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Book Reviews

BOOK REVIEWS

Immigration: Process and Policy

By T.A. Aleinikoff & D.A. Martin, West Publishing Co., St. Paul, Minnesota, 1985, pp. lxxxii, 1042.

Not long ago, one could justifiably complain about the absence of satisfactory teaching materials for a law school course in immigration law. Several books were and still are available in treatise format.[1] But such publications, lacking cases or other primary sources, offer students only a superficial challenge unless supplemented with a substantial dose of the teacher's own materials.

In the past several years, two traditional law school casebooks have stepped into this gap. The first was *Immigration Law and Refugee Policy* by Arnold Leibowitz.[2] The second book, by Professors Aleinikoff of Michigan and Martin of Virginia, from which I taught during the spring of 1986, is the subject of this review.[3] I will discuss it primarily as a set of teaching materials, since that is the book's main purpose.

The book's overall organization and coverage present no major surprises. The first two chapters include general introductory materials. Detailed coverage begins in chapter three, where the authors examine admission and exclusion, in both substantive and procedural aspects. Chapter four focuses on problems of defining "entry" and "reentry." Chapter five covers the substantive and procedural aspects of deportation, and chapter six examines relief from deportation. Judicial review is the focus of chapter seven. The final three chapters deal with refugees and political asylum, undocumented aliens, and citizenship.

Despite the conventional overall organization and coverage, the selection and ordering of materials within each chapter embody some bold choices that impart a distinctive character to the book as a whole. For

1. *See, e.g.*, C. GORDON & E. GORDON, IMMIGRATION AND NATIONALITY LAW (student ed. 1985); NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE (student ed. 1981).

2. A. LEIBOWITZ, IMMIGRATION LAW AND REFUGEE POLICY (1983). Because I have not taught from the Leibowitz book, I offer no comprehensive review of it.

3. T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY (1985).

the classroom teacher, these choices are the book's greatest strength, but at the same time, they present some potential pedagogical pitfalls.

Within each topic the authors constantly jump back and forth among several levels of approach to the overall subject of immigration law. All coursebooks do some of this shifting, but this one does so across an unusually broad range, so much so that each chapter seems to contribute readings to not just one, but rather to several intertwined courses in immigration law. A closer look at part of chapter three, which covers admission and exclusion, illustrates this key feature of the book.

One type of immigration law course focuses on the acquisition of immigration benefits by careful planning in light of a complex body of statutes, regulations, and subconstitutional case law. Chapter three starts on this level, with short, straightforward text describing the nonimmigrant categories. It next gives an overview of preference petitions and the quota system, plus several problems designed to test for mastery of the basics.

The chapter then broadens the inquiry to focus on several readings under the heading, "Changing Patterns of American Immigration." The selections range from statistics on the source countries of new immigrants to a policy discussion of assimilation of immigrants into American society. This wider topic ties in nicely with part of chapter one, where the authors sketched the history of immigration to the United States and presented some of the key moral and philosophical questions relating to immigration. By returning to these themes in the admission and exclusion context, Professors Aleinikoff and Martin remind us of a different immigration law course, one that concerns history, morality, and public policy.

Chapter three next turns to a more detailed consideration of the family reunification categories. The primary focus is *Fiallo v. Bell*,[4] a 1977 United States Supreme Court opinion that upheld the constitutionality of section 101(b)(1)(D) of the Immigration and Nationality Act.[5] That provision defines "child" to include an illegitimate child seeking an immigration preference by virtue of its relationship with its natural mother, but not with its natural father. While the shift from subconstitutional to constitutional immigration law may seem abrupt, the authors are only returning to an issue introduced in chapter one—the central problem of the plenary power to Congress to legislate in the immigration field, unhampered by constitutional doctrines that have developed to control other types of legislative activity.[6]

4. 430 U.S. 787 (1977).

5. 8 U.S.C. § 1101 (1982 & Supp. II 1984).

