ory has failed is precisely because courts have been too pragmatic, too unprincipled, too *ad hoc*, and too majoritarian.

Professor Smith does not address many of the questions left burning at the end of *Foreordained Failure*. He fails to say how he would resolve the interpretive problems created by his historical argument, and he elects to give only a brief discussion of the practical implications of his theoretical argument. Yet these are not tragic flaws in his effort. Smith's historical argument is powerfully presented, and he makes a valuable effort "to clarify our situation by trying to explore the nature and sources of our current confusion." (p. 121) Although Smith is wrong to suggest that the elusive nature of "neutrality" renders the process of theorizing about religious liberty hopeless, he nicely ferrets out and critiques the background assumptions that inform modern theories of religious freedom. His book is insightful, original, and foreordained to succeed.

JUSTICE IN IMMIGRATION. Edited by Warren F. Schwartz.[1] New York: Cambridge University Press. 1995. Pp. 246. Cloth, $49.95.

Hiroshi Motomura[2]

Immigration law reduces to a few basic but difficult questions. Should we restrict entry by outsiders? If so, what principles guide those restrictions? And after a newcomer arrives, when is she no longer a "newcomer," but one of "us"? These three questions are deceptively simple when so phrased, but they are the core issues of law and policy. We should keep them in sharp focus, the mind-numbing complexity of the Immigration and Nationality Act notwithstanding.

We can answer these questions from different perspectives. One perspective involves policymaking through legislative and administrative processes. This is, of course, the staple diet of the Senate and House immigration subcommittees, as well as the Immigration and Naturalization Service, the Executive Office of Immigration Review, and other administrative bodies. Our three basic questions inform decisionmaking at this level, but inevita-

1. Professor of Law, Georgetown University Law Center.

2. Professor of Law, School of Law, University of Colorado at Boulder. I would like to thank Linda Bosniak and Carol Lehman for their thoughtful comments on earlier drafts, and Hans-Joachim Cremer for guidance on matters of German law.

bly the process consists of reactions seriatim to immediate political pressures and concerns. A thousand architects and a thousand carpenters have built the house of immigration law.

Where, then, do those who make immigration policy through legislative and executive processes find the basic principles and norms that guide them and sometimes limit their choices? The Constitution is the answer in many areas of American law. But in immigration law, the Constitution's ability to play this role is limited by the plenary power doctrine, which severely restricts judicial challenges to immigration decisions by the government.

One of the unfortunate consequences of the plenary power doctrine is the absence of a dialogue between the judiciary and the political branches based on a mature body of constitutional doctrine that sets out the fundamental values and the outer boundaries of immigration law and policy. True, the plenary power doctrine has undergone significant erosion over the past half-century. The Supreme Court has recognized a "limited judicial responsibility" to exercise constitutional judicial review in immigration cases.[3] On another occasion, the Court suggested that an immigration decision by the political branches must have a "facially legitimate and bona fide reason," or else it cannot withstand constitutional judicial review.[4] Some courts have exercised this limited scrutiny to strike down immigration decisions as unconstitutional.[5] Some courts have developed a procedural due process exception to the plenary power doctrine.[6] And other courts, while not striking down statutes as unconstitutional, have interpreted them to reach the same outcome.[7] In spite of all of this, the erosion of plenary power has not resulted in a coherent body of constitutional principles.[8] Constitutional norms play a role in advocacy, but it is very hard to predict when courts will be persuaded.

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3. See *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977). Cf. *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952).

4. See *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

5. See, e.g., *Garberding v. INS*, 30 F.3d 1187, 1190-91 (9th Cir. 1994); *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976).

6. See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625 (1992).

7. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545 (1990).

8. See generally Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 Hast. Const. L.Q. 925 (1995); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1 (1984).

We need a constitutional compass, not only for policymakers in the legislative and executive branches, but also for judges when they interpret and apply immigration statutes. And those who would fashion that constitutional compass for these policymakers and judges need an even more basic sense of direction as they consider the fundamental questions of immigration law.

This is the context for the significant contribution made by *Justice in Immigration*, a collection of essays edited by Professor Warren F. Schwartz. As the title suggests, the authors use the language of justice and welfare to engage in a conversation about immigration law and policy. Is it ever "just" for borders to keep people out? If so, then when? Does immigration promote "welfare"? Whose welfare?

