A Theory of Property Right’s Approach to the History of Immigration Law

Abstract

This article attempts a new account of the history of the immigration law of European countries that are typical countries of immigration. It states that the right to decide over somebody’s migration to a given place is a (legal) property right which contains the right to control access to institutions, first and foremost to well-working labor markets. The property right is most often allocated to the potential receiving state, in rarer cases to potential migrants. It is subject to different rules for transactions between these two agents. If the right to control somebody’s migration is a property right, then the history of immigration law is the history of the delineation, the allocation and the alternation of transaction rules regarding this property right. I argue that pressure to define this property right in more detail, to reallocate it and to change transaction rules stems from changes in the value of the property right and that the history of immigration law can, therefore, be read as a series of reactions to changes in the value of the property right over migration. I outline some implication that this insight has for the likely future development of immigration law.
Introduction

Many accounts of the history of the politics and the law of immigration set out from the idea that it is the history of popular feelings towards foreigners and the changing perception of the “other”.¹ I take a different approach. Not because I think that such perceptions play no role in the creation and evolution of immigration law but because I think that the varying value of controlling migration can do more to explain changing perceptions of foreigners than the other way around.

The theory of property rights provides a tool to approach the evolution of immigration law from a different angle. If the control over somebody’s migration to a given place is a property right than its definition by the legal order, its allocation to either the receiving country or the potential migrant and the definition of transaction rules for transactions between the two can be expected to react in some way to changes in the value of this property right.² This is Demsetz’ point that property rights are created (and redistributed) in response to new economic forces that increase the value of the right.³ A property rights approach to the evolution of immigration law provides, therefore, a tool-box for reverse engineering it in the hope to understand more about it and its likely future development. True, it is important, not to rely on mono-causal explanations for the development of legal rules that govern a phenomenon as complex as migration.⁴ To rely on the value of the property right over migration as the explanatory factor can avoid that if it is aware of the fact that economic, political, cultural and legal factors can all equally play into the changing value of this property right. The paper is about the unifying mechanism of very different causes, not the attempt to reduce the evolution of immigration law to a specific cause.

I rely on the legal concept of property rights in this article (since I am interested in the evolution of immigration law), defined as what the government delineates and enforces as a person’s right to exclusively use a good,⁵ in this case, the good to control someone’s migration to a given place. This is to be distinguished from the purely economic concept of property rights, defined as an “individual’s ability to directly consume the services of an asset or to consume it indirectly through exchange.”⁶ It also is to be distinguished from

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¹ For an example, see Hollifield 1992, 204.
² Libecap 1986, 231.
³ Barzel 1997, 91.
⁴ Schuck 1984, 5.
⁵ Barzel 1997, 3, 90.
⁶ Barzel 1997, 90. For a more extensive discussion of the difference between the two, see Barzel 2015.
the much more narrow conception of property rights that only concentrates on the legal institute of property, excluding less inclusive bundles of rights such as possession and the mere legal control of valuable rights (such as the right to do certain things to the detriment of others).\footnote{I am aware of the criticism of this use of the term property right (Hodgson 2015) and share it to the degree that I think it is important to distinguish between actual, positive law and mere custom (in this contribution I am interested in the positive immigration law of countries). I would object to this criticism that I think that possession, and other forms of the (legal) control of goods, that are weaker than property, are just as well legal institution and can aptly be described as property rights in the sense that they give control over goods, even if they are attenuated bundles of rights compared to property. I would also caution to restrict property rights on physical goods and argue, that they also include the control over valuable activities (such as the production of emissions or of migration). This larger notion might be helpful to mitigate the danger that property rights are reduced to agent-object relationships (Hodgson 2015, 702).}

The paper is organized into three main parts. In a first part, I state the conceptual argument, that the control over somebody’s migration is a property right and that therefore the idea that the legal order, in its definition, allocation and the definition of the applicable transaction rules, has to react to changes in the value of this property right. In a second part, I lay out a series of assumptions how we would expect the legal order to behave if the value of this property right goes up or down, if it goes up or down for mainly one of the concerned parties (either for potential migrants or for potential receiving states), how changing transaction costs come into play and which structural factors might influence the value of the property right. In the third part I will gather examples of rapid reform in the immigration law of typical countries of immigration and try to explain them in the light of the conceptual argument I laid out. In a concluding fourth part, I will sort out, how the value of the property right “control over somebody’s migration” is likely to change in the future and how this is likely to influence the future development of immigration law in typical countries of immigration.

I) The Conceptional Argument

Economic history is rife with examples of the creation and the granting of property rights that essentially give access to markets - or more generally to a well-functioning setting of institutions. Rights for merchants, rights for citizens of given cities and rights for entire cities within a larger entity to offer their goods and services and thereby enjoy the protection of a law-enforcing power.\footnote{Pejovich 1972, 315. See also Strahm 1955, 117.} These privileges have long been understood as valuable property rights.\footnote{North 1978, 696.} Nowadays, given that labor is the most important asset by which...
people gain a revenue and given that it is very often the only asset over which people dispose,\textsuperscript{10} the question who has and has no right to carry his or her labor into institutional settings (chief among them labor markets), where labor is highly productive, has become the single most important predictor of someone's expected lifetime-income.\textsuperscript{11} The control over that possibility, the right to veto the migration of an individual from a relatively dysfunctional setting of institutions into a relatively functional setting has, therefore, become one of the potentially most valuable property rights with regard to the likely outcomes of individual's economic lives. It is a property right that in almost all cases are either under the control of the potential receiving state (who can then veto a possible immigration by a given individual) or under the control of the said individual (which then has the possibility of immigration since nobody but herself could veto her immigration). If the property right is transacted, it is in almost all cases transacted between these two agents. Employers in the gulf-states kafala-System\textsuperscript{12} or communist countries of origin are alternative but rare candidates to hold the property right instead.

