both for the nature of the underlying resource and the pressure to control access to it. It also stresses the importance of coherence in jurisprudence that led to an allocation of property rights to migrants that was never politically intended. Overall, a property rights approach to the genesis of immigration law can highlight the pressure to *internalize* external effects – not just those of migration, but even more so, those of the restriction of migration.

---

24 For the decline of exit visas, see Czaika et al. (2018), pp. 27–29.
25 See the examples at Rass (2012), pp. 219–220.

5 Implications of the Property Rights and Enclosure Perspective

In addition to its potential to clarify the past, there is predictive power in an enclosure approach to immigration law. While one may argue that too many factors play into the value of the property right over migration to enable predictions, the analysis nevertheless provides two important insights. First, it can help to predict what will happen if the value of the property right over migration either increases or decreases. Second, it can help to determine the factors that influence its value. These factors can be grouped crudely into the value of moving (which is determined – among other things – by global differences in productivity and stability) and the costs of the transaction of the property right (which are mainly influenced by technological developments).

5.1 On the Value of Moving (and Enabling Movement)

Branko Milanović relies on the concept (Milanović 2016, pp. 128–132) of the world of Fanon, where geographical origin is the most important predictor of life outcomes, and the world of Marx, where class is the most important predictor of life outcomes. We currently live in a world of Fanon. It is unknown if and when we are moving back to a world of Marx (Milanović 2016, p. 148). The effect of either of these scenarios on the value of the property right over migration is also unknown.

It seems a logical conclusion that the value of the property right over migration increases if place of birth becomes an even more important predictor than class in determining life outcomes. In this scenario, access to international mobility means access to an even bigger leap in productivity and security for would-be migrants, and it is likely to be hoarded even more jealously by potential receiving countries. Conversely, the value of the property right may decrease if the difference in income between countries converges. Branko Milanović suggests that the ›citizenship premium‹ he describes could gradually erode if differences in mean income between poor and rich countries diminish, and with it, the importance of the location of birth (Milanović 2016, p. 143). While this may be true for a static reading of a citizenship premium, it fails to account for the premium of legally backed mobility. If market economies with large middle-class populations continue to develop in the global south, this does not imply that the property right over the migration of these new middle-class members (i.e., the right to control their international mobility) loses value. Given their improved education and integration in the formal economy, which enhances their chances to succeed in markets abroad, it might not only become easier for them to migrate but also

more desirable given their enhanced expectations of a good life (Massey 1999, p. 318).[26] The prognosis of a decreasing value of the property right over migration may therefore be as misleading as earlier expectations (that also shaped immigration policies) that women will more and more give up paid work and stay at home (again) once household incomes increase (Afonso 2019, p. 264). Even if the leap in income for potential migrants diminishes, the value of the property right over their migration might continue to grow because it allows for more self-fulfillment rather than for more income. The reason is that international mobility (i.e., access to specific sets of institutions) is a *complementary good* to individual skills. It might increase in value when human capital becomes more specialized because it may remain the only means to gain access to a highly specific set of institutions, the one in which specialized human capital can be brought to unfold most of its specific potential. Consider the following example: Someone could have become an engineer of a general formation 30 years ago. The possibility to migrate would have offered that person a multiplication of income while doing more or less the same work as in the country of origin. However, a generation later, thanks to improved circumstances, that same person may have the possibility of becoming a highly specialized engineer capable of performing exciting and fulfilling tasks that can only be undertaken in a handful of laboratories situated in Europe, Japan, and the United States. Having access to these countries may have a greater value now, even if the difference in average incomes for engineers might be smaller. Legal migration grants access to thrilling, if specialized, opportunities.

Unlike in situations of growing global inequalities, however, in this scenario, the leverage of countries of origin to internalize negative externalities of the restriction of migration (the damage of the exclusion of potential migrants) also grows. Notably, they might try to trade access to their own increasingly attractive markets in exchange for access to labor and service markets (Schlegel 2018a, p. 126). It will become increasingly expensive for potential receiving countries to turn such an offer down. The growing internalization of the external effects of migration restrictions is, therefore, a likely future development in immigration law in the case of a closing gap between the economies of the global south and the global north. Growing internalization in this context means that states either allow migration more often (i.e., transfer the property right over migration more often) or they must factor in the cost of forgone benefits from trade and other forms of cooperation with countries of origin.

