Restricting Rights, Losing Control: The Politics of Control over Asylum Seekers in Liberal-Democratic States—Lessons from the Canadian Case, 1951–1989

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1. Introduction

International migration constitutes an issue of high politics between states and a highly political one within them. This is especially true of asylum seekers, who—unlike immigrants and overseas refugees—are not selected for resettlement before they arrive but who nevertheless possess the right under Article 14(1) of the 1948 *Universal Declaration of Human Rights* "to seek and to enjoy in other countries asylum from persecution." While continuing to express their commitment to assisting "genuine" refugees, liberal democracies often maintain that their inland refugee status determination systems are subject to considerable abuse. In response, such states have worked to co-ordinate policies at the international level and change them at the national level to meet core control objectives of providing protection while deterring unsolicited migration. However, such policies may not have been much more than a qualified success. Thus, as liberal democracies have made it harder to seek and to enjoy refuge (UNHCR, 2006), asylum seekers have increasingly turned to irregular routes to access inland determination systems (Castles et al., 2003). Of course, the growth in such migration can be traced to numerous factors, such as increasing economic disparities between countries and the extension of transnational social networks (Ghosh, 1998). It can also be linked, the analysis presented below suggests, to rights-restrictive policies, through

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which greater control over borders is pursued by limiting the rights-based claims that non-citizens can make against the receiving state.[1] This provides an important refinement of the more traditional emphasis in the comparative literature on the link between rights expansion and problems of control, and in doing so it allows for a more complete understanding of control policies and politics in liberal–democratic states.

Since the 1970s, liberal democracies have seen a significant increase in demands for entry by non-citizens and have often experienced difficulties in controlling their borders—in regulating the ability of international migrants to enter into and/or remain within the territories under their sovereign authority. In response, a comparative literature has developed that explores why "laws and administrative measures designed to control immigration often end up having consequences that are almost the opposite of those originally intended" (Portes, 1997: 817). Although many explanatory factors have been identified in an increasingly sophisticated field of study (see, for example, recent surveys by Castles, 2004; Cornelius and Tsuda, 2004; Cornelius and Rosenblum, 2005; Lahav and Guiraudon, 2006), it is widely accepted that control and rights are intrinsically connected in liberal-democratic states, that "rights must be considered in any theory of international migration" (Hollifield, 2000: 148). More specifically, it is argued that rights expansion for non-citizens has frequently produced control failures, wherein states have been unable to achieve policy objectives in regulating the ability of non-citizens to enter into and/or remain within their borders. In particular, attention has been focused on the role of rights-based politics—especially the activities of individuals, interest groups and the courts in promoting the rights of non-citizens vis-à-vis the receiving state—in this process. This is, however, too narrow a reading of the control-rights nexus, of the ways in which control and rights intersect, in liberal-democratic states. Indeed, the focus on rights-based politics often leads analysts to downplay or overlook how the particular rights-based choices that states make can affect the chances of control policy failure or success.

Accordingly, the analysis presented below shifts the emphasis from rights-based politics to the rights-restrictive policies that generate them. It argues that such policies can increase the risks of control failure when they open up avenues—by fostering rights-based politics, encouraging circumvention of regular migration channels and creating administrative inefficiencies, for example—along which state policies can be challenged effectively. It also suggests that a negative feedback loop can arise when control failures are followed by further restrictive policies. Thus, while rights-restrictive policies cannot by themselves explain control policy failures, they deserve considerably more attention than they have received to date. Moreover, the analysis recognizes that rights-restrictive policies can contribute to control success when they fail to generate rights-based

Abstract. Since the 1990s, a prevalent theme in the comparative literature on liberal–democratic state responses to increasing international migration holds that the expansion of rights protections for non-citizens has undermined restrictive border control policies. The argument presented in this article suggests that this is too partial an understanding of the ways in which control and rights intersect—the *control–rights nexus*. Accordingly, it analyzes Canadian policies towards asylum seekers from the 1950s to the 1980s to explore the ways in which the restriction of rights can undermine state control policies by generating rights-based politics, encouraging the circumvention of control policies and creating administrative inefficiencies. Altogether, the analysis provides an important refinement of the study of the control–rights nexus and allows for a more complete understanding of control policies and politics in liberal–democratic states.

