

An obvious way to reduce this ‘dead capital’ would be to allocate the property right over migration more often to potential migrants rather than to potential receiving states. The problem with

such a policy is that it might be too radical to be realistic. An alternative to the reallocation of the property right over migration is to ease its transfer to migrants in specific cases. If the costs for the transaction of the property right are low, the initial suboptimal allocation of the property right is less problematic because individuals are able to obtain this property right at low costs. The creation of easy, predictable and affordable ways for obtaining an entry ticket – that is, for getting the property right over one's own migration – would be a policy that could, over time, reduce the substantial waste of life opportunities, income and human capital that is caused by the way we deal with migration.

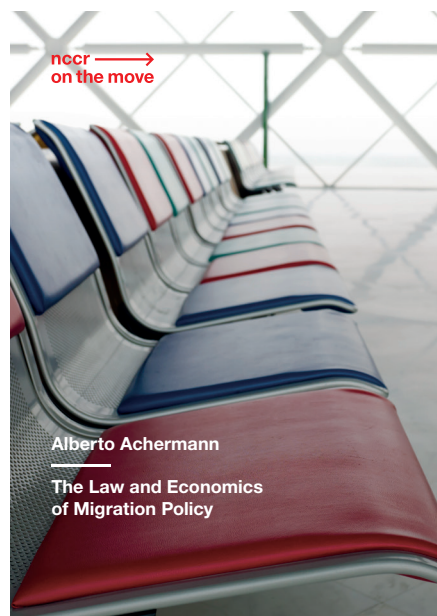
Calabresi, Guido, and Douglas A. Melamed.
"Property Rules, Liability Rules, and
Inalienability: One View of the Cathedral".
Harvard Law Review 85, no.6 (1972):
1089–1128.

Cassee, Andreas. *Globale Bewegungsfreiheit. Ein philosophisches Plädoyer für offene Grenzen*. Berlin: Suhrkamp (Suhrkamp Taschenbuch Wissenschaft, 2202), 2016.

Demsetz, Harold. "Toward a Theory of Property Rights". *The American Economic Review* 57, no.2 (1967): 347–359.

Mona, Martino. *Das Recht auf Immigration. Rechtsphilosophische Begründung eines originären Rechts auf Einwanderung im liberalen Staat*. Basel: Helbing Lichtenhahn, 2007.

Trebilcock, Michael J., and Matthew Sudak. "The Political Economy of Emigration and Immigration". *New York University Law Review* 81 (2006): 234–293.



Project of the “nccr – on the move”
Alberto Achermann, University of Bern

How can the law pertaining to migrants best be structured? Considering a framework involving different levels of decision-making, the main focus is on where regulation should take place and how rights should be allocated to various actors. This project uses input and concepts from economics to assess legal rules and analyze policymaking.

In a nutshell #6 is based on the writer's dissertation, which was written as part of the project.

Contact for in a nutshell #6: Stefan Schlegel, PostDoc at the Max Planck Institute for the Study of Religious and Ethnic Diversity in Göttingen, former doctoral student of the nccr – on the move, schlegel@mmg.mpg.de

The nccr – on the move is the National Center of Competence in Research (NCCR) for migration and mobility studies. The center aims to enhance the understanding of contemporary migration and mobility patterns. Designed to develop new perspectives on the changing migratory reality, the nccr – on the move brings together research projects from social sciences, economics and law. Managed from the University of Neuchâtel, the network comprises nineteen research teams from eight universities in Switzerland: the universities of Neuchâtel, Basel, Bern, Fribourg, Geneva, Lausanne, Lucerne, and Zurich.

“in a nutshell” provides answers to current questions on migration and mobility – based on research findings, which have been elaborated within the nccr – on the move. The authors assume responsibility for their analyses and arguments.