---

26 For a review of the evidence of a so-called migration hump, see Clemens (2015), esp. p. 174.

Under an alternative scenario, the value of moving will decrease because work can increasingly be done remotely, and migration is therefore gradually no longer a precondition to access interesting labor. The property right over migration would then undergo a similar trajectory as the property right over emigration. Its enforcement would become lenient, reforms rare, and eventually, it would be abandoned as a general rule and reserved for special cases. However, such a scenario overestimates technology as a surrogate to territorially bound sets of institutions. Even if such technology was readily available, much of it would rely on territorially grounded infrastructure and thereby on the quality of sets of institutions that have to provide these infrastructures. It is likely, therefore, that the tyranny of geography is here to stay (Zahn and Schlegel 2020, p. 67).

5.2 Transaction Costs

The question of transaction costs could only be touched upon in this article and is worthy of further research, given that transactions between states and individuals are less well-theorized than contractual and voluntary transactions among private actors. Default rules of transaction are different in a public-law setting than in a contractual setting, and this has implications for transaction costs. Changing transaction costs may well impose pressure to change transaction rules in a specific context like immigration law. Addressing these questions here is prohibited by space. However, some predictions regarding the development of transaction costs seem straightforward: Technological innovation is poised to bring down transaction costs further, especially search and enforcement costs. Technology that can provide, communicate, and verify information about individuals, their identity, their characteristics, their record, and their financial situation is likely to become increasingly operational across international borders. This will enhance the value of the property right over migration because transferability is one factor for its value.

Transactions (can) lead to the internalization of the costs of the policies of a state or the behavior of individuals. Therefore, falling transaction costs enhance pressure to internalize the external effects of the state activity to restrict migration and of the individual activity to migrate. The closer transaction costs come to zero, the more relevant what otherwise is just a *reductio ad absurdum* (Allen 2015, p. 380) becomes the question of who would eventually obtain the property right over migration in a world of zero transaction costs. In other words, who are the agents that impose smaller negative external effects on the other agents than in all other possible allocations of the property right? Generally, no one values the property right over their migration quite as much as would-be migrants do. They are most directly affected

by the decision over their migration, as they are the only ones having the necessary information and incentives to invest in the value of the property right (Schlegel 2017, p. 167). Therefore, the hypothesis can be extended to predict that the lower the transaction costs and the higher the probability of a transaction that lowers external effects, the likelier the property right will be obtained by migrants rather than receiving states. Thus, an immigration regime in which more people can obtain control over their own international movements – likely on highly selective and not necessarily just criteria – seems plausible.

6 Conclusion

The approach developed here shows that the emergence and evolution of immigration law in European countries of immigration can be explained as a series of reactions by lawmakers to the changing value of the underlying resource (i.e., sets of institutions) and access to this resource. Many factors play into this value, and it may change for just one side, either for potential receiving states or potential migrants. Still, the approach helps explain why immigration laws emerged everywhere at around the same time after there had been next to no use for them in the 19th century (except for rules regarding emigration and the mobility of ›vagrants‹). It illustrates why immigration laws became ever more detailed – especially in some aspects, such as enforcement and the determination of refugee status – more sophisticated, and much more selective. The approach also draws attention to the problem of transaction costs in the field of immigration law and the pressure to internalize the negative effects of the restriction of migration.

Taken together, these observations suggest a trend from an initial enclosure of sets of institutions to a nuanced reallocation of access to those institutions. More detailed, more elaborate, and more socially stratifying (not more restrictive overall) immigration laws are the likely trend detected by a property rights approach. The main driver of the ever more selective nature of the enclosure is the growing pressure to internalize the external effects of either the exclusive or freely accessible use of sets of institutions. *Internalization* is achieved by allowing the transaction of the property right over migration from the once discretionarily deciding states to increasingly autonomous individuals – or at least to those individuals who are lucky enough to have some leverage to impose part of the costs of their exclusion on potential receiving states.