Résumé. Depuis les années 1990, un thème répandu dans la littérature comparative sur les réponses des États libéraux démocratiques à la croissance de la migration internationale soutient que l'extension de la protection des droits des non-citoyens a compromis les politiques restrictives de contrôle des frontières. L'argument présenté dans cet article suggère que ce thème offre une compréhension trop partielle de la dynamique d'intersection du contrôle et des droits – le *control-rights nexus*. En conséquence, il analyse les politiques canadiennes envers les demandeurs d'asile depuis les années 1950 jusqu'aux années 1980 pour explorer les manières dont la restriction des droits peut miner les politiques de contrôle de l'État en générant des politiques de droits, en encourageant le contournement des politiques de contrôle et en créant des lourdeurs administratives. En somme, l'analyse apporte une mise au point importante à l'étude de cet enjeu et permet une compréhension plus complète des politiques de contrôle et de la politique dans les États libéraux démocratiques.

politics or when such politics are unsuccessful, a common occurrence that is all but ignored in the literature. In summary, then, the analysis situates the control–rights nexus within a broader analytical framework in order to appreciate better how rights-based policy choices (and not simply rights expansion and rights-based politics) affect liberal–democratic control.

These ideas are explored through a study of Canadian control policies towards asylum seekers from the 1950s to the 1980s, focusing on the control failures of the latter decade. This critical case represents an important addition to the literature for several reasons. First, it constitutes a clear example of policy failure, one that saw the complete breakdown and thorough overhaul of the country's inland refugee status determination system. Moreover, it involved both rights-restrictive policies and rights-based politics, which allows the relationship between control and rights to be probed along the dimensions outlined above. Second, Canada is rarely studied in the comparative control literature and, when the 1980s crisis is referenced, the focus is generally placed on the expansion of rights for asylum seekers and not their restriction (García y Griego, 1994; Reitz, 2004). The case merits, therefore, reconsideration. Third, the Canadian literature, in turn, has yet to apply the comparative literature's findings on the relationship between control and rights in liberal democracies to Canada. In a more cautionary vein, it is important to note that the Canadian inland refugee determination system, "with its resources, expertise and humanitarian focus, is recognized internationally as a model

to be emulated" (UNHCR, 1998: 1). While such exceptionalism might affect how well the conclusions drawn from the Canadian case can be applied to other liberal democracies, the possible dividends of incorporating it more firmly into the comparative canon remain significant. This would not only add additional breadth to the collective effort to determine what is distinctive about liberal–democratic control, but it could also bring greater depth to this project by uncovering previously overlooked dynamics and patterns.

This process is initiated in section 2, which traces the focus on the expansion of non-citizen rights in the comparative control literature and proposes an alternative understanding of the control–rights nexus. In section 3, the historical background to the 1980s crisis is presented, from Canada's decision not to sign the 1951 *Convention relating to the Status of Refugees* to its creation of the Refugee Status Advisory Committee (RSAC) system with the passage of the 1976 *Immigration Act*. In section 4, the analysis traces the breakdown of the RSAC system in the 1980s and its replacement with the Immigration and Refugee Board (IRB) in 1989. Through a close examination of policy debates, decisions and outcomes, support is provided for the ideas presented in section 2. Finally, key lessons in terms of the Canadian and comparative control literatures are drawn and discussed in section 5.

2. The Control-Rights Nexus in the Comparative Literature

Although the term "control" has long appeared in the study of international migration, its use as a conceptual or theoretical tool to assist in describing, evaluating and explaining liberal–democratic state behaviour is of relatively recent origin. Indeed, it was not until the early 1990s that a dedicated effort was made to pursue the "systematic theoretical analysis of both the external pressures impinging on the state and the internal dynamics of the legislative and administrative bodies dealing with" control (Portes, 1997: 817). Previously, politics and the state had been fairly marginal considerations in the literature on international migration, a situation that to no small extent stemmed from the lack of attention paid by political scientists themselves (Freeman, 2005). Instead, explanatory efforts more often sought to elucidate the economic and sociological dimensions of cross-border population movements without touching on "the fact that the streams were flowing through gates, and that these openings were surrounded by high walls" that rested on a foundation of state sovereignty (Zolberg, 1999: 73). Since the early 1990s, however, much work has been undertaken to explore the political dimensions of control, especially in terms of perceived control policy failures. One prominent claim concerns the constraining effects on control of the recognition of

non-citizens rights within receiving states, especially in terms of rights-based politics. As will be seen in this section, however, while this body of work has shed considerable light on the politics of control in liberal–democratic states, it is not without certain limitations.