The property right over migration is allocated to potential migrants if they have a right to migrate to a given place that cannot be vetoed by the receiving state. Citizens of the European Union who migrate within Europe are an example. Refugees in the sense of the Refugee Convention that actually made it into one of the signatory states are another example. These people are endowed with the property right over their own migration (to certain countries). The property right over migration is allocated to a receiving state if it has the possibility to avoid or veto a given migration. This is the case if a state has – according to its immigration law and the international treaties on the matter – discretion to allow a given migration or not. It is also the case if the potential migrant is part of a group that falls under immigration caps since the cap could theoretically be at zero. In these cases, the receiving state simply waived its right to veto immigration for a predetermined number of permissions but retains its power to theoretically veto it in all cases. The property right, therefore, remains with the receiving state.

Transaction rules can be property rules, liability rules, and inalienability rules.\textsuperscript{13} In situations, in which either a state or a migrant can veto the transaction of the property right to the other party, the property right is

\textsuperscript{10} Sen 2001, 162.
\textsuperscript{11} Milanovic 2016, 133.
\textsuperscript{12} For an astonishingly similar system in Germany in the late 19th century, see Herbert 2001, 33.
\textsuperscript{13} Calabresi, Melamed 1972
protected by a property rule. In situations in which the transaction is possible against the will of one of the
two concerned parties but for the price of (some sort of) compensation, the property right is merely
protected by a liability rule. Examples are special fees or taxes that some migrants have to pay in order to
obtain a permission to immigrate. The compensation of a migrant for a prevented or abridged migration by
the receiving state would be an example for a liability rule for a transaction in the opposite direction. The
property right over migration is protected by inalienability in situations in which it is forbidden to transfer
it to the other party, be it a migrant or the state.

It is a simplification to speak of the property right over migration. This property right contains in fact the
control over a bundle of rights, like for example the right to enter a country, the right to stay, the right to
enter its labor market, its market of services, the right to some social transfers, the right to bring family
members in and probably eventually the right to become the citizen of a country. In the categories of Charles
Reich’s seminal “New Property”, the property right over migration would be a bundle of rights that
typically contains a sort of occupational licenses (the right to offer any sort of labor at all, so the right offer
one’s human capital on the market of labor and services of a country), a sort of franchise (understood as a
partial monopoly, which it is since the number of competitors is limited by immigration law), some public
resources like public space, that can be co-used by migrants, and some public services (like protection by
the police and legal institutions, public education for immigrants children etc.). The exact composition of
the bundle that an immigrant enjoys varies from immigration status to immigration status and often from
one individual situation to another. Although, in this article, the focus is on the stick “access to the labor
market” within the larger bundle of rights – because arguably this is the stick that is mostly responsible for
the large and volatile value of the bundle – it should not be forgotten that it contains other sticks too, which,
under certain conditions might do more to explain the value of the bundle. This is true especially regarding
access to social transfers under the conditions of a rapidly expanding welfare state.

If the control over somebody’s migration is understood as a property right, then immigration law as a field
of law may be described as the sum of rules that define and allocate property rights over migration, that

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14 Reich 1964, 734-37.
define, in what situation, which transaction rule applies and the rules that set up a mechanism of enforcement for either the original allocation or the result of legal transactions of the property right.

The idea to bridge legal and economic history with the help of the theory of property rights is as old as the theory. Demsetz suggested that property rights arise when it becomes economic, for those affected by externalities to internalize benefits and costs. Or as Barzel puts it: “As the values of commodities and of commodity attributes change, and as the costs of delineation and of protection change, people’s decisions regarding what to leave in, what to relinquish, and what to reclaim from the public domain change correspondingly.” People would do so either in determining private- or state ownership of a certain right, both of which mean that the determined owner, be it the state or a private individual, can exclude all the others from the use of that right. State-ownership of property rights in that sense does therefore not mean, that property rights are in the “public domain” (in the sense of Barzel) because they are defined and allocated. They are just allocated to the state (and by the state). But the state disposes of a procedure to decide about their use, much like a firm. It does not rely on a collective deliberation procedure to settle this question (while the procedure of delineation and allocation of the property right is a collective deliberation). It is a property right that the state has not assigned to a private person but to a legal person – to itself. It then becomes a state prerogative which the state can trade away if it chooses to – to other states or international organizations (in treaties) or to individuals by granting them certain freedoms.