References

Afonso, Alexandre. 2019. Migrant Workers or Working Women? Comparing Labour Supply Policies in Post-War Europe. *Journal of Comparative Policy Analysis: Research and Practice* 21 (3): 251–269. https://doi.org/10.1080/13876988.2018.1527584.

Alchian, Armen A., and Harold Demsetz. 1973. The Property Right Paradigm. *The Journal of Economic History* 33 (1): 16–27. https://doi.org/10.1017/S0022050700076403.

Allen, Douglas W. 2015. The Coase Theorem. Coherent, Logical, and not Disproved. *Journal of Institutional Economics* 11 (02): 379–390. https://doi.org/10.1017/S1744137414000083.

Anderson, Terry L., and Peter J. Hill. 1975. The Evolution of Property Rights: A Study of the American West. *The Journal of Law and Economics* 18 (1): 163–179.

Anderson, Terry L., and Peter J. Hill. 1990. The Race for Property Rights. *Journal of Law and Economics* XXXIII: 177–197.

Barzel, Yoram. 1997. *Economic Analysis of Property Rights*. Cambridge: Cambridge University Press.

Barzel, Yoram. 2012. A Theory of the State. Economic Rights, Legal Rights, and the Scope of the State. Cambridge: Cambridge University Press.

Bast, Jürgen. 2011. *Aufenthaltsrecht und Migrationssteuerung*. Tübingen: Mohr Siebeck.

Bast, Jürgen. 2012. Das neue Aufenthaltsgesetz in Deutschland (2002–2011): Zwischenbilanz und Trends. In *Jahrbuch für Migrationsrecht 2011/2012*, eds. Alberto Achermann, Cesla Amarelle, Martina Caronia, Astrid Epiney, Walter Kälin, and Peter Uebersax, 63–79. Bern: Stämpfli Verlag.

Boyle, James. 2003. The Second Enclosure Movement and the Construction of the Public Domain. *Law and Contemporary Problems* 66: 33–74.

Brown, Eleanor Marie Lawrence. 2011. Visa as Property, Visa as Collateral. *Vanderbilt Law Review* 64 (4): 1047–1105.

Brubaker, Rogers. 1994. Are Immigration Control Efforts Really Failing? In *Controlling Immigration. A Global Perspective,* eds. Wayne A. Cornelius, James Hollifield, and Philipp Martin, 227–231. Stanford: Stanford University Press.

Calabresi, Guido. 2016. *The Future of Law and Economics. Essays in Reform and Recollection*. New Haven: Yale University Press.

Casella, Alessandra, and Adam B. Cox. 2018. A Property Rights Approach to Temporary Work Visas. *The Journal of Legal Studies* 47 (1): 195–227. https://doi.org/10.1086/694166.

Cassee, Andreas. 2016. *Globale Bewegungsfreiheit. Ein philosophisches Plädoyer für offene Grenzen*. Berlin: Suhrkamp.

Clemens, Michael A. 2015. Does Development Reduce Migration? In *International Handbook on Migration and Economic Development*, ed. Robert E. B. Lucas, 152–185. Cheltenham: Edward Elgar Publishing.

Comte, Emmanuel. 2018. *The History of the European Migration Regime. Germany's Strategic Hegemony*. London: Routledge.

Czaika, Matthias, Hein de Haas, and María Villares-Varela. 2018. The Global Evolution of Travel Visa Regimes. An Analysis based on the DEMIG VISA Database. *Population and Development Review* 44 (3): 1–34.

Demsetz, Harold. 1967. Toward a Theory of Property Rights. *The American Economic Review* 57 (2): 347–359.

Espahangizi, Kijan. 2022. *Der Migration-Integration-Komplex. Wissenschaft und Politik in einem (Nicht-)Einwanderungsland, 1960–2010*. Konstanz: Konstanz University Press.

Farahat, Anuscheh. 2018. Inklusion in der superdiversen Einwanderungsgesellschaft. Verfassungsrechtliche Eckpunkte. In *Jahrbuch des öffentlichen Rechts der Gegenwart Band 66*, eds. Susanne Baer, Oliver Lepsius, Christoph Schönberger, Christian Waldhoff, and Christian Walter, 337–369. Tübingen: Mohr Siebeck.