The control–rights nexus was first explored in detail by Hollifield in his landmark investigation into the politics of control, *Immigrants, Markets and States*. "Rights-based politics and more expansive citizenship policies," he wrote, "have worked to stimulate immigration and weaken the capacity of democratic states to control their borders" (1992: 222). Although not the only factor involved (markets also featured prominently in his analysis), rights-based politics were seen as constituting an unprecedented and increasingly central challenge to the justifications that had long underpinned state control policies: "Liberal states have tried to regulate migration according to the realist principles of sovereignty and the national interest, yet liberalism in its rights aspect forces these states to recognize migrants as individuals. Their own cultures and institutions have compelled the liberal states to modify or abandon statist policies" (228). Indeed, he argued that liberal democracies like the United States had become subject to a "judicial assault on the sovereignty and autonomy of the state" (186). By focusing on rights expansion and rights-based politics, Hollifield established an interpretation of the control–rights nexus (see Figure 1) that has since figured largely in the control literature.

For example, Cornelius and colleagues gave this idea a prominent place in the first edition of their influential edited comparative volume, *Controlling Immigration*. They proposed that various push–pull dynamics in the international system of states (including the end of the Cold War and growing economic inequalities), transnational social networks and demand for cheap labour were "necessary but not sufficient" explanatory factors of the "crisis of immigration control" (1994: 8). In particular, a human rights discourse had been advanced through both judicial and legislative means, resulting in an expansion of the rights possessed by non-citizens within liberal democracies. This domestic process—especially judicial influence—served, they suggested, to "constrain the executive authorities of democratic states in their attempts to achieve territorial closure" (10). Thus, in the context of the other factors noted above, the ascendancy of a rights-based politics that was inclusive of non-citizens provided Cornelius and colleagues with a crucial component in explaining their finding that liberal democracies were losing control.

FIGURE 1
The Control-Rights Nexus: The Traditional Formulation

Rights-based politics → control failure

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Subsequently, Joppke argued that control policies were "self-limited by interest group pluralism, autonomous legal systems, and moral obligations toward particular immigrant groups" (1999: vii). He explored how the judiciary created situations of "self-limited sovereignty" where, once admitted, "an alien enjoys the equal protection of the law, and the state has 'self-limited' its capacity to dispose of her at will" (1998: 19). He concluded that "independent courts have clashed with restriction-minded state executives, and rights expansion for immigrants [has been] achieved against rather than with the latter" (2001: 340). Thus, in exploring the relationship between control and rights, Joppke's work was consistent with the idea captured in Figure 1; as an embodiment of rights expansion, rights-based politics were held to undermine state control.

Although this idea constitutes a core contribution to the study of liberal–democratic control, it has certain limitations. First, with its focus on the expansion of rights and rights-based politics, little if any differentiation is made between different kinds of rights or degrees of expansion. The possibility that some forms of expansion could be more problematic from a control perspective than others is thereby overlooked. Second, with its emphasis on control failure, the literature has failed to reflect the extent to which rights-restrictive policies often result in control success. On the one hand, states have developed ways to remove their actions from the effects of rights-based politics by shifting the authority and practice of control "to venues more favourable to restrictive control policies" (Guiraudon, 2001: 33). Thus, in response to rights-based politics, three control strategies have often been adopted: "a shift of decision making in monitoring and execution powers upward to intergovernmental fora, ... downward to local authorities, ... and outward to nonstate actors" (Guiraudon and Lahav, 2000: 176). Of particular importance has been the practice of "deter[ring] immigration by regulating embarkation at or near the point of origin," which Zolberg (1999: 73) has called "remote control."