6. Chapter one discusses the major nineteenth century cases establishing the plenary power doctrine: The Chinese Exclusion Case, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893); and others. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 3,

The authors then return to the subconstitutional course, specifically to an examination of several court decisions concerning other problems in defining "child."[7] They pose some tricky technical problems under the statute. Also on the subconstitutional level, the authors discuss immigration based on marriage.[8] Finally, the book presents a brief discussion of sham marriages and the ethical responsibilities of attorneys, thus dealing with yet another dimension of the subject, professional responsibility.

These constant shifts of emphasis among various approaches to immigration law are typical of the entire book. They might lead one to conclude that the book is unevenly paced and that its organization is unnecessarily confusing. Especially at first, many students will find their target very elusive. There is, however, good reason for the book's approach. A coursebook can explore the full richness of immigration law only by viewing it from a wide variety of changing perspectives. And by doing so, the book puts the teacher in an optimal role. His or her major task is to help the student sort out and then weave together the various strands in the book, which usually requires placing the day's material into the context of related reading from earlier chapters.

The apparently conventional order of the book's topics is well-designed to enhance this effect without complicating the more technical lessons. For example, the authors devote separate chapters to admission and exclusion on the one hand, and deportation on the other, with an intervening chapter on entry.[9] This organization serves to highlight the continuing plenary power theme because Congress's plenary power is itself the doctrinal root of the distinction between exclusion and deportation, and because it is also what makes the definitions of "entry" and "reentry" so critical.

Having several intertwined courses in immigration law presents difficulties for both teacher and student. For example, the plenary power strand shows up in so many contexts that it seems sometimes quite tan-

at 5–37. *See generally* Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

7. The concern is interpreting the provision that confers immigration benefits on a child who was born illegitimate but later "legitimated." *See* Immigration and Nationality Act § 101(b)(1)(C), 8 U.S.C. § 1101(b)(1)(C) (1982). The principal cases in the book are De Los Santos v. INS, 690 F.2d 56 (2d Cir. 1982); and Kaliski v. District Director, 620 F.2d 214 (9th Cir. 1980).

8. The principal case, Bark v. INS, 511 F.2d 1200 (9th Cir. 1975), holds that whether a marriage is a "sham," and therefore not a proper basis for an immigration preference, depends on the subjective intent of the parties at the time of marriage. Later evidence of separation is relevant only in that it may shed light on that intent, but cannot alone support a finding that a marriage was not bona fide when entered. *Id.*

9. *Cf.* A. LEIBOWITZ, *supra* note 2, at 8–1 to –184, which assigns a much less prominent role to exclusion and deportation, and to the distinction between the two.

gled. In large part, this happens because the key plenary power cases appear in the order dictated by the book's overall organization, which is not always the best sequence to read them. Thus, we have to wait seventy pages after *Fiallo v. Bell*[10] to discuss *Kleindienst v. Mandel*,[11] which predates *Fiallo* by five years and represents an important aspect of the *Fiallo* majority's analysis.[12] And some material, while very provocative, takes us quite far afield. For example, the authors use the problem of defining "moral turpitude" as a vehicle for a legal process discussion of the "meaning of statutes."[13]

On the whole, however, it is difficult to fault the authors' decision to sacrifice optimal ordering within certain lines of cases in order to combine several different approaches to immigration law. The alternative, which in the plenary power cases would be to remove them from their subconstitutional settings, would be far less satisfactory. And the digressions do not diminish the book's overall effectiveness. In fact, once teacher and student become familiar with the book's general organizational pattern, the book's frequent shifts of emphasis make it much more interesting reading than most other coursebooks.

The wide variety of materials presented also heightens reader interest. For example, the authors' use Ann Novotny's account of Ellis Island in 1907[14] as a backdrop for discussing current admission procedures under sections 231 through 240 of the Immigration and Nationality Act.[15] Excerpts from Calvin Trillin's humorous *New Yorker* article about the everyday practice of immigration law also add an interesting touch.[16] Notes and questions succinctly inform and probe. The authors also give useful suggestions for further reading, while resisting the temptation to provide a running bibliography.

