

INTRODUCTION

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The following papers provide divergent perspectives on a concept that is and will likely remain “essentially contested”: immigrant assimilation in American society. To be properly termed “essentially contested,” a concept must have “a combination of *normativity* and *complexity*: only normative concepts with a certain internal complexity are capable of being essentially contested.”¹ “Immigrant assimilation,” the idea explored in this symposium, contains contradictory currents of welcome, of adaptation, of conformity, of inclusion, and of loss. All these ideas have normative strands. Capable of elaboration from any number of distinct and distinctively valued starting points, assimilation holds “contestation at the core, not just at the borders or penumbra.”² Any clear formulation of “assimilation,” as a consequence, is elusive, even perhaps misleading. For “essentially contested concepts . . . are present to us only in the form of contestation about what the ideal really is.”³

This symposium, therefore, is as much illustration as resolution of how public (and legal) debate on immigration is a site where different normative accounts of “assimilation” and national belonging compete. Since concerns with immigration push kudzu-like into fields as diverse as criminal law, education law, administrative law, and employment law, these other fields of law have also become fraught loci for loud debate on the terms and conditions of national belonging.

The historical case for seeing immigration law as a vehicle for larger normative contestation was most recently made by Mae Ngai. She recounts the passage and history of the 1924 Johnson-Reed Immigration Act and the forty-year regime of quotas that followed, which together marked the end of historically unrestricted migration from

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1. See Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?* 21 *LAW & PHIL.* 137, 150 n. 27 (2002) (citing W.B. Gallie, *Essentially Contested Concepts*, 56 *PROCEEDINGS OF THE ARISTOTELIAN SOC.* 167 (1955–56)).

2. See Waldron, *supra* note 1, at 149.

3. *Id.* at 151.

Europe.⁴ Ngai marshals considerable evidence for the proposition that “the line between alien and citizen is soft” and “illegal alienage is not a natural or a fixed condition but the product of positive law; it is contingent and at times unstable.”⁵ Opening her narrative, she shows how the 1924 federal legislation emerged at the confluence of “scientific” racialism, foreign policy imperatives, and “contemporary prejudices among white Protestant Americans from northern European backgrounds and their desire to maintain political and social dominance.”⁶

Not that the confluence of race politics and immigration is unique to an American context. As Saskia Sassen has argued persuasively, migration policies in Europe since the turn of the twentieth century have also been marked by a “dynamic of racialization”⁷ all too visible again today in debates there about women veiling and the integration of Muslim minorities.⁸

Past is also prologue. Today’s immigration debates coalesce in part around heated and seemingly interminable debates about matters of relatively straightforward fact. But beneath these factual debates about wage competition, remittances, and crime, one catches glimpses of broader social anxieties.

Consider the straightforward question whether net immigration to the United States benefits U.S. citizens purely in terms of wages. Easy to formulate as an empirical inquiry, the question yields widely varying responses about whether migration depresses or elevates wages within the citizen population.⁹

Widening the lens, there are even more nettlesome questions about the exact economic consequences on sending states of immigration to the United States. While gains in remittances are celebrated by some,¹⁰ the drain on trained professionals in sending states is deplored

4. See generally MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004).

5. *Id.* at 6.

6. *Id.* at 23. For a summary of this argument, and a reflection on its relevance to the contemporary context, see Mae M. Ngai, *The Lost Immigration Debate*, *BOSTON REV.*, Sept.–Oct. 2006, available at <http://bostonreview.net/BR31.5/ngai.html>.

7. SASKIA SASSEN, *GUESTS AND ALIENS* xvi, 77–96 (1999).

8. See generally Aziz Huq, *Faith is not Destiny; Three Inquiries into Jihadism and Its Sources*, 23 *WORLD POL. J.* 99 (2006) (reviewing three recent books discussing Jihadism and the integration of Muslim minorities).

9. For a sample of this debate, see MICHELE WUCKER, *LOCKOUT: WHY AMERICA KEEPS GETTING IMMIGRATION WRONG WHEN OUR PROSPERITY DEPENDS ON GETTING IT RIGHT* 96–97 (2006).