On the other hand, much less attention has been paid to instances where rights-based politics are not sufficient to counter rights-restrictive policies at the domestic level. As will be seen when the Canadian case is reviewed in section 3, rights-restrictive policies can succeed, for example, when opposing groups fail to mobilize sufficient support or when such measures receive consensus-like support among parliamentarians. This again suggests the need to differentiate between different types of rights-based policies. Third, with its focus on rights-based politics, the literature has done too little in "bringing states directly into the analysis as independent entities" (Freeman, 2005: 122). Thus, rather than looking just at rights-based politics (especially when this is reduced to judicial interventions), it is important to examine the executive and legislative contexts within which rights-based policies are generated and implemented (Hansen, 2002; Lahav and Guiraudon, 2006). These criticisms

do not challenge the basic assertion as to the importance of the connection between control and rights in liberal–democratic states but suggest that the study and understanding of this relationship needs to be refined.

Thus, through the various contributions summarized above, an important research path has been developed for the study of liberal–democratic control, one of probing "how far ... liberal democracies [can] go in limiting rights of foreigners as a strategy for immigration control" (Hollifield, 1999: 57). While such practices are expected to be bounded by "ideas, institutions, and culture, as well as certain segments of civil society" (Hollifield, 1999: 58), the task of providing firmer conceptual and empirical—including historical—foundations remains. Of particular relevance is that while it seems clear that "regulating international migration requires states to be attentive to the (human and civil) rights of the individual" (Hollifield, 2005: 901), too little has been done to move past the problematizing of rights expansion for non-citizens in the study of the politics of liberal–democratic control.

The need to do so can especially be seen in the case of asylum seekers, which—although on the margins of the control literature—has been subject to a similar analysis. Most notably, Joppke (1997) has emphasized the role of judicial influence in undermining control in the United States and Germany, which prompted an assertion of state sovereignty over human rights through policies of deterrence and exclusion. This trend has been identified in many liberal democracies and has also been pursued through the development of transnational control policies (UNHCR, 2006). Moreover, with the increased securitization of migration policy in the post-September 11, 2001, period, rights-restrictive approaches towards non-citizens have been expanded (Crépeau et al., 2007). As noted in the introduction, however, there is evidence that this approach has not been all that successful, although the comparative literature tends to view this area as one where liberal democracies have exerted more control (Freeman, 1998; Joppke, 1997). This underscores the need to develop a better understanding of the relationship between control and rights.

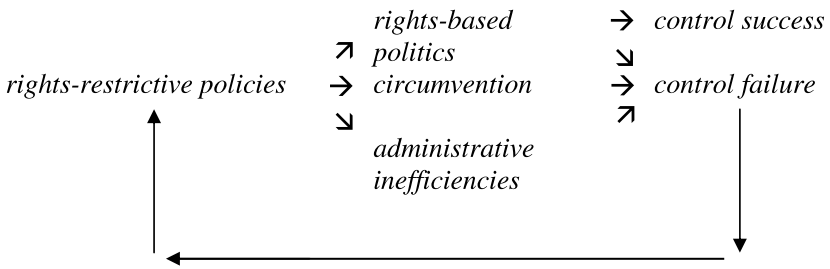
Unfortunately, the study of the control–rights nexus (in reference to asylum seekers or other international migrants) has reached an analytical cul-de-sac of late. This can be seen in the literature surveys cited earlier, in which the traditional formulation is presented uncritically. However, if this construction doesn't capture the empirical reality, it will not account for control outcomes satisfactorily. Moreover, if the relationship between control and rights remains obscured, it will be difficult to develop tools to manage the tension between state sovereignty and human rights more effectively. As well, if the primary focus remains on judicial and societal actors, the responsibility of executive and legislative authorities for control failures will be underestimated. Finally, given their liberal foundations, it is especially important that liberal democracies carefully consider

the implementation of rights-restrictive policies, not only because they may serve to undermine the legitimacy of the state (Hollifield, 2005: 901) but because they may carry a considerable cost for non-citizens seeking to enter into and remain within the receiving state, especially those seeking protection from persecution.

In an effort to clarify the control–rights nexus, four amendments to the traditional formulation are offered here (see Figure 2). First, the starting point of the analysis is extended from rights-based politics to the rights-restrictive policies to which they respond.[2] This permits policies to be compared, for example, in terms of the extent to which they restrict different rights, foster rights-based politics and produce a loss of control, and subjects executive and legislative actors to closer scrutiny. Second, by anchoring the analysis in rights-restrictive policies, it becomes possible to assess the extent to which such policies might produce control failure by other avenues, such as encouraging individuals to circumvent regular migration channels or creating administrative inefficiencies within the state. Third, the possibility that rights-based politics might increase control is recognized, a reality all but ignored in the literature. Finally, it is predicted that a government could place itself within a negative feedback loop, wherein a control policy failure prompts a rights-restrictive response, which in turn fails, and so on, until a more systemic loss of control occurs.