The authors make little effort to hide their personal positions on a number of key issues, but they always present those views in a manner that allows for lively, well-informed classroom debate.[17] The book's occasional use of dialogues, skillfully timed and not overdone, is very helpful in this respect.[18] The book is a good one to teach against, for those so inclined.

10. 430 U.S. 787 (1977), discussed at text accompanying notes 4–6 *supra*.

11. 408 U.S. 753 (1972).

12. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 125, 194.

13. *See id.* at 377–98.

14. A. NOVOTNY, STRANGERS AT THE DOOR: ELLIS ISLAND, CASTLE GARDEN, AND THE GREAT MIGRATION TO AMERICA 10–23 (1971).

15. 8 U.S.C. §§ 1221–1230 (1982 & Supp. 1986).

16. Trillin, *Making Adjustments*, THE NEW YORKER, May 28, 1984, at 65.

17. *See, e.g.*, T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 453–63 (offering their views on the "border/interior distinction").

18. *See, e.g., id.* at 342–47. In addition to their own dialogues, the authors present excerpts

At about 1000 pages, the book is too long to cover completely in a three-unit (45-hour) course, but its core of 750-odd pages can be. Instructors with thirty classroom hours will need to cut more substantially. Here, a word of caution: an eclectic collection such as this tempts the teacher to eliminate some material from the reading assignments for the sake of covering more topics by semester's end. With this particular book, however, doing so is especially risky because each selection adds not only to the topic at hand, but also to one of the book's recurring themes.

The book's most significant avoidable weakness is in its treatment of the statutory and regulatory aspects of immigration law, which is the heart of many law school courses. At this level, the book could do a much better job of placing doctrine into a realistic tactical context. For example, the book limits its coverage of nonimmigrant visas to less than five pages.[19] Yet in the practice of immigration law, nonimmigrant visas, especially B, E, H, and L visas, are much more important than that. Moreover, the cursory treatment of nonimmigrant visas weakens the treatment of permanent residence, which cannot be considered fully in many instances without examining possible nonimmigrant statuses as well.[20] This also means that the authors forego an excellent opportunity to challenge and interest students with the highly interesting tactical and ethical problems that arise when nonimmigrants become immigrants. Finally, well-drafted problems in the nonimmigrant visa area would present a good opportunity to provide skills training in the use of regulations, to which the book pays relatively little attention.

On a technical level, the book could be improved in several ways. Students' inclination to work closely with the statute would be enhanced if the statutory materials, currently in the book's appendix, were separately bound. This supplement could be updated annually to include both legislative amendments and significant new developments. Another technical difficulty with the book is that it often is hard to tell if text is the authors', or an excerpt from another source. Clearer headings or a different type size would solve the problem.

My last point of criticism is that the book lacks a teacher's manual. The authors should not leave it for a reviewer to be the first to address

from other works in that format, including B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); and Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

19. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 97–101, 103. Temporary workers under H-2 visas and similar programs receive more detailed treatment, but outside the context of nonimmigrant visas generally. *See id.* at 175–83, 798–832.

20. This approach is especially true with the recognition of the "dual intent" doctrine, which can be construed to allow an alien to seek nonimmigrant visas and immigrant statuses simultaneously. *See generally* 62 Interpreter Releases 437, 450–52, 950, 965–67, 1149 (1985).

the pedagogical issues discussed here. Rather, teachers and students would benefit greatly if the authors would share their thoughts and experiences in writing and teaching from the book.

While I have focused on Aleinikoff and Martin's book as a set of teaching materials, I do not mean to overlook the book's significant contribution to the general literature and scholarship on immigration law. I can think of no other work in the field, in any format, that does such a complete yet succinct job of synthesizing the many dimensions of immigration law into a coherent whole. In this regard, the book is remarkably successful, not only in teaching immigration law, but also in defining it.

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Antitrust and Trade Policy in the United States and the European Community, Annual Proceedings of the Fordham Corporate Law Institute

Edited by Barry E. Hawk, Matthew Bender, New York, 1986, pp. 796, $75.00.