Freeman, Gary P. 2007. The Decline of Sovereignity? Politics and Immigration Restriction in Liberal States. In *Challenge to the Nation-State. Immigration in Western Europe and the United States*, ed. Christian Joppke, 86–108. Oxford: Oxford University Press.

von Frisch, Hans. 1910. *Die Staatsrechtliche Stellung der Fremden*. Berlin: Carl Heymann.

Gálvez, Liska. 2016. The Hukou System Chinese Modernization Pattern: Tradition and Modernity. In *Observatorio de la Politica China*. https://politica-china.org/areas/sociedad/the-hukou-system-chinese-modernization-pattern-tradition-modernity. Accessed: 6.9.2022.

Goldin, Ian, Geoffrey Cameron, and Meera Balarajan. 2011. *Exceptional People. How Migration Shaped our World and will Define our Future*. Princeton: Princeton University Press.

de Haas, Hein, Katharina Natter, and Simona Vezzoli. 2016. Growing Restrictiveness or Changing Selection? The Nature and Evolution of Migration Policies. *International Migration Review* 52 (2): 1–44. DOI: 10.1111/imre.12288.

de Haas, Hein, Stephen Castles, and Mark J. Miller. 2020. *The Age of Migration. International Population Movements in the Modern World*. London: Macmillan International.

Hatton, Timothy J. 2007. Should we Have a WTO for International Migration? *Economic Policy* 22 (50): 339–383. DOI: 10.1111/j.1468-0327.2007.00178.x.

Herbert, Ulrich. 2001. *Geschichte der Ausländerpolitik in Deutschland. Saisonarbeiter, Zwangsarbeiter, Gastarbeiter, Flüchtlinge*. Munich: C.H. Beck.

Hesse, Günter. 1983. Zur Erklärung der Änderung von Handlungsrechten mit Hilfe ökonomischer Theorie. In *Property Rights und Ökonomische Theorie*, eds. Alfred Schüller and Willi Meyer, 79–109. Munich: Vahlen.

Hodgson, Geoffrey M. 2006. What Are Institutions? *Journal of Economic Issues* 40 (1): 1–25. DOI: 10.1080/00213624.2006.11506879.

Hodgson, Geoffrey M. 2015. Much of the »Economics of Property Rights« Devalues Property and Legal Rights. *Journal of Institutional Economics* 11 (4): 683–709.

Hohfeld, Wesley N. 1913. Some Fundamental Legal Conceptions as Applied in Judicial Reasoning. *Yale Law Journal* 23 (1): 16–59.

Hollenstein, André, Patrick Kury, and Kristina Schulz. 2018. *Schweizer Migrationsgeschichte*. Baden: Hier und Jetzt Verlag.

Hollifield, James F. 2011. Migration and the Global Mobility of Labor: A Public Goods Approach. In *Global Mobility Regimes*, ed. Rey Koslowski, 219–240. Basingstoke: Palgrave Macmillan.

Hollifield, James F. 2004. The Emerging Migration State. *International Migration Review* 38 (3): 885–912.

Hollifield, James F. 1992. *Immigrants, Markets, and States. The Political Economy of Postwar Europe*. Cambridge, Mass: Harvard University Press.

Johnson, Denise R. 2007. Reflections on the Bundle of Rights. *Vermont Law Review* 32: 247–272.