Whether such an internalization becomes economic for those affected, is a question of the size of the externalities and of the costs of internalization. In that sense, the specification and the allocation of property rights are “endogenously determined”; it is not an end in itself but the result of the “desire of the interacting persons for more utility.” External effects of either migration or the prevention of migration can be – among many other possibilities – competition on labor- and service markets, fiscal risks and the change of a perceived collective identity. On the other hand, external effects may consist of diminished expected lifetime income of potential migrants, the impossibility for them to live a life with loved-ones, or to migrate to a secure and peaceful place. Like in the use of any given good, the control over migration creates these

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15 Demsetz 1967, 354; see also Acemoglu, Robinson 2013, 139.
17 Demsetz 1967, 354.
18 Trachtman 2008, X.
19 Pejovich 1972, 310.
external effects to the one or to the other side. They are in that sense reciprocal. It is either the potential receiving state or the potential migrants who suffer or enjoy the external effect when the property right is not allocated to them. It is a question of the allocation of the property rights – and of the exact architecture of the bundle – whether external effects can overall be minimized or not.

Like for many other resources, the value of the resource “control over somebody’s migration” (and the importance of the underlying external effects) changed over time and sometimes rapidly so and that is – so the claim of this paper – the main explanatory factor for changes in (and the emergence of) immigration law.

II.) The Application to Immigration Law

If we try to apply this approach to immigration law, it is useful first to conceptualize the moment of the emergence of the property right over migration. In a second step, it will be important to identify the effects that might drive changes in the value of the property right – either for the potential receiving state or for the potential migrant and to specify how changes in the value for one of these two agents are translated into changes in the value for the other. Related to this interaction is the question, what constitutes transaction costs with regard to the transaction of property rights over migration, what influences the importance of these transaction costs and how changes in transaction costs are translated into changes in the value of the property right.

The Emergence of the property right over migration

“Property rights exist as a continuum. They range from open-access conditions at one extreme to limited and vague rights definitions, and to specific, exclusive property rights at the other extreme,” says Libecap. This also describes a typical chronological development. Since the creation and enforcement of any kind of property right regime – including an immigration law – is costly; there must have been a time when the costs of the specification and the enforcement of the property right were higher than their utility. One would expect to find none or just a very rudimentary immigration law under such circumstances and that the pressure to internalize growing external effects of either the activity of migration or the activity of restricting migration led to a more and more detailed definition of property rights over migration. Eventually, we would

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20 Libecap 1986, 235.
expect to observe the emergence of the complex, detailed, multilayered and constantly reformed immigration law of today.

The property right over migration is understood here as the control over the access to a set of public institutions (like political and legal institutions) and the market\textsuperscript{21} that develops under these institutions,\textsuperscript{22} as well as access to public space. This as opposed to access to private institutions (like firms) and the jobs they provide and access to privately owned space. Some sort of public sphere, some sort of statehood must therefore exist, not only to make it viable to delineate the right to control access to it but to make this possible in the first place. While early forms of the control of access to cities date far back and are an early manifestation of property rights over migration, modern immigration laws give access to nation states\textsuperscript{23} and in order to understand their evolution, it is therefore interesting to know whether there was a time when these nation states already existed but the creation of property rights over the access to them was not yet deemed to be worthwhile.

One would expect that such a situation is possible when there is either nothing to get by immigrating into such a country (because there are hardly any public institutions or so dysfunctional ones that nobody cares to migrate there) or because populations are generally sedentary and migration is a very rare phenomenon or both.

All of this is not to claim that the process of the specification and allocation of property rights over a certain good in general or over the control over migration specifically automatically leads to an overall efficient situation. Both specification and allocation are the product of power politics and the interest of powerful rent seekers may well prevail over the interests of overall-wealth maximization.\textsuperscript{24} 

\textsuperscript{21} De Alessi 1980, 13, underlines the role of institutional arrangements to close the labor market to competitors. He mentions union shops as an example but the most important example is immigration law, the basic function of which is to exclude foreigners as competitors on the labor market.

\textsuperscript{22} While a lot of the literature on property rights underemphasizes the instrumental role that institutions play to make them fully operational (Hodgson 2015, 700), the property right over migration precisely gives control over the access to institutions which is why their role is especially important to emphasize in this context.

\textsuperscript{23} There are exceptions to this. In China, access to cities remains a precious and scarce right that is often not granted or not fully granted to domestic migrants from rural areas. Although under the permanent pressure of reform and somewhat decentralized, the so called hukou system continues to restrict internal migration, less so because it restricts access to urban labor markets but because it restricts access to urban services like the health- and education system: Gálvez 2016, 2.

\textsuperscript{24} Richter, Furuboth 2010, 134; Libecap 1986, 232.
Drivers of change in the value of the property right over migration

Pejovich identifies as some important factors that change the value of property rights technological innovations and the opening of new markets, changes in relative factor scarcities, and the behavior of the state. These factors do not fit easily into the analysis of the evolution of the property right over migration that describes the relationship of an individual and a state. It has to be translated into this specific context.

The writings of Hatton and Williamson are helpful to this end. They identify three main factors for why the circulation of labor is much more restricted than the circulation of goods in most industrialized nations in the post war period. The extension of the proportion of the native population that has a political say, the extension of the value of social transfers that may be included in the bundle of rights of migrants and the expansion of the pool of potential immigrants. All of these factors can be said to have an influence on the value of the property right over migration. The extension of the population that has a political say enhances the political value of controlling migration for a government and the political cost of not controlling (or not curbing) immigration. This is so since it is normally the working class that perceives immigrants as competitors and that would threaten to vote a government out if it does not erect controls over access to the labor market. The potential value of social transfers to which immigrants have access enhances the potential costs of potential migrant's stay in a receiving state and thereby the value of controlling this immigration for the receiving state. Indirectly it also enhances the political price of immigration since voters tend to be more reluctant towards immigration when immigrants have access to higher social transfers.