Contact for the series: Ursula Gugger Suter, Communication Officer, ursula.gugger@nccr-onthemove.ch

nccr 
on the move

**National Center of Competence in Research –
The Migration-Mobility Nexus**
nccr-onthemove.ch

Université de Neuchâtel
Faubourg de l'Hôpital 106
2000 Neuchâtel, Suisse



**nccr →
on the move**

**National Center of Competence in Research –
The Migration-Mobility Nexus**
nccr-onthemove.ch

Stefan Schlegel

Is Control over Migration an Asset? And If It Is, Who Can Make the Most of It?

in a nutshell #6, March 2017



SWISS NATIONAL SCIENCE FOUNDATION

The National Centres of Competence in Research (NCCR) are a research instrument of the Swiss National Science Foundation

Messages for
Decision-Makers

“Control over migration” is a valuable asset of which – theoretically – either the country of destination or migrants themselves can dispose.

— Immigration law regulates essentially who owns this asset and how it can be transferred.

— The allocation of this asset in society is of great importance with respect to the level and distribution of its wealth.

— Current immigration law does not allocate this asset optimally. The “pie” is thus much smaller than it could be.

— Invoking the “efficiency” of migration policy is pointless if all of the effects on all of those affected are not taken into account.

What is “efficiency” in immigration law?

Domestic immigration law frequently refers to the goal of “efficiency”, thereby often ignoring the external effects of immigration governance completely. External effects are felt, for example, by those who cannot migrate because of a given immigration law and whose opportunities in life are therefore reduced.

The idea that the efficiency of a given legal rule could be meaningfully assessed while ignoring its effects abroad makes no sense. In environmental law, for instance, it is easy to see that ignoring the effects of a given policy on the environment of other countries in order to make the policy appear more efficient would be highly problematic. Immigration law should apply the same standards. Either the efficiency of a legal rule is assessed by taking all its effects into account, or the criterion of efficiency is meaningless.

Migration is an asset. If you have the opportunity to migrate, you are better off than if you do not have it. This is why the control over a person’s migration is also an asset. Consequently, immigration law is – essentially – concerned with the distribution of control over migration. Immigration law could do a much better job of allocating this asset in a way that enhances wealth and wellbeing in society.

Let’s Start with a Simple,
Yet Elegant Theory of Law

This research project develops a new approach to immigration law – an approach that is mainly interested in the understanding of immigration law as a tool for allocating assets within society. There is a theory of law that allows for such an approach: It is called the theory of property rights, a branch of the economic analysis of law. It provides a simple, yet elegant explanation of what the legal order actually does: It is mainly concerned with avoiding a society where “might makes right”.

This is done by defining rights to an exclusive control of assets and by allocating these rights to one of a number of competing agents in society. In principle, the legal order has to define and allocate such a right for any asset in a society. These rights are called “entitlements” or “property rights”. The notion of what constitutes an asset in this theory is very broad. It includes everything that increases the satisfaction of agents.

One example is the asset of “silence”. The legal framework has to define who can decide (in what places and at what times) whether there may be noise or not. Another example is the asset of “having children”. Normally, it is the concerned persons themselves to whom this particular right is allocated, but there are exceptions.

The Property Right over Migration
A third example of an asset – and this is the central insight of this project – is the asset of “migration”, i.e., the migration of specific persons to specific places. The legal framework must allocate control over the asset of “migration” to one of several competing agents. The right to decide whether a specific person may migrate to a specific place can be called the property right over migration.

— “The property right over migration gives control over a very valuable asset – the right to migrate or to prohibit migration.”

It is valuable because migration is often a necessary precondition to safeguarding a person’s life and liberty. Even more often, it is a necessary precondition for a wide range of economically useful activities. Unlike the property right over the asset of “having children”, the property right over the asset of “migration” is not normally allocated to the individuals concerned (potential migrants), but rather to the potential receiving state.

Highly Theoretical – and Very Practical
In addition to the allocation of the property right over migration, immigration law has to solve a second problem, which is how this property right can be transferred from one agent to another. In the context of migration, this means from the State to a potential migrant and vice versa. The legal system must define a transaction rule. Further, it has to establish a mechanism that allows for enforcement of the allocation decisions and any subsequent transactions of these property rights.

This high level of abstraction involved in the analysis of immigration law offers a number of advantages not only for the theoretical understanding of immigration law but also for its practical design.

The most important practical insight for immigration policy is this: The property right over a person’s migration to state X has to be allocated. It is not naturally in the hands of state X. It might just as well have been allocated

the other way round – to migrants rather than to states – even if it is the State, or the legislative body within the State, that allocates this property right. An example where states tend not to allocate the property right to themselves, even though they could, is the property right over the asset of “having children” (a counterexample was China until recently).