Joppke, Christian. 1998. Why Liberal States Accept Unwanted Immigration. *World Politics* 50 (2): 266–293.
Kaplan, Benjamin J. 2018. The Legal Rights of Religious Refugees in the ›Refugee-Cities‹ of Early Modern Germany. *Journal of Refugee Studies* 2: 2–20. DOI: 10.1093/jrs/fey010.
Lange, Tesseltje. 2020. A New Narrative for European Migration Policy: Sustainability and the Blue Card Recast. *European Law Journal* 26 (3–4): 274–282. https://doi.org/10.1111/eulj.12381.
Lessig, Larry. 2002. The Architecture of Innovation. *Duke Law Review* 51: 1783–1801.
Libecap, Gary D. 1986. Property Rights in Economic History: Implications for Research. *Explorations in Economic History* 23: 227–252.
Lucassen, Jan, and Leo Lucassen. 2009. The Mobility Transition Revisited, 1500–1900: What the Case of Europe Can Offer to Global History. *Journal of Global History* 4 (3): 347–377. https://doi.org/10.1017/S174002280999012X.
Massey, Douglas S. 1999. International Migration at the Dawn of the Twenty-First Century: The Role of the State. *Population and Development Review* 25 (2): 303–322.
Massey, Douglas S., Joaquin Arango, Hugo Graeme, Ali Kouaouci, Adela Pellegrino, and Edward J. Taylor. 1993. Theories of International Migration: A Review and Appraisal. *Population and Development Review* 19 (3): 431–466.
Mau, Steffen. 2021. *Sortiermaschinen*. Munich: C.H. Beck.
Meyers, Eytan. 2002. Multilateral Cooperation in International Labor Migration. UC San Diego Working Paper Series. https://escholarship.org/uc/item/4zv454f5. Accessed 6.9.2022.
Meyers, Eytan. 2007. *International Immigration Policy. A Theoretical and Comparative Analysis*. New York: Palgrave Macmillan.
Milanović, Branko. 2016. *Global Inequality. A New Approach for the Age of Globalization*. Cambridge, MA: The Belknap Press of Harvard University Press.
North, Douglass C. 1993. *The New Institutional Economics and Development*. https://econpapers.repec.org/paper/wpawuwpeh/9309002.htm. Accessed 6.9.2022.
North, Douglass C. 1978. Structure and Performance: The Task of Economic History. *Journal of Economic Literature* 16 (3): 963–978.
Ocobock, Paul Robert. 2008. Vagrancy and Homelessness in Global and Historical Perspective. In *Cast out…Vagrancy and Homelessness in Global and Historical Perspective*, eds. A. L. Beier and Paul Robert Ocobock, 1–34. Athens: Ohio University Press.
O'Rourke, Kevin H. 2001. *Globalization and Inequality: Historical Trends* (NBER Working Paper, No. 8339), https://www.nber.org/papers/w8339. Accessed 6.9.2022.
Parusel, Bernd. 2010. *Abschottungs- und Anwerbungsstrategien. EU-Institutionen und Arbeitsmigration*. Wiesbaden: VS Verlag für Sozialwissenschaften.
Pejovich, Svetozar. 1972. Towards an Economic Theory of the Creation and Specification of Property Rights. *Review of Social Economy* 30 (3): 309–325.
Piguet, Etienne. 2013. *L'immigration en Suisse. Soixante ans d'Entrouverture*. Lausanne: Presses Polytechniques et Universitaires Romandes.
Polanyi, Karl. 2010 [1944]. *The Great Transformation. The Political and Economic Origins of our Time*. Boston, MA: Beacon Press.
Rass, Christoph. 2010. *Institutionalisierunsprozesse auf einem internationalen Arbeitsmarkt. Bilaterale Wanderungsverträge in Europa zwischen 1919 und 1974*. Paderborn: Schöningh.

Rass, Christoph. 2012. Temporary Labour Migration and State-Run Recruitment of Foreign Workers in Europe, 1919–1975: A New Migration Regime? *International Review of Social History* 57 (Special Issue 20: Mediating Labour: Worldwide Labour Intermediation in the Nineteenth and Twentieth Centuries): 191–224.

Reich, Charles A. 1964. The New Property. *The Yale Law Journal* 73 (5): 733–787. DOI: 10.2307/794645.

Richter, Rudolf, and Furubotn, Eirik G. 2010. *Neue Institutionenökonomik. Eine Einführung und kritische Würdigung*. Tübingen: Mohr Siebeck.

Rifkin, Jeremy. 2000. *The Age of Access. The New Culture of Hypercapitalism, where all of Life is a Paid-for Experience*. New York: Jeremy P. Tarcher/Putnam.

Schäfer, Hans-Bernd, and Claus Ott. 2020. *Lehrbuch der ökonomischen Analyse des Zivilrechts*. Berlin: Springer.

Schlegel, Stefan. 2017. *Der Entscheid über Migration als Verfügungsrecht. Eine Anwendung der Ökonomischen Analyse des Rechts auf das Migrationsrecht am Beispiel der Schweiz*. Tübingen: Mohr Siebeck.