The same is true for the expansion of the pool of potential migrants. The more potential immigrants are out there, the higher the costs of not being able to control their entry and the political costs of doing nothing about that.

These factors help to fit the special situation of property rights over migration into the factors for the change in the value of property rights that Pejovich identified. Technological change, for instance, opens migration as a possibility for much more people and to a wider range of possible destination. This is true for transportation technology but also for technology to communicate, to transfer knowledge and to transfer

25 Pejovich 1972, 316.
26 Hatton, Williamson 2006
28 For the role of faster and more reliable steamboats in the great transatlantic migration of the 19th century, see Goldin et al. 2011, 59.
money. The emergence of the internet might, therefore, be as important in making migration a viable option for more people as is the invention of the airplane.

What are new markets for the property right over somebody's migration? Since this specific property right controls the access of one given individual to one given state, it can only practically be transferred between one state and one individual which is why it is misleading to speak of a market in this case. This does however not exclude the possibility that the control over somebody's migration to a given place gives newly access to some form of lucrative activity. If there is, for instance, a growing demand for interpreters for a certain language in a given country, a new and specific labor market for people with specific skills emerges and the property right, therefore, gives control over the access to this newly emerged market (which enhances its value).

Changing factor scarcity in the context of migration mainly means the changing relationship between capital and labor. The scarcer labor is in relation to capital, the more valuable it is to have control over its import - for both the state and for potential migrants.

The role of the state as the driving factor for the value of the property right seems not to have great explanatory power in a context where the property right is almost always controlled by the state. But the obvious way in which the behavior of the state is influencing the value of the property right is the improvement of the quality of its institutional setting. If a state improves the rule of law, the security of property rights, the performance of its courts and so on, the value of controlling the access to its institutional setting is augmented. A second way in which state behavior might become important is the behavior of the sending state. If the sending state actively encourages emigration and provides policies to make it more attractive - it might, for instance, provide subsidized transportation, cheap and safe channels for remittances or even a program that multiplies remittances with tax money - the value of the control over access to another country's labor market grows. Again, this is true for both the value it has for the (receiving) state and for potential migrants.

The role of changing transaction costs
Before we look into the question how the change of transaction costs may influence the property right over migration, it will be useful to clarify, what transaction costs are in this specific context. While again, the fact that the transaction occurs between a state and an individual rather than among private subjects on a market
and the fact that property rights are not usually sold but transacted against some sort of benefit (like relief of labor shortage in a country or future tax revenue) makes it necessary to specify the exact nature of transaction costs in this context. All three important groups of transaction costs – search costs, bargaining costs, and enforcement costs – require some clarification.  

Search costs refer to the difficulty to find a partner for an exchange. Already it is not easy for a prospective migrant to identify a potential state to migrate to, let alone to find out, on what conditions migration to this state would be possible. The larger the number of potential countries of destination, the thicker their norms on immigration and the smaller the differences in their immigration law, the higher the search costs for potential migrants. But the original allocation of the property right is in all but exceptional cases to the state, rather than to the potential migrants, which is why transactions almost always take place from the state to the potential migrant. It is only later, in the case of reclaiming a visa that the property right is transferred in the other direction. States who aim to transact the property right over migration or some persons with very specific characterizations to these same persons (by granting them a permission to stay) are also confronted with search costs. The more specific the persons they are looking for, the higher the search costs. A shift from simple laborers that provide skills that any physically healthy person can acquire within weeks to highly specialized personnel that is sought for in a modern service economy entails, therefore, a likely increase in search costs. The difficulty of gathering and verifying information about past behavior, actual skills and financial situation of potential migrants is another driver of search costs.

The transaction of property rights over somebody’s migration takes place in accordance with the immigration law of a country. Depending on its degree of detail and stringency, there is very little room for the negotiation of an individual “price” for the transaction of the control over somebody’s immigration – the exact conditions under which a state would be willing to transact the property right. For this specific cost group, the costs might actually be lowered by a detailed and clear immigration law that leaves little room for personal exceptions as opposed to a rudimentary law that leaves much discretion to the competent administration as to when it cedes the property right to an individual. As the number of potential migrants increases, the search costs may increase. But the original allocation of the property right is in all but exceptional cases to the state, rather than to the potential migrants, which is why transactions almost always take place from the state to the potential migrant. It is only later, in the case of reclaiming a visa that the property right is transferred in the other direction. States who aim to transact the property right over migration or some persons with very specific characterizations to these same persons (by granting them a permission to stay) are also confronted with search costs. The more specific the persons they are looking for, the higher the search costs. A shift from simple laborers that provide skills that any physically healthy person can acquire within weeks to highly specialized personnel that is sought for in a modern service economy entails, therefore, a likely increase in search costs. The difficulty of gathering and verifying information about past behavior, actual skills and financial situation of potential migrants is another driver of search costs.