10. TRANSNATIONAL INST. FOR GRASSROOTS RESEARCH AND ACTION, *MONEY DOWN THE WIRE: TRANSNATIONAL ORGANIZING ON REMITTANCES 1* (2006) (“Love

by others.¹¹ These debates seem fraught beyond what factual dispute would warrant. They hint at larger uncertainty about economic security.

Immigration debates furthermore must be set against what Jonathan Simon calls “technologies of exile”—which includes not only deportation, but also mass incarceration and a rise in gated communities, employee dismissals, and even school suspensions.¹² Such policies play to public self-identification as victims, and to politicians’ ability to assuage fear through punitive control mechanisms.¹³ Public fears regarding immigration and crime have long coalesced around well-known criminal gangs reputedly composed in large part of recent immigrants.¹⁴ A recent study of Chicago’s racial and ethnic disparities, however, suggested that a significant immigrant presence in a neighborhood yields lower odds of violence.¹⁵ The same data set also suggests that certain second-generation immigrants have higher rates of criminal activity.¹⁶

Yet empirical data are unlikely to settle a debate so long so anchored in the larger conception of the public as collective victim. Factual resolution thus attends elusive normative agreement. Given the complexity of most empirical inquiries into migration’s consequences, therefore, each side in the debate has some incentive to assail factual conclusions favoring the other side, generating rolling disputes that look empirical but that are in fact normative. It thus seems feasible to hypothesize that such debates, or ones like them, will persist as facts continue to be pressed into the service of normative agendas.

for family and community are now also globalized, and find expression through remittances.”).

11. See Fitzhugh Mullan, *Quantifying the Brain Drain: International Medical Graduates in the United States, the United Kingdom, Canada and Australia* (Feb. 4, 2005), available at <http://www.academyhealth.org/nhpc/foreignpolicy/mullan.pdf> (quantifying the magnitude and origin of international medical graduates to the workforce of the four named recipient countries and the corresponding “brain drain” on the sending countries).

12. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 172–73 (2007).

13. See *id.* at 109.

14. See, e.g., Laurel R. Boatright, ‘Clear Eye for the State Guy’: *Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement*, 84 TEX. L. REV. 1633, 1646–48 (2006) (arguing that enlisting state and local law enforcement agencies to aid immigration enforcement would also reduce crime).

15. Robert J. Sampson et al, *Social Anatomy of Racial and Ethnic Disparities in Violence*, 95 AM. J. PUB. HEALTH 224, 230 (2005).

16. Eyal Press, *Do Immigrants Make Us Safer?*, N.Y. TIMES MAGAZINE, Dec. 3, 2006, at 23–24.

Immigration also taps into larger concerns about the bounds of the liberal polity. For example, a normative issue largely unaddressed by this symposium is the link between ideas of immigration assimilation and notions of political community, an idea that Bonnie Honig carefully explores. Starting from the observation that migrants are held up as models of industry and Horatio Alger-esque material achievement, Honig observed that immigrant *political* activity, by contrast, has been historically regarded with suspicion or worse.¹⁷ This tension between material and political mobilization, Honig argues “comes right out of America’s fundamental liberal commitments, which map a normatively and (still) materially privileged national citizenship onto an idealized trajectory to membership.”¹⁸ The “problems” with foreigners, in short, are a mirror of American liberal thinkers’ own anxieties about the relation between political apathy and *pleonexia*.

All these liberal anxieties now are deepened and complicated by “the American ideology of a republic simultaneously exceptional and universal; unique in the good fortune of its institutions and endowments, and exemplary in the power of its radiation and attraction.”¹⁹ For obvious reasons, the terrorist attacks of September 11, 2001, intensified anxieties about immigration, provoking, not for the first time, “a terrible moral crisis . . . threatening the nation” via vectors of migrating bodies.²⁰ At the same time, the attacks’ genealogy is impossible to disentangle from past projections of American power and ideology,²¹ or the subsequent fact of America’s manifestly (if not successful) imperial presence in far-flung pockets of the globe. In almost literal ways, “the bodies of the historically produced minorities . . . allow[ed] fears of the global to be embodied within [them] . . . when

17. Bonnie Honig, *How Foreignness “Solves” Democracy’s Problems*, 16 Soc. TEXT 1, 1–3 (1998).

18. *Id.* at 16.