The publication contains articles based upon lectures delivered during the Twelfth Annual Proceedings of the Fordham Corporate Law Institute. The twenty-six articles cover a vast variety of issues that are discussed both from an American and a European point of view. Each article is followed by a panel discussion; the discussions offer further insights into the problems of antitrust law and international trade. All articles are written by renowned experts in the field of antitrust law and trade policy.

Terry Calvany and Randolph W. Tritell of the Federal Trade Commission deal with the question of whether the invocation of import relief pursuant to the Trade Agreements Act of 1979 can constitute an antitrust violation (p. 2). They conclude that where evidence of sham exists, the enforcement agencies are committed to investigating and prosecuting where warranted under the *Noerr-Pennington* doctrine.

Charles M. Stark (p. 21) and Eleanor M. Fox (p. 63) deal with the Justice Department's *Antitrust Guide for International Operations*. They analyze the development of the law since 1977, when the Guide was published, and conclude that due to changes in law and policy the Guide no longer reflects the way in which the Justice Department would analyze

the antitrust laws' application. Mr. Stark and Professor Fox illustrate the need for updating the Guide and recommend that it should not be relied upon in many of its aspects.

Joel Davidow considers foreign and domestic allegations that the private treble damages plaintiff remains the "rogue elephant" in the area of antitrust and foreign relations since he is not sensitive to the foreign relations issues raised by the relief sought (p. 37). The author is not particularly optimistic about the introduction of new tests or the abolition of private treble damages. He doubts that these measures will increase the predictability of results in hard cases and considers the changes already made to be adequate to resolve most of the issues that previously gave rise to foreign criticism.

The articles by James A. Rahl (p. 131) and James T. Halverson (p. 151) discuss the applicability of U.S. antitrust laws to export commerce and the changes that occurred in this area due to the Export Trading Company Act of 1982. Both authors are dubious about the actual need for the legislation. Furthermore, Professor Rahl argues that the Act has abandoned American leadership in promoting steps toward the reduction of restrictive business practices in international trade.

Douglas A. Riggs and John T. Masterson, Jr. consider the role of the U.S. Department of Commerce in the area of antitrust (p. 163). Their article evaluates the Department's attempt to undertake a macroeconomic review of federal antitrust statutes and enforcement policies, which may hamper American international competitiveness. A. Paul Victor and Jeffrey P. Bialos analyze the ruling of the U.S. Supreme Court in the case of *Mitsubishi Motors Corp. v. Soler* to afford certain private parties the option to arbitrate their antitrust disputes (p. 183). They conclude that the ruling is a worthwhile experiment that could ease the tensions resulting from the extraterritorial application of the U.S. antitrust laws. Donald F. Turner tries to find an appropriate resolution of jurisdictional issues in the application of antitrust law to foreign conduct (p. 231). He suggests that bilateral and international treaties would be the most promising vehicles for reaching solutions of jurisdictional issues.

The extraterritorial application of European antitrust laws is the subject of the article by Kurt Stockmann of the West German Federal Cartel Office (p. 251). For Mr. Stockmann, the trend in Europe is more in favor of the effects principle than of the doctrine requiring conduct on national territory. Nevertheless, he stresses the existence of widespread disagreement in Europe on how to handle the effects doctrine. Due to the growing impact of European Community law on antitrust matters, the attitude of the Commission of the European Community toward the effects doctrine is of special interest. Bastiaan von der Esch considers the Commission's exercise of jurisdiction in cases of restriction of competition (p. 285). In

his opinion even a restrained application of the effects doctrine may lead to conflicts of jurisdiction within the Community. Like Mr. Turner, Mr. von der Esch favors international agreements to solve these conflicts. From an American perspective, Douglas E. Rosenthal proposes ten principles to reduce jurisdictional conflicts in antitrust matters, principles that he considers to be acceptable for both the member states of the Community and the United States (p. 301).

A problem that still puts tensions on the relationship between the United States and the countries of the European Community is the extraterritorial application of American discovery rules. Two articles focus on the American practice and its repercussions. James R. Atwood's article provides an overview and history of foreign blocking statutes that play a role in international antitrust litigation and examines the application of the foreign compulsion defense in the context of discovery disputes (p. 327). The purposes and the effect of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters on American federal and state discovery procedures is considered by Denis McInerney (p. 353). The panel discussion reveals considerable disagreement on the use and utility of the Hague Convention (p. 369).