Schlegel, Stefan. 2018a. A Bundle of Bundles of Rights – International Treaties Regarding Migration in the Light of the Theory of Property Rights. *Utrecht Journal of International and European Law* 34 (2): 111–129. http://doi.org/10.5334/ujiel.448.

Schlegel, Stefan. 2018b. Move inside the ›Bell Jar‹. A Property Rights Approach to the Skills of Migrants. In *International Migration* 56 (6): 36–51. https://doi.org/10.1111/imig.12499.

Schlegel, Stefan. 2020. Elemente einer institutionenökonomischen Analyse des Migrationsrechts. In *Philosophie des Migrationsrechts*, eds. Jelka Markow and Frederik von Harbou, 113–132. Tübingen: Mohr Siebeck.

Schönwälder, Karen. 2001. *Einwanderung und ethnische Pluralität. Politische Entscheidungen und öffentliche Debatten in Großbritannien und der Bundesrepublik von den 1950er bis zu den 1970er Jahren*. Essen: Klartext.

Schweizerische Eidgenossenschaft. 1924. Botschaft des Bundesrates an die Bundesversammlung über die bundesrechtliche Regelung von Aufenthalt und Niederlassung der Ausländer. Schweizerisches Bundesblatt, 1862. https://www.fedlex.admin.ch/eli/fga/1924/2_493_511_587/de. Accessed: 6.9.2022.

Schweizerische Eidgenossenschaft. 1999. Botschaft zur Genehmigung der sektoriellen Abkommen zwischen der Schweiz und der EG (BBl 1999 6128). https://www.admin.ch/opc/de/federal-gazette/1999/6128.pdf. Accessed: 6.9.2022.

Scott, James C. 2008 [1998]. *Seeing Like a State. How Certain Schemes to Improve the Human Condition Have Failed*. New Haven: Yale University Press.

Sen, Amartya. 2001. *Development as Freedom*. Oxford: Oxford University Press.

Stoffel, Walter A. 1979. *Die völkervertraglichen Gleichbehandlungsverpflichtungen der Schweiz gegenüber den Ausländern. Eine Untersuchung über die Bedeutung der Gleichbehandlungsklauseln in den Niederlassungsverträgen*. Zürich: Schulthess.

Strahm, Hans. 1955. Stadtluft macht frei. Das Problem der Freiheit in der deutschen und schweizerischen Geschichte. In *Mainauvorträge,* ed. Konstanzer Arbeitskreis für mittelalterliche Geschichte, 103–121. Sigmaringen: Jan Thorbecke Verlag.

Thym, Daniel. 2010. *Migrationsverwaltungsrecht*. Tübingen: Mohr Siebeck.

Timmer, Ashley S., and Jeffrey G. Williamson. 1998. Immigration Policy Prior to the 1930s: Labor Markets, Policy Interactions, and Globalization Backlash. *Population and Development Review* 24 (4): 739–771.

Torpey, John. 2000. *The Invention of the Passport. Surveillance, Citizenship and the State*. Cambridge: Cambridge University Press.

Uebersax, Peter. 2012. Das AuG von 2005: zwischen Erwartungen und Erfahrungen. In *Jahrbuch für Migrationsrecht 2011/2012*, eds. Alberto Achermann, Cesla Amarelle, Martina Caronia, Astrid Epiney, Walter Kälin, and Peter Uebersax, 3–62. Bern: Stämpfli Verlag.

Waldron, Jeremy. 1985. What Is Private Property? *Oxford Journal of Legal Studies* 5 (3): 313–349.

Wilkinson, Tom. 2022. Boris Johnson Wants a Trade Deal with India. But Will the UK Accept Looser Immigration Rules? *The Wire*, 24.1.2022. https://thewire.in/trade/india-uk-trade-deal-immigration. Accessed: 6.9.2022.

Wollenschläger, Ferdinand. 2007. *Grundfreiheit ohne Markt. Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime*. Tübingen: Mohr Siebeck.

Zolberg, Aristide R. 2007. The Exit Revolution. In *Citizenship and Those who Leave. The Politics of Emigration and Expatriation*, eds. Nancy L. Green and François Weil, 33–60. Urbana: University of Illinois Press.