I

Joseph Carens opens the book with an essay that not only introduces the other contributions but also deftly captures many of the tough issues for today's immigration policymaker. He groups issues under three separate but interconnected headings: "special claims," culture, and economics. By "a special claim," Carens means "a distinctive and compelling moral claim to admission." (p. 4) His point that refugees and families both have special claims makes sense, gently correcting the many policymakers who would not readily see the link. Moving to the second set of issues, Carens asks whether it is permissible to take culture into account in the initial selection of immigrants. And if so, how? And after initial admission, what degree of cultural adaptation may the receiving society legitimately expect of immigrants? As for the third issue—economics—to what extent should the economic interests of the receiving society guide its immigration policy? Even assuming that economic considerations should guide policy, how should we weigh the economic interests of different groups within the receiving society? And what about the economic terms of admission? What social entitlements should we provide newcomers? Carens conveys the treacherous complexity of these questions while providing a clear roadmap for the other authors' answers to these questions, including a brief but accurate summary of the other ten essays.

A collection of essays by eleven different authors hardly lends itself to detailed review in a few pages, and specific criticism of the views in the book is available in the book itself, as many of the essays respond to others. Rather, the focus here is not on their specific theses, but on their common ground in ori-

entation and method. For many readers of a journal called *Constitutional Commentary*, the most intriguing aspect of this book will be its relationship with the constitutional aspects of immigration law. Precisely because the application of constitutional principles to immigration cases is so unclear, a parallel (or anterior) inquiry in the language of justice and welfare has great promise.

Much of the book asks whether and how fundamental principles of liberal democracy place outer limits on the content of immigration law and policy. As Michael Trebilcock puts it in his essay: "How does one define and justify the conditions of membership in the community?" (p. 219) In his words, immigration policy debates in "all Western democracies" center around "two core values that stand to some irreducible degree in opposition to each other: liberty and community." (p. 220)

Individual autonomy is a core value in a liberal democracy, but immigration laws restrict the free movement of individuals if they are outsiders or nonmembers. Yet, are limits on immigration necessary to maintain other essential aspects of a liberal democracy? What, for example, is the role of immigration in the construction of community? And to what degree is the construction of community essential to the individual autonomy of those who, as members, engage in that enterprise?

Individual autonomy in one form—through freedom of movement—thus stands in tension with individual autonomy in another form—through restrictions on the movement of others, which may be necessary to construct communities within which to pursue liberal democratic goals. This tension prompts many of the authors in this collection to search for principles of justice to help resolve this tension, and even more fundamentally, to ask whether there can be a resolution at all. As Jules Coleman and Sarah Harding put the question in their contribution: "Are immigration policies the sorts of things that fall within the ambit of distributive justice?" (p. 39)

Or instead, must we think of distributive justice as applying to communities, and not across the borders of communities? In other words, is "membership" in a community anterior to "rights" recognized by a community? Or does every human being have some justice-based claim to become a member? Most of these authors seem to believe that we owe more membership-based obligations to those who are somehow "closer" to us. But these authors vary on exactly how we should meet those obligations, and in turn on what immigration restrictions are morally permissible under principles of justice.

These authors include some of the nation's most distinguished and prolific scholars in law, philosophy, and economics. Interestingly, many of them have little background in immigration law and policy. (Joseph Carens is a notable exception.) This combination of erudition and innocence is the source of many of the book's virtues—and a few vices.

First, a brief but necessary word about the vices. Several essays get the law wrong in places. A sampling would include: that family-based immigration is not numerically limited (p. 47) (true for parents, spouses, and minor children of citizens, but false for other relatives of citizens and for all relatives of permanent residents)[9]; that alienage is a suspect classification (p. 179) (since the Supreme Court announced that principle in *Graham v. Richardson*,[10] it has declined to apply it in a number of cases, notably *Mathews v. Diaz*);[11] that ethnic Germans around the world have "a right to claim citizenship" (pp. 21, 31) (German citizenship requires more than mere German ethnicity);[12] and that Germany permits asylum applicants to work pending a decision (p. 24) (as a rule, they may not).[13]

There are a few other curious passages. The use of the term "legalized aliens" to refer to permanent residents (p. 22) is confusing, since "legalized aliens" are previously undocumented aliens who acquired lawful status under the amnesty provisions of the Immigration Reform and Control Act of 1986.[14] It is not quite right to say that citizenship is "essential to vote in any election in the United States and Canada." (p. 27) A few American localities permit noncitizen voting. While these are isolated exceptions, they have figured prominently in discussions of alien suffrage.[15] Statements about the rarity of naturalization in Germany (p. 32) overlook recent government initiatives to ease the legal requirements. And one account of the history of American

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9. See Immigration and Nationality Act §§ 201-203 (codified at 8 U.S.C. §§ 1151-1153).