The limits as well as the importance of the jurisdiction of the European Court of Justice in antitrust cases are the subject of Sir Gordon Slynn's contribution to the volume (p. 383). His analysis of a number of recent cases provides interesting insights into the Court's approach toward the enforcement of EEC competition law. Sir Gordon Slynn's description of the law under articles 85 and 86 of the EEC Treaty is complemented by Professor Ernst Steindorff's article on Common Market Antitrust Law in Civil Proceedings before National Courts and Arbitrators (p. 409). Professor Steindorff stresses the difficulties that a national judge faces in applying Community law and in understanding the European Court's judgments. These difficulties, as Professor Steindorff points out, result from the fact that the great majority of the judges in the member states of the Community have no access to the sources of Community antitrust law (p. 428). Whether such a statement is true or unfounded deserves, I think, further consideration.

Although cooperation between firms is an important means to increase necessary structural and technological changes within the European Community, it can also have anticompetitive effects. For Manfred Caspari of the Commission of the Community, joint ventures are, therefore, the focus of The Intersection of Antitrust Law and Industrial Policy in the EEC (p. 449). Mr. Caspari suggests that joint ventures should be subject to careful scrutiny by the antitrust authorities of both the EEC and the member states. Colin Overbury's analysis of EEC Competition Law and High Technology emphasizes that the Commission's competition policy

is in favor of private firms cooperating in research and development, specialization, joint ventures, and other means of promoting high technology (p. 465). Insofar as new technologies can bring about more competition, Mr. Overbury does not consider the promotion of high technology to be inconsistent with the Commission's opposition to market distortions.

The role of competition rules in the field of R & D cooperation is questioned by Alexis Jacquemin and Bernhard Spinoit (p. 487). The authors suggest that instead of modifying competition rules, Europe should use more positive incentives, such as tax deductions, to encourage the formation of new R & D joint ventures. Similarly, Angus K. Maciver argues strongly in favor of a new European policy for high technology industries to overcome the technology gap between the countries of Western Europe on the one hand and the United States and Japan on the other hand (p. 521). He recommends a laissez-faire, noninterventionist approach toward antitrust.

Three articles of the volume deal with the European Community's antidumping rules. First, J.H.J. Bourgeois addresses a number of new or current aspects of the EEC antidumping enforcement (p. 563). Guy J. Pevtchin analyzes the judgment of the European Court of Justice in *Allied Corporation, Transcontinental Fertilizer Company and Kaiser Aluminium and Chemical Corporation v. Council of the EEC* to show the limits on the extent of injury under the EEC antidumping rules (p. 605). Clive Stanbrook examines the impact of Community interest and injury determination on antidumping measures in the EEC (p. 623).

Proceedings brought before the European Court of Justice under article 173 of the EEC Treaty by individuals or corporations for the annulment of antidumping and antisubsidy measures, safeguard measures against illicit commercial practices, or measures under the common rules for imports are the subject of the article by John Temple Lang (p. 641). From a practitioner's point of view, Michael J. Reynolds discusses problems posed by the changes made to the Form A/B on which it is necessary to notify agreements to the Commission that may, according to the wording of article 85 of the EEC Treaty, affect trade between Member States and that have as their object or effect the prevention, restriction, or distortion of competition within the common market. Finally, the antitrust settlement practice of the Commission is the subject of Ivo Van Bael's article (p. 759). Mr. Van Bael criticizes that the Commission's settlement practice largely occurs outside the due process requirements contained in Regulation No. 17 (which governs the administrative process leading to decisions in antitrust cases) and stresses the need of change.

Counsel working in the area of antitrust law will find the publication a very valuable tool for solving problems arising in this field. They will benefit from both the thorough articles and the high-quality panel dis-

cussions. The authors have done an admirable job and their work is recommended as required reading for those involved in the international practice of law and for those teaching American and European antitrust law.

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