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29 Cooter, Ulen 2014, 74; Libecap 1986, 231.
30 Search cost may include the cost for middlemen who match workers with employers in receiving countries. For immigration in the German agricultural and industrial sector, measures to lower to circumvent the costs of middlemen were already taken in the early 20th century: Herbert 2001, 34.
transactions grows, creating an immigration law that leaves little room for negotiations is one way of reducing transaction costs. For the very few people who have substantial amounts of money or very rare talent to offer to a state, it is however unlikely that a state does not open the possibility of individual negotiations and is therefore willing to accept substantial negotiation costs in these specific cases.\textsuperscript{31}

Transactions in immigration law need to be enforced as they were negotiated. That means it has to be ensured that only those people who own initially owned or obtained the property right over their migration actually migrate, that they only have factual control over the bundle of rights that they actually have obtained (and e.g. do not work without having obtained access to the labor market or not for longer hours than their visa permits etc.) and that they leave after the time that their visa granted them in a country. Immigration law is a field of law that suffers from chronic and systematic under enforcement in almost all typical immigration destinations. Enforcement costs are high and the more restrictive an immigration law, the higher they tend to be. On the other hand, no group of costs might be influenced more strongly by technological innovation than enforcement costs. In some other contexts, technological innovation has changed the cost structure of enforcement so radically, that an entirely different distribution of property rights emerged.

The canonic example for declining enforcement costs is the invention of barbed wire for the enforcement of property rights in land in the American West.\textsuperscript{32} Given that barbed wire is such a widely used technology for the enforcement of the property right over migration, the question emerges whether this specific technology or any such technology has led to a rapid increase or decline in enforcement costs. This can be dismissed out of hand for barbed wire or other border enforcement techniques, that might well enable to maintain or improve the enforcement of the state owned property right but at high costs that have not been brought down markedly by any such technology and that are under constant pressure of being circumvented by potential migrants.

This might be different with identification technologies. The identification of unknown individuals at low costs and with high certainty is a key element for the enforcement of immigration law. Biometric technology

\textsuperscript{31} For an overview over the proliferation of programs that give access to a residency permission or citizenship for money or talent, see Shachar, Bauböck 2014, 3.

\textsuperscript{32} Anderson, Hill 1975
might well have played a significant role in markedly reducing these costs. The “smart borders” that the EU hopes to erect,\textsuperscript{33} that will be relatively easy and quick to cross for trusted users that provide the necessary information in an easily verifiable way might soon become an example of this sort of the reduction of transaction costs. The development of passports and identity cards that cannot easily be forged would be an earlier example of such a technological innovation. The experience that states do not rely on this technology if there is a state obligation but no real incentive to enforce property rights over migration, as in many instances of systematically imperfect enforcement of immigration law, shed doubt on the importance of such technology relative to other driving factors, such as the demand of the labor market, be it the regular or the irregular labor market.

To wrap up the preliminary thoughts on the transaction costs for the transfer of the property right over migration: Information costs tend to get higher, the more specific the skills of migrants are, that a potential receiving state looks for and the more specific the needs are, that a potential migrant looks for. Like for the cost of transportation and communication, technological inventions like mobile communication and the internet can counter this trend. Negotiation costs tend to be lowered as the room for discretion that immigration law leaves to the authorities shrinks. This is a trend likely to be observed in many countries with an increasingly detailed immigration law that has to cope with a larger number of potential migrants. However, this trend might be mitigated for the small but important group of people that are highly sought for by receiving states and that have some room to negotiate their individual bundle of rights. Technological innovation is more important regarding enforcement costs than for any other group of transaction costs. However, although a great deal of technical innovation has been mobilized in order to enforce immigration law, none of it seems to have lowered transaction costs so radically so far, as to alternate the structure of property rights in a fundamental way. Rather, the enforcement of immigration law seems to be an arms race between receiving states, migrants and organized crime that leads to an uneasy but evolving equilibrium.

A final conceptional point that needs to be addressed is the question, how changes in the value for one side of a potential transaction – either the potential receiving state or a potential migrant – influences the value for the other side. The answer to this lies in the transaction rule. As long as the transaction is easily possible, changes in the value for the one agent, that does not currently hold the property right, affect the value for

\textsuperscript{33} See the report of the EU Commission on these plans (6.4.2016): COM(2016) 205 final.
the other side since it could transfer it to the other for an augmented price. The same is not necessarily true if the value of the property right is enhanced just for the one side that already owns the property right. This makes it harder (more expensive) for the other side, to obtain the property right, but not necessarily more worthwhile. If, however, property rights cannot be transacted easily or if transactions are forbidden altogether, changes in the value for the one side are not translated into changes in the value for the other side. This applies to all the situations in which the property right comes with a rule of inalienability. Since the property right over migration is inalienable to basically all the other agents except for the state and the migrant in question, changes in the value of the property right for other potential holders (like family members or employers) are not translated automatically in changes of the value for one of the actual holders. But there are situations conceivable in which the transaction between a potential receiving state and a potential migrant are barred by an inalienability rule. Cases in which the transaction might be attractive to the state but its immigration law forbids it in the name of some higher goal, like the limitation of immigration. In the other direction, cases are conceivable, where the deprivation of the property right over migration has such extreme consequences for the migrant (like degrading or inhuman treatment in the country of origin) that the property right cannot be given away, even with her consent. Situations, where property rules apply do not make a transaction of the property right impossible but dependent on the consent of the current holder of the property right. Unlike in the case of a liability rule, the current holder of the property right has a veto position in these situations. This enhances negotiation costs (as a form of transaction costs) since negotiations have to end with a mutual consent or they fail. The larger, however, the value of the property right for the party that does not currently hold it, the larger the margin of negotiations and the lower, therefore, the number of cases in which transaction costs are prohibitively high. In situations in which property rules apply, changes in the value of the property right for the one party are therefore translated at least indirectly into changes in the (exchange) value of the property right for the other party. In situations, in which liability rules apply (and the price for the transaction is found by some independent institution like a court rather than through negotiations), changes in the value for the one party are translated into changes for the other party under the condition that this independent instance can sense and reflect the true momentary value of the property right (or at least changes in the value) for the party that previously held it.
If the property right enhances its value for one potential agent but not for the other, this also enhances the pressure to change the transaction rule – at least if it is generally allocated to the agent to which it has less value than to other potential owners. Even for its current holder, its value is diminished by the impossibility to indirectly consume its value by transactions.