19. Perry Anderson, *Internationalism: A Breviary*, NEW LEFT REV., March–April 2002, at 23.

20. JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY 191–195* (2003) (describing nativist reactions to inflows of Irish and German immigrants from the 1820s through the 1840s).

21. By far and away, the best and most precise articulations of this history are LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* (2006), and FAWAZ GERGES, *THE FAR ENEMY: WHY JIHAD WENT GLOBAL* (2005). Transcending facile and misleading notions of “blowback,” both Wright and Gerges show in considerable detail the interaction between American aid to the Afghan mujahideen, American troop’s introduction into Saudi Arabia in anticipation of the First Gulf War, and the personal narratives of Al Qaeda leaders.

specific situations became overcharged with anxiety.”²² Most clearly, this manifested as a post-September 11th wave of hate crimes against individuals perceived as alien.²³ Less obviously, September 11th accelerated the overlap between criminal and immigration regulatory regimes.²⁴

If ideas about assimilation or the optimal regulation of immigration cannot be untangled from normative concerns about fear, crime, and security (economic and national), we might be especially suspect of claims that immigration law embodies a set of immutable “American” values, or that traditions of immigration necessarily warrant special respect. Values change. Tradition is what we make of it.²⁵ It is precisely the burden of immigration law to *house* the conflicting strands of American debates on who belongs, and how they belong, in this specific society. The content of immigration law and the brute fact of its legality are only beginnings of a discussion, not closing gestures. And historical accounts of American openness, or of an exceptional American character, are of limited use in understanding the direction and account of contemporary debates.

Essentially contested concepts such as immigration assimilation, in short, precipitate into fierce factual and legal doctrinal disputes that are illuminated periodically by the subterranean normative fissures at stake. In the teeth of such complexity, no journal symposium, even one bringing to bear the large disciplinary toolkit of the legal academy or the manifold talents of the participants assembled here by the *Journal of Legislation and Public Policy*, could do justice to the irresolvable complexity of this debate. Nor could it, by definition, settle that debate.

The following essays focus on one aspect of the debate: how the project of “governmentalization” occurs in schools, prisons, court-

22. ARJUN APPADURAI, FEAR OF SMALL NUMBERS: AN ESSAY ON THE GEOGRAPHY OF ANGER 47 (2006).

23. HUMAN RIGHTS WATCH, “WE ARE NOT THE ENEMY”: HATE CRIMES AGAINST ARABS, MUSLIMS, AND THOSE PERCEIVED TO BE ARAB OR MUSLIM AFTER SEPTEMBER 11, 3–5 (2002), available at <http://hrw.org/reports/2002/usahate/usa1102.pdf>.

24. See, e.g., Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th ‘Pale of Law’*, 29 N.C. J. INT’L L. & COM. REG. 639, 641 (2004) (describing how “[t]he citizen/non-citizen and criminal/civil lines have been used on a massive, indeed unprecedented scale” since 9/11); accord Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83–95 (2005) (charting pre-9/11 and then post-9/11 changes in the interaction between criminal and immigration regulations).

25. Raymond Williams remarked that tradition is “an active and continuous selection and reselection, which even at its latest point in time is always a set of specific choices.” RAYMOND WILLIAMS, CULTURE AND MATERIALISM 16 (2005).

rooms, and bureaucracies through a “set of rationally manipulable instruments for reaching large sections of the inhabitants of a country as the targets of [government] ‘policies’—economic policy, administrative policy, law, and even political mobilization.”²⁶ Contests over “assimilation” are no less fraught in these theaters than in the larger discursive public domain. The stakes are no less. Governmentalization involves the imposition of coercive state power to practices that were not previously subject to regulation. The essays thus shed important clarificatory light on one aspect of a debate that all too often runs muddy and eddied, and that likely will endure as long as the Republic does.

26. PARTHA CHATTERJEE, *THE POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD* 34 (2004).