Although these ideas cannot be explored fully here, their merit is substantiated through a close examination of Canadian control policies towards asylum seekers from 1951 to 1989. It shows that rights-restrictive policies contributed to a loss of control during the 1980s by prompting rights-based politics, encouraging circumvention and fostering administrative inefficiencies, while additional restrictive responses failed to diminish these dynamics. It also situates this crisis within a long-standing political struggle concerning the rights of non-citizens in Canada, which provides for a richer understanding of this critical case. In doing so, it

FIGURE 2
The Control-Rights Nexus: An Alternative Formulation



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raises important questions for the study of control in Canada and other liberal democracies along both historical and contemporary dimensions, which are discussed in section 5.

3. The Rise of the RSAC, 1951–1978

In order to understand Canada's decision to undertake a rights-restrictive approach in creating the RSAC in the 1970s, some historical background is necessary. First, it is informative to explore Canada's initial reaction to the 1951 *Convention*, as it reveals a long-standing concern over the rights of refugee claimants in Canada. Second, it is useful to summarize how Canada had previously determined refugee claims prior to the RSAC. Third, it is important to review an earlier control problem that directly influenced decision makers during the debates leading up to the passage of the 1976 *Immigration Act*. As will be seen, this earlier case is also noteworthy as it provides an example of rights-restrictive policies that resulted in control success.

After the Second World War, there was little reason to believe that Canada would be supportive of any international effort to define state responsibilities towards those seeking protection from persecution. After all, it had distanced itself from such initiatives before the war, possessed one of the worst records in assisting Jewish refugees during the war and pursued a conservative refugee resettlement policy just after the war (Kelley and Trebilcock, 1998). With the drafting of the *Convention*, however, Canada seemed to alter its outlook, such that Canadian Leslie Chance–who chaired the United Nations committee that undertook this work–reported that "we have been regarded throughout as taking [a] forward attitude" (Donaghy, 1990: 430). The traditional explanation holds that Canada nonetheless refused to become a signatory because it feared that obligations assumed under the *Convention* would prevent it from deporting refugees considered to represent security threats (Dirks, 1977). More fundamental, however, was the concern that the rights claims noncitizens could make against the state would increase. According to Secretary of State for External Affairs Lester B. Pearson, the government was worried that a refugee might gain "the right to be represented in the hearing of his appeal against deportation" and that the *Convention* would "grant rights to communists or to other persons who believe in the destruction of fundamental human rights and freedoms" (Donaghy, 1990: 434, 432). As a result of this decision not to add its signature, refugees seeking protection in Canada were left dependent on ministerial discretion.

The issue next meaningfully arose in the 1966 *White Paper on Immigration*, which initiated radical changes to Canadian immigration policies. This was itself the culmination of a political battle that had been

waged in Parliament throughout the post-war period concerning the rights of non-citizens in the immigration process. While restrictionists sought to maintain the considerable discretion that officials possessed to determine who could resettle in Canada, expansionists pressed to make such decision making more consistent with liberal interpretations of procedural fairness and non-discrimination. By empowering the Immigration Appeal Board (IAB) to determine whether individuals were treated fairly and creating a reasonably objective points system to select immigrants, Canada went some distance in recognizing the due process and equality rights of non-citizens within the immigration system (Hawkins, 1988). Moreover, aside from anticipating that Canada would sign the *Convention* (which it did in 1969), the *White Paper* proposed creating an inland refugee determination process. Indeed, E.P. Beasley of the Immigration department observed that Canada had "become a country of first asylum" and that "the time may have come to set forth in legislation machinery and a methodology for determining these individual cases more precisely and more fairly" (Canada, 1966b, 4: 149).