III.) Traces in Immigration Laws (to be completed)

The aim of this section is to analyze the history of immigration law in the light of the stated conceptual arguments and to see whether they can enlighten these developments and whether any predictive power flows from it.

Particularly interesting for this analysis are developments that occur through a wide variety of countries at the same time or at comparable points in their socio-economic development. At least for the net-immigration countries in northern Europe, such macro-developments can very broadly be summarized as the large absence of rules around the middle of the 19th century,\textsuperscript{34} the emergence of bilateral treaties that guaranteed more or less the same treatment by the state as citizens (with the exception of political rights) in the second half of the 19th century. This relatively liberal form of migration governance\textsuperscript{35} came to an abrupt halt with the beginning of WWI.\textsuperscript{36} In between the wars, actual immigration laws that monitored and restricted immigration sprang up across Europe (in France earlier than in other countries of immigration\textsuperscript{37}).\textsuperscript{38} In the period after the war, this was superseded by a strong need and a rapid increase of foreign workers, many of which were perceived as guest workers that were never supposed to settle.\textsuperscript{39}

Despite an increasing prominence in political debates and in legislative activity and despite growing expenditures for enforcement, the importance of migratory movements remained largely subject to business

\textsuperscript{34} For the German Lands see Thym 2010, 51; Hollifield remarks that capital markets tended to be more restricted than labor market since capital had a more effective lobby and capital was relatively scarce as opposed to labor. The degree of organization of labor influenced, how strong the interests of labor could lobby: Hollifield 1992, 100.

\textsuperscript{35} Bade 2002, 209-22. The German Reich did not have an actual body of immigration law until WWI. This, however, did not mean a right to migrate but rather large discretion in admitting or expelling migrants: Thym 2010, 53.

\textsuperscript{36} Goldin et al. 2011, 67; Moses 2006, 49.

\textsuperscript{37} Bade 2002, 221.

\textsuperscript{38} For France, see Hollifield 1992, 49 (m.H.); for Germany, see Thym 2010, 56.

\textsuperscript{39} See for Germany and Switzerland Herbert 2001, 202-17; Hollifield 1992, 58.
cycles. In the eyes of some, the halt of recruitment created more problems than it solved, especially since it was unsuccessful to reduce unemployment and it made it more difficult for migrants to return.\(^{40}\)

In many cases, this recruiting was enabled and sustained by bilateral treaties between the sending- and the receiving country.\(^{41}\) After it became clear that this turnover-system would not work in practice\(^{42}\) and after economic growth became negative or slower, access to the labor market was severely restricted in the 70ies.\(^{43}\)

From there on, other forms of immigration than labor market-induced migration became more important, especially family reunification and asylum,\(^{44}\) which became the central stage of legislative activity.\(^{45}\) Policies to attract high skilled migrants became increasingly popular after 2000.\(^{46}\) While immigration from outside of Europe became much more selective over this time, two important legal developments superseded this tendency. One was the growing influence of international law, especially international Human Rights Law that protected the bundles of rights of migrants irrespectively of where they came from,\(^{47}\) and that made migration policies that openly discriminated on the basis of migrant’s origin increasingly untenable.\(^{48}\) The other was the complete liberalization of migration within the member states of the European Community. A fairly recent development is the transfer of competences in the governance of migration to the European Union and an increasing awareness of an ongoing “war for talents”, that requires European Countries to offer attractive bundles of rights for the chosen few that are internationally sought for.\(^{49}\) A hardly yet visible but potentially important development is the growing importance of international service providers that need access to a country’s market of services rather than to its labor market.\(^{50}\) De Haas, Natter, and Vezzoli challenge the widespread view of ever more restrictive immigration rules in postwar industrial countries.

Rather the development was characterized by rapid liberalization after 1945, decelerating liberalization from 1973 to 1989 and a balance between liberalizing and restricting changes in immigration law since 1990.\(^{51}\)

\(^{40}\) Hollifield 1992, 116.
\(^{41}\) de Haas et al. 2016, 12; Herbert 2001, 203.
\(^{42}\) Herbert 2001, 232.
\(^{43}\) Hollifield 1992, 74.
\(^{44}\) Hollifield 1992, 92.
\(^{45}\) For an overview of such policies, see de Haas et al. 2016, 25-27.
\(^{46}\) de Haas et al. 2016, 24. In Germany, a shortage of qualified IT-workers was an important trigger to take a new immigration law at hand in the beginning of the year 2000: Bast 2012, 64.
\(^{48}\) de Haas et al. 2016, 27.
\(^{49}\) For Germany, see Herbert 2001, 333.
\(^{50}\) Schlegel, Sieber-Gasser 2014
\(^{51}\) de Haas et al. 2016, 12.
The trend towards liberalization has therefore never been reversed. Increasing selectiveness and increasing complexity is the constant feature of immigration law, not increasing restrictiveness.\textsuperscript{52} This goes along with a trend to reform immigration laws in ever shorter intervals.\textsuperscript{53}

In a closer look at these developments, it is equally important to observe the behavior of courts as those of the legislature, since courts often have a clearer understanding of the value of the property right over migration in specific cases than the legislature and have therefore a tendency to protect the bundle of rights of potential migrants stronger than warranted by the positive law. This can lead to a jurisprudence that counteracts and sometimes frustrates the efforts of the legislature to rearrange property rights over migration.