10. 403 U.S. 365, 371-72 (1971).

11. 426 U.S. 67, 78-80 (1971).

12. See Bundesvertriebenengesetz § 6(1); Hans Alexy, Rechtsfragen des Aussiedlerzuzugs, 1989 Neue Juristische Wochenschrift 2850.

13. Arbeitserlaubnisverordnung § 5; Arbeitsförderungsgesetz § 19(4).

14. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359, 3394 (codified as amended at 8 U.S.C. § 1255a).

15. See, e.g., Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 70 (Princeton U. Press, 1996); Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 Mich. J. Int'l L. 259, 292-300 (1992); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1460-61 (1993).

immigration law (p. 152) disregards important research on the extensive body of state immigration regulation before 1875.[16]

These are more than mere quibbles. They undermine the confidence of the informed and experienced reader. However, from a purely analytical standpoint, these passages never undermine the author's basic point. At a more fundamental level, these essays are full of the illuminating, the perceptive, and the provocative. What is interesting—and this is the reason to raise these concerns—is that the book is often illuminating, perceptive, and provocative precisely *because* the authors seem unencumbered by conventional wisdom, or by the details of doctrine, for that matter.

II

A. Defining Immigration Law

This collection makes significant contributions on several questions that have important parallels in constitutional immigration law. One question is quite basic: what is "immigration law"? The traditional definition includes admitting noncitizens into the United States and allowing them to remain. Until the recent changes in the 1996 immigration reform legislation, this meant "admission," "exclusion," and "deportation." Now the terminology is "admission," "inadmissibility," and "removal."[17] Thus, "immigration law" proper does not include aliens' rights and responsibilities once they are in the United States; such "nonimmigration" questions belong to a distinct body of "alienage" law. The line between immigration law and alienage law is important—above all because courts typically apply the plenary power doctrine to limit judicial review of "immigration" but not "alienage" matters. One of the fundamental conceptual problems for immigration law scholarship is this elusive but pivotal line between immigration law and alienage law.[18]

Mark Tushnet defines immigration policy to include not only immigration proper, but also the integration of migrants into the receiving society, i.e., questions on the alienage side. (p. 147) Treating immigration and alienage together is key to Tushnet's

16. See Gerald L. Neuman, *The Lost Century of Immigration Law (1776-1875)*, 93 Colum. L. Rev. 1833 (1993).

17. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 304, Pub. L. 104-208, 110 Stat. 3009.

18. See, e.g., Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. Rev. 1047 (1994); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 Va. J. Int'l L. 201, 203 (1994).

ultimate conclusion: that immigration restrictions are generally inconsistent with principles of liberal democracy. Jean Hampton and Alan Sykes work with similar definitions. (pp. 89, 183-84) James Buchanan likewise focuses on problems of integration, particularly the problem that immigrants, even if they have no net economic impact, may undermine the social and political order if they are allowed immediate and direct political participation. (p. 65) Louis Michael Seidman takes an equally broad view of "immigration" when he contrasts *Plyler v. Doe*[19] with the absence of judicial review for deportation decisions. Seidman asks: "How can it be that it is constitutional to deport them, thereby depriving them of both a U.S. education and physical presence, but that it violates their constitutional rights to deprive them of a U.S. education without depriving them of physical presence?" (p. 142)

These authors may be right to look beyond the separation between immigration law and alienage law, and to adopt this broader definition of immigration law and policy without express defense or elaboration. Indeed, I share the view that we need to integrate immigration and alienage law into a larger body of constitutional principles governing membership. Yet, the informed reader may wonder why these authors do not pause to mention the considerable debate about this definition. Prominently, Michael Walzer has provided a seminal, highly textured account of the relationship between immigration and alienage issues. Much of his treatment suggests that any efforts to integrate immigration and alienage law must consider some key differences between them.[20]

B. Permissible Limits on Immigration

The book also contributes by addressing a second basic question with important parallels in constitutional immigration law: what, if any, limits on immigration are permissible in a liberal democracy? Jules Coleman and Sarah Harding explore the tension between liberal democracy and immigration restrictions by surveying the laws of several Western liberal democracies. They evaluate these laws by asking what conception of justice would justify them, and that analysis leads them to question the legitimacy of states and borders. Jean Hampton discusses nonconsensual, ethnicity-based or race-based conceptions of mem-

19. 457 U.S. 202 (1982).

20. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 52-61 (Basic Books, 1983). See also Bosniak, 69 N.Y.U. L. Rev. at 1068-87 (cited in note 18).

bership—such as in Germany and Japan—to illustrate the sort of immigration restrictions that are incompatible with liberal democracy. After examining the contrast with a "consensual" model, her evaluation of the nonconsensual model leads her to question the "legitimacy of the nation-state." (p. 78) Hampton "reject[s] most citizenship policies driven by a strong sense of nationalist identity." (p. 68)

Stephen Perry discusses how a liberal democracy can strike a coherent balance between universal and localized obligations. He concludes that the obligations of liberal states toward outsiders (especially refugees) are more extensive than usually recognized in practice, but that these universal obligations do not negate additional and greater localized obligations. (p. 105) Receiving societies should have some discretion as to the numbers of immigrants admitted, and immigration restrictions are not "fundamentally illiberal" per se. But Perry argues that *some* restrictions are impermissible. (p. 105) A liberal democracy may not exclude on cultural grounds; by way of exception, however, culturally based admission criteria may be used for refugees only. (pp. 110-24) In contrast, Seidman doubts that the fundamental tension between universal and local obligations can ever be reconciled. He argues that Coleman and Harding's defense of the right to membership "fails to capture our ambivalence about the duties we may owe to persons outside our own political community." (p. 136)

By addressing the question of what limits on immigration are permissible in a liberal democracy, these essays shed light on parallel topics in constitutional immigration law. One parallel concerns the plenary power doctrine itself. The idea that we owe duties to those outside our political community is highly relevant to one criticism of the plenary power doctrine. Without such duties, there is one less reason for constitutional judicial review and one more reason for plenary power. After all, the plenary power doctrine derives much of its justification from the view that rights are only for members, and hence that the Constitution has no application to immigration decisions. The relevance of these essays to plenary power goes one important step further. Skepticism about the nation-state itself and about national borders forces us to think beyond the "national imagination" in which

much legal and political discourse about immigration takes place.[21]

Here is another parallel: the discussions of ethnicity-based, or race-based conceptions of membership are helpful in understanding the role of race and national origin in United States immigration law.[22] The parallel in constitutional immigration law lies in the nondiscrimination norm in our constitutional culture generally, and its statutory expression in immigration law in the 1965 amendments to the Immigration and Nationality Act.[23] Pertinent here is Hampton's caution that her "argument against nation-states is *not* an argument against the importance of a cultural community, but it is an argument against the idea that cultural and political communities should always—or even usually—overlap." (p. 87-88) Perry makes a related point: it is the character of culture that counts, not its substance. A liberal democracy may restrict membership to maintain *some* culture, but not to maintain a *particular* culture, for example with a certain racial or ethnic composition. Thus Perry writes: "a liberal state always contains the seeds of a pluralist society." (p. 120) And Tushnet writes: "Membership in some community is morally valuable. Membership in a community constituted in a particular way is not." (p. 155)

C. Whose Justice, Whose Welfare?

The book asks a third key question with a important parallel in constitutional immigration law: *whose* "justice" or "welfare" matters? To the extent that this question poses a choice between members and outsiders, a number of the essays address it as part of their analysis of permissible limits on immigration. But to the extent that the choice is between members competing for influence over immigration policy, the book devotes relatively little analysis.

The one exception is Gillian Hadfield, who writes: "At first the normative question raised with respect to immigration law appears to be, Who should we let in? But if we press on this characterization of the issue, I think we will see that it begs a

21. See Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 Conn. L. Rev. 555, 570-71, 585-90, 598-600 (1996). See also sources cited id. at 604 n.119.

22. See Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 Mich. L. Rev. 1927, 1938-52 (1996) ("*Two Models*"); Stephen H. Legomsky, *Immigration, Equality, and Diversity*, 31 Colum. J. Transnat'l. L. 319 (1993).

23. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911. See generally *Two Models* at 1932-38 (cited in note 22).

deeper question: Who are 'we'?" (p. 204) She elaborates: "[i]mmigration policy, the existence of borders that mark some as insiders and others as outsiders, is *logically prior* to the normative defense of conventional welfare analysis." (p. 204) Thus, "a social welfare function that reflects the well-being of men alone or current workers alone is to assume away the ethical issues raised." (p. 205) From this Hadfield concludes: "a social welfare function that focuses exclusively on the impact of immigration on current residents cannot be the basis for the economist's participation in a normative debate on immigration." (p. 205) Her solution is a "global social welfare" perspective. Whether or not this is persuasive, Hadfield's essay helpfully raises the problem of the perspective from which the "we" is defined.

Here the constitutional parallel is this question: with whose rights should lawmakers be concerned? Constitutional immigration law needs to pay more attention to this issue. The traditional view in constitutional immigration law is that the plenary power doctrine stands opposed to the recognition of immigrants' rights. Another view, which deserves further development by judges, advocates, and scholars, is that the rights of members to confer membership on outsiders is not necessarily a power exercised by the state, and that the process of conferring membership is more pluralistic than in commonly recognized. The complexities of this process should be taken much more seriously than they have been historically.[24]

III

Beyond contributing with regard to these three questions with parallels in constitutional immigration law, the book highlights some aspects of immigration law and policy that are easy to forget. A doctrinal approach to immigration law and policy tends to overlook the fact that immigration is just one way to transfer resources across borders, and that redrawing of borders, trade, and foreign aid are alternatives. We might also consider forms of direct action besides foreign aid, for example military intervention. Perry makes these links explicit. (p. 103) Sykes points out that some of the costs associated with immigration are not costs of immigration at all, but rather costs of entitlement programs and other public benefits open to immigrants. (p. 176) Susan Vroman is right that Sykes' argument in favor of immigra-

24. See generally Hiroshi Motomura, *Whose Immigration Law?: Citizens, Aliens, and the Constitution*, 97 Colum. L. Rev. (forthcoming 1997); *Two Models* at 1942-45 (cited in note 22); Motomura, 35 Va. J. Int'l L. at 201-16 (cited in note 18).

tion is "quite similar to the argument used in favor of free international trade." (p. 212) And as previously mentioned, several authors raise basic questions about viewing immigration from a perspective that assumes the legitimacy of the nation-state or of states and borders generally.

The questions raised in this volume are sometimes more interesting and helpful than the answers that the authors propose. For example, several essays discuss the obligations owed to "refugees." Coleman and Harding conclude that "all refugees have a right to immigrate." (p. 52) But who is a "refugee"? The problems of refugee and asylum policy would be less intractable if we could always ascertain who they are. Often lacking is an awareness of the problems of procedure, as matters of both administration and due process. Similarly, the book devotes considerable analysis to whether immigrants contribute to the American economy. To be sure, the answer affects virtually all immigration choices. But economic analysis is only the beginning of inquiry. Typical legislative choices do not concern immigration per se but rather narrower choices about specific categories. Even Tushnet hedges his conclusion: "As a matter of principle, liberals ought to be committed to *relatively* unrestricted immigration policies." (p. 155, emphasis added) In the end, what does "relatively" mean? Isn't defining "relatively" the whole game?

The idea that there are fundamental norms—whether they are styled "liberal democratic principles" or "constitutional immigration law"—that guide and limit immigration law is key to its sound and coherent future development. The book's claim in the front matter to be the "first interdisciplinary study" of the subject is overstated.[25] But we do need more of them.

25. See, e.g., Bruce A. Ackerman, *Social Justice in the Liberal State* 89-95 (Yale U. Press, 1980); Yasemin Nuhŏlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (U. of Chicago Press, 1994); Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* at 31-62 (cited in note 20); Mark Gibney, ed., *Open Borders? Closed Societies?: The Ethical and Political Issues* (Greenwood Press, 1988); William Rodgers Brubaker, ed., *Immigration and the Politics of Citizenship in Europe and North America* (U. Press of America, 1989); *Symposium: Law and Community*, 84 Mich. L. Rev. 1373 (1986); Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 Va. J. Int'l L. 237 (1994); Stephen H. Legomsky, *Why Citizenship*, 35 Va. J. Int'l L. 279 (1994); David A. Martin, *The Civic Republican Ideal for Citizenship and for Our Common Life*, 35 Va. J. Int'l L. 301 (1994); and Peter H. Schuck, *Whose Membership Is It, Anyway? Comments on Gerald Neuman*, 35 Va. J. Int'l L. 321 (1994).