In 1967, a system was established whereby refugee claims would be determined in a quasi-judicial manner under the discretion granted to the IAB to land non-citizens on humanitarian and compassionate grounds. In 1973, the *Convention* definition of a refugee was written into Canadian law to ensure its use when the IAB heard claims. A claimant would submit their case in writing, which the board would then consider. If it thought the claim was likely to succeed, an oral hearing would be scheduled. If rejected (and refused on humanitarian and compassionate grounds), claimants could seek leave to appeal on points of law to the Federal and Supreme Courts. In 1974, however, the process was reconstituted on a more administrative basis through the creation of the Advisory Committee on Applications for Refugee Status within which officials determined claims through a paper review. Those refused refugee status could still apply to the IAB.

Although the provision of a firmer statutory foundation for the inland process was scarcely broached when the government moved to overhaul Canadian immigration and refugee law not long thereafter, it nonetheless dominated debates between 1975 and 1977. Indeed, Liberal Immigration Minister Bud Cullen observed that "it was a subject that concerned the members of the standing committee [that examined the proposed law] and the witnesses who appeared before it more than any other" (Canada, 1977a: 7978). One of the objectives included in the 1976 *Immigration Act* preamble was "to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted." Critics argued that the proposed determination system would be inadequate to this task. Asylum seekers would be examined under oath by an immigration official and a written

transcript would be forwarded to the RSAC, which would use it to render a decision to be sent to the minister for a determination. If the outcome was negative, the claim would be reviewed on humanitarian and compassionate grounds by a special review committee (SRC) within the department. Those rejected could apply for leave to have their claim redetermined by the IAB (although the humanitarian and compassionate provision would now be removed), and subsequently apply for leave to appeal on points of law to the Federal and Supreme Courts.

Although many due process concerns were raised (such as the quality of the information collected by officials and the lack of independence of the RSAC and SRC), the most prominent stemmed from the absence of a guaranteed oral hearing. When decision makers had "no opportunity to observe the claimant while he is giving his statement," the Inter-Church Committee on Human Rights in Latin America argued, "any determination of his credibility is seriously affected[, which] ... is often the most important aspect of the case" (Canada, 1977b, 30A: 54). Claimants could only tell their story in person, respond to questions, clarify uncertainties or have witnesses called after being rejected by the minister and granted leave by the IAB. This was "unnecessarily cumbersome" and "unfair to the claimant," the Inter-Church Committee, among others, maintained (29). Proposals to include an oral hearing received widespread support from opposition MPs and Liberals, such as Chuck Caccia and Louis Duclos. For his part, Conservative MP Jake Epp suggested that in signing the *Convention* Canada had accepted the responsibility "to set up a procedure whereby [a claimant] can ... fully explain his or her case." Even if the system would attract false claims, he said, this would be "a small price to pay" to ensure fairness. NDP MP Andrew Brewin argued that the right to an oral hearing was "really a fundamental part of our whole jurisprudence and fair play" (Canada, 1977b, 49: 20).

Although Cullen almost accepted the need for an oral hearing, immigration officials convinced him that this would "expose the system to the danger of being overwhelmed by non-bona fide claims, clogged by delay, and obstructed by legal entanglements" (internal memorandum quoted in Dirks, 1984: 293). This position was based on officials' interpretation of a recent control problem that had beset the IAB.[3] In the same 1967 regulations that had established the points system, the government had permitted immigration applications from non-citizens within the country: "From now on," its press release advertised, "any visitor to Canada can apply for permanent residence" (quoted in Canada, 1973: 891). As a result, the Board soon faced an uncontrollable backlog as rejected applicants appealed their deportation on humanitarian and compassionate grounds. Although IAB Chair Janet Scott signaled the issue's urgency in 1968, and despite repeated calls to act in Parliament, the government first responded in June 1972, when it introduced (unsuccessful) stopgap

measures to clear the backlogs of both in-country applications and appeals. In November, the regulation that allowed in-country applications was rescinded, at a time when some 4,000 were being lodged a week. Finally, in mid-1973, in response to charges that these changes had been too limited and unfair to those who had come to Canada in good faith, the right to appeal deportation on humanitarian and compassionate grounds to the IAB was removed for most visitors and a special review program was instituted for non-citizens already in Canada who sought permanent residence. Although the government was much criticized for its handling of this issue, the rights-restrictive orientation of many of these measures received widespread support in Parliament, and was generally understood to have increased control. Indeed, the IAB would not experience similar backlog problems until the RSAC system began to falter in the mid-1980s.