The emergence of the property right over migration in the 19\textsuperscript{th} century

The second half of the 19\textsuperscript{th} century was marked both by the phenomenon of massive international migration both within Europe and across the Atlantic as well as by a sharply rising global inequality that was entirely driven by inequality between countries (since inequality within countries was in decline).\textsuperscript{54} It is, therefore, an era in which the value of controlling migration quickly expanded, both because of the number of people to whom migration was a viable option and because of the growing value in the form of future expected income that could be accessed by migrating. The idea that migration should be unconstrained prevailed in this era (even if this idea was of course not applied to all groups of migrants).\textsuperscript{55} The often quoted conclusion of an international Emigration Conference, held in 1889 summarizes this: “We affirm the right of the individual to the fundamental liberty accorded to him by every civilized nation to come and go and dispose of his person and his destinies as he pleases.”\textsuperscript{56} The idea that the control of a person over her own migration is something that he or she “disposes of” of; strongly reflects the idea of a property right allocated to the individual (at least by “civilized nations”).

Even countries in the center of industrialized Europe like Switzerland did not have an immigration law in the second half of the 19\textsuperscript{th} century.\textsuperscript{57} Their primary occupation was the regulation of emigration. The need

\textsuperscript{52} de Haas et al. 2016, 30.
\textsuperscript{53} For Germany, see Bast 2012, 77.
\textsuperscript{54} O’Rourke 2001, 15-18.
\textsuperscript{55} Especially migrants of Asian origin were soon banned from this system of relatively great freedom; de Haas et al. 2016, 28; Goldin et al. 2011, 58.
\textsuperscript{56} Quoted in Thomas 1961, 9.
\textsuperscript{57} Moses 2006, 43.
for both, highly qualified and less qualified laborers was great and there was little incentive therefore to regulate immigration.\textsuperscript{58}

The era is marked by the growing number and the growing importance of bilateral treaties among countries that guaranteed equal rights, often equal footing with citizens with the exception of political rights. The motivation for countries to conclude such treaties was the protection of their citizens abroad. The increased mobility of their own subjects created a need for this specification and allocation of property rights. It was by virtue of mutuality that rights were also created for immigrants in one's own country.\textsuperscript{59}

An astonishing fact about these treaties is that they quite simply were ignored by the courts in the second half of the 20\textsuperscript{th} century although they formally remained in force.\textsuperscript{60} It was the property rights of immigrants that were simply ignored, which was only possible because they were ignored by both or all the countries involved on a mutual basis and on mutual consent.\textsuperscript{61}

Stoffel creates a direct link between the creation of the welfare state and the decline in the number of treaties that guarantee free movement.\textsuperscript{62}

In countries like Switzerland, that were net emigration countries up to the 1880ies, immigration soared quickly after that. In the 30 years from 1880-1910, the number of immigrants living in the country doubled.\textsuperscript{63} With the outbreak of the war, it was easy for the administration to legitimize the need for a control of entries, an obligation to hold passports and the possibility to expel undesired foreigners. Switzerland though only passed a by-law that enabled this in 1917.\textsuperscript{64}

\textbf{State's hold on the property right over migration}

The interwar period was marked by the emergence of the first forms of overarching immigration laws in many European countries. While they were rudimentary at first and left a great deal of discretion to the

\textsuperscript{58} See for Switzerland Spescha et al. 2015, 38.
\textsuperscript{59} Bast 2011, 84.
\textsuperscript{60} For their declining importance and observance in Germany, see Bast 2011, 87.
\textsuperscript{61} For Switzerland and its partner-countries, see Piguët 2013, 14.
\textsuperscript{62} Stoffel 1979, 71.
\textsuperscript{63} Spescha et al. 2015, 39.
\textsuperscript{64} Spescha et al. 2015, 40; Moses 2006, 49.
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-knotted net of rules regarding migration – many of which have the effect
to protect migrants in their rights – and therefore a more detailed delineation of property rights over
migration can be observed through a large number of countries in the second half of the 20th century.65 The
German law on foreigners operated with a general clause as its central device that said: Immigrants may be
admitted if this is not to the detriment of the interests of the German State.

The sheer number of immigrants in Germany made it both unpractical and problematic to have them administrated by large discretionary powers of the administration. The pressure grew to have a more detailed bill regarding migration. When a new bill was passed in 1990, its marked difference compared to its predecessor was that it guaranteed rights to migrants under certain conditions, including a right to become a citizen.66 Interestingly, the asylum law was restructured in great detail earlier than the bill on immigration.