The Right to Impose a Disadvantage
Property rights entail the right to impose a disadvantage, a negative external effect on others. If I own the property right to silence in my neighborhood, I can impose the obligation to keep quiet on my neighbors. If I own the property right over my migration, I can impose my migration on those who may have preferred to remain free from it.

— “On the other hand, if state X owns the property right over my migration to state X, state X can impose a disadvantage on me. Not being allowed to migrate diminishes my opportunities in life.”

Allocating property rights over migration to states rather than to migrants is therefore not simply a reluctance to help migrants in need. It means actively impairing the life opportunities of potential migrants, thereby imposing a negative external effect on migrants and their countries of origin (who forgo remittances and incentives for their inhabitants to invest in their human capital).

Whether it is possible for the country of destination to impose this external effect on migrants and their countries of origin or not has a lot to do with power relations. If countries of origin grow powerful enough, they will be able to force potential receiving countries to internalize this effect. Internalization means to take account of the social costs of one’s own behavior. In the context of migration, this means that the state that wants to block migration would have to take account of the negative external effect that this behavior imposes on others. It must either pay for the external effect or refrain from producing it. Under this condition, blocking migration quickly becomes too expensive. The

most likely outcome of the enforced internalization of the social cost of the repression of migration, therefore, is to allow migration more often – to hand over the property right over migration to potential migrants more often.

This has happened, for instance, with migration from the EU/EFTA countries to Switzerland. The establishment of the EU single market and the subsequent need of the Swiss economy to participate in it provided the EU with the means for applying political pressure on Switzerland. The EU was able to convince Switzerland to surrender its property right over the migration of EU/EFTA citizens to Switzerland to these citizens, thus making it impossible for Switzerland to further impose a negative external effect on them – i.e. blocking them from its attractive labor market. The EU has even proven to be powerful enough to prevent Switzerland from taking back these property rights, after it became constitutionally obliged to do so with the “initiative on mass immigration”.

Third countries will also try to enforce the internalization of the external effects imposed on their citizens – caused by the suppression of their migration – once their leverage grows. If, for example, India had an increasingly attractive market and a population that would profit from access to foreign labor markets, why wouldn’t India’s government try to tie access to its markets to improved labor market access for its citizens in contracting states?

— “This pressure to internalize the social costs of the repression of migration could well prove to be important for the future of international migration governance.”

A Second Best Solution: Facilitated Transaction of the Property Right
The second insight of great practical importance is that it is very unlikely that the property right over migration will be in the hands of the agent who values it most as long as it remains allocated to the potential receiving state.

In an ideal market, where trade was completely costless (trading partners are easy to find, enforcement of

contracts is unnecessary, etc.), potential migrants could, as a general rule, buy the property right over their own migration. Imagine a world in which all the agents had to buy all the property rights from some sort of bank that auctioned them off to the highest bidder. Imagine that all the individual players in this game had the same funds. In such a game, potential migrants could in general come up with a better offer to buy the property right over their own migration than anyone else. Potential receiving states (a sort of bidding consortium in such an auction) would hardly be willing to pay a price to remain free from migration as high as potential migrants would be willing to pay *to be able to migrate*. Since states have pooled resources from many individuals, they have, of course, more bidding power than individual migrants do. But since they would have to buy up the property rights over migration of all potential migrants if they wanted to generally control immigration, they would quickly use up all of their funds in competition with individual bidders who wanted to obtain the right over their own migration. Instead of trying to buy all of the property rights over immigration to their territory, they would instead concentrate on buying the property rights over the migration of individuals they absolutely want to keep out (such as dangerous individuals).

This means that in an environment with perfect conditions for increasing overall wealth, potential migrants would in general end up owning the property right over their migration. In addition, potential migrants are the ones who can enhance the value of the property right over their own migration. If potential migrants invest in their human capital, their opportunities of gaining access to a good income through migration grows and, consequently, the value of their migration – and of the property right that gives control over it – increases as well. But much of the investment cannot happen if potential migrants do not own the control over their migration and cannot be sure that the investment will pay off.