Switzerland, despite considerable political pressure from anti-immigration groups,67 never gave in to this pressure and unlike Germany never officially halted the recruitment of foreign workers. Instead, it initiated a rapid succession of different attempts to curb this migration.68

The End of the era of the guest worker and pressure to control family- and humanitarian migration

The role of countries of origin
A factor in the redistribution of property rights over migration that is easily underestimated is the importance of the role of the country of origin. In Switzerland, the successful renegotiation of preferable terms of accommodation of guest workers by the Italian Government in 1964 can be said to be the beginning of the End of the politics to only allow seasonal access to the labor market and no family reunification.69 The German Gastarbeiter politics was heavily influenced by a treaty with Turkey70 that also

65 For Germany, see Thym 2010, 59; for the USA, see Hollifield 1992, 179.
66 Thym 2010, 61-63.
67 Schlegel 2017; Piguet 2013
68 Hollifield 1992, 105.
69 Piguet 2013
70 Besides Turkey, Germany concluded recruitment agreements with Greece, Italy, Spain, Yugoslavia and others between 1960 and 1965: Thym 2010, 57.
helped to improve the rights of Turkish migrants in Germany and in 1986 nearly led to a regime of free movement with Turkey. In the case of France, Algeria refused to allow the recruitment of Algerians after there were incidences of maltreatment of Algerian workers in France. Countries that are associated with the European Single Market (the EEA-countries and Switzerland with the exception of Liechtenstein) had to give in 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, there is clear evidence that the free movement of persons with the EU/EFTA would have never been politically possible, weren’t it for the “carrot” of access to the single market. Despite a successful referendum to amend the constitution to reintroduce caps, the threat to lose access to the single market was too strong to put the constitutional obligation to cap migration from the EU/EFTA into practice. The reclaim of the property rights over migration from EU/EFTA citizens failed.

Counter-tendencies: Free movement and the rise of international human rights protection
A recent study has shown that immigration to European countries has become more liberal over time and that most of the legal reforms passed since 1945 have had an alleviating effect.

IV) Conclusion: likely future developments (to be completed)

This paper has shown that the emergence and the evolution of immigration law in typical European countries of immigration can be explained as a series of reactions by lawmakers on the changing value of the property right over migration. There are many factors that play into the value of this property right and it may change for just one side, either for potential receiving states or for potential migrants. Still, the approach is helpful to explain why immigration laws emerged everywhere at around the same time after there had been no use for them in the 19th century and why they became ever more detailed and sophisticated since and much more selective. The approach also helps to draw attention to the problem of transaction costs in the field of immigration law and to sort out what the contribution of changing transaction costs played in the development of immigration laws.

71 Herbert 2001, 259.
72 Hollifield 1992
73 de Haas et al. 2016.
Is there something in that analysis with predictive power? It becomes clear, based on the above analysis that too many factors play into the value of the property right over migration in order to make predictions with reasonable certainty. But the analysis provides for two important steps. It can help us to predict what will happen if the value of the property right over migration either grows or falls and it can help us to sort out the factors that will play into the development of its value. These factors can be grouped crudely into the value of moving (which is determined by global differences in productivity and stability), the costs of the transaction of the property right (which are mainly influenced by technological developments) and the political costs of allowing migration to happen.\textsuperscript{74} The development of the political costs is the most difficult to predict.

**On the value of moving (and enabling to move)**

To use the Milanović’s comparison\textsuperscript{75} of either the world of Fanon (where origin is the most important predictor of life-outcomes) rather than the world of Marx (where class is the most important predictor of life-outcomes): If the income gap between rich and poor countries widens (if we stay in a world of Fanon), the property right over migration becomes a ticket to an even greater gain in productivity and therefore also gains in value. This would most likely lead to an even more jealous hoarding of these property rights by the potential receiving states.

If on the other hand, market economies with large middle-class populations continue to develop in the global south, this does not necessarily mean that the property right over the migration of these new middle-class members loses in value. Given their improved education and their improved integration in the formal economy, which enhances their chances to succeed in labor markets abroad, it might not only become easier for them to migrate but also more useful and more desirable, given their enhanced expectations of a good life. But unlike in situations of growing global inequalities, the leverage of countries of origin to enforce the internalization of negative externalities of the restriction of migration grows. It is especially access to their own, increasingly attractive markets that they might try to trade in exchange for labor- and service-market access for their citizens. For potential receiving countries, it will become increasingly expensive to turn such a deal down. The growing internalization of the external effects of migration-restrictions is, therefore, a

\textsuperscript{74} Political costs may also push policy makers towards performative policies which create the impression of an impact rather than an actual impact.

\textsuperscript{75} Milanovic 2016.
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 (they transact the property right over migration more often) or that they forgo
potential gains from trade and other forms of cooperation.

**Transaction costs**
Technological innovation as a way to bring down transaction costs, especially search- and enforcement cost,
seem to be a likely future development. This will enhance the value of the property right over migration.

The most likely prediction in the context of likely falling transaction costs seems to be that the pressure to
allow transactions – to opt for a transaction rule that allows transactions more easily in more situations –
will be growing. An immigration regime in which more people can obtain the control over their own
international movements – likely on highly selective and not necessarily just criteria –, seems plausible.

**Political costs**
Given that the value of bundles of rights has grown asymmetrically – the stick "access to welfare" grew
quicker than other aspects of the emergence of modern welfare states – the rebundeling of the typical bundle
of rights is a likely development.\(^76\)
Publication bibliography