While officials used this example during the debates over the RSAC to underline the control dangers that could arise when non-citizens were granted additional rights, its significance can be seen in other ways as well. Indeed, the actions of the government in allowing in-county applications in 1967, letting backlog problems grow unchecked and finally instituting rights-restrictive measures amid stern denunciations of non-citizens abusing the country's generosity formed a pattern that would be repeated in the case of the RSAC, reviewed in section 4. The main difference, however, lies in the fact that there was essentially unanimous support for the rights-restrictive response adopted because it targeted an area over which the state was understood to have a legitimate right to legislate (the immigration status of visitors in Canada) and because it did not seem to offend prevailing ideas of the rights of non-citizens. As a result, there was limited opposition (primarily within affected immigrant communities) and no significant rights-based politics emerged. This provides initial evidence of the need to examine the specific rights-based choices that states make in exploring the relationship between control and rights in liberal–democratic states. In contrast, the debates surrounding the creation of the RSAC reveal that the government instituted a rights-restrictive approach to asylum seekers in the face of widespread rights-based opposition.

In response to such critics, Assistant Deputy Minister Richard Tait countered that "people attempting to enter Canada have no compunction in their efforts to gain access to Canada to claim that they are refugees, even if they are not" (Canada, 1977b, 48: 14). Moreover, he maintained, the law would already go "all the distance that [critics] are concerned that we should go in ensuring that errors are not made and are not perpetuated through the system" (49: 21–22). At issue, Cullen argued, was a basic "conflict between the right of the individual to fair and just treatment and the right of Canada to defend its legitimate interests and those

of its citizens and residents" (Canada, 1977a: 7934). Such thinking, however, stemmed from a false dichotomy, Conservative MP David Macdonald replied: "If he is saying that we will have to begin sacrificing certain rights before the law to have a fair and just hearing in order to protect the sanctity and survival of the state, then surely he is saying something that is not in the best tradition of a liberal democracy" (7395). However, the government maintained its position and its rights-restrictive approach became law.

This brief historical survey reveals that the government had long been concerned lest refugee claimants gain too many rights in Canada, especially the right to an oral hearing. Although the purely discretionary refugee determination system that existed after the war was given a quasi-judicial foundation in 1967, the role of the courts was limited by statute and then by a shift back towards a more administrative approach in 1974. With the RSAC, the government further increased its discretionary powers by relocating decisions on humanitarian and compassionate considerations to the Immigration Department, while the due process protections afforded to asylum seekers were purposefully limited (most notably with respect to an oral hearing), despite warnings that this would undermine core control objectives of providing protection and deterring unsolicited migration. Asylum seekers were thereby partially excluded from a consensus position (Kelley and Trebilcock, 1998: 381) that was generally embodied in the 1976 *Immigration Act* concerning the protection of non-citizen rights within the immigration process.

4. The Fall of the RSAC, 1978–1988

It was not long, however, before control problems arose in the new system. Indeed, controversial cases where asylum seekers were ordered deported to refugee-producing countries after being deemed not to meet the *Convention* definition arose regularly by 1979. This occurred, lawyer Thea Herman argued, because the "whole process denies the principles of natural justice" (quoted in Harpur, 1979: A12). Critics called for substantial reforms to ensure access to qualified legal counsel for claimants, reasons for rejection and the right to an oral hearing, among others (Delegation, 1983). Cullen, however, maintained that Canada had struck the right balance "of concern for the individual and a disincentive to frivolous refugee claims" (Canada, 1979, 25: 7). In contrast, Lloyd Axworthy—who became Immigration Minister in 1980—found that the system, while meeting minimal *Convention* requirements, did not match "the higher traditional Canadian standards of fairness and justice" (Canada, 1980, 22: 5) and established an independent task force to evaluate it. It would produce the first of four major government-initiated reports during 1981–

1985 that pointed to the system itself—not the courts or even increasing numbers of claimants—as the primary cause of Canada's control problems with respect to asylum seekers. As the system proved unable to cope with growing demands for asylum, an extensive debate unfolded that would see the resolution of some rights-based issues (such as the inclusion of an oral hearing) with the creation of the IRB, while others would remain.

"Fairness in any area of government administration is a moral duty, a political necessity and often a legal requirement," the Task Force reported. In refugee determination it was "crucial, because the government may, in effect, be deciding on the life or death of a person" (1981: 3). Its report concluded that "the existing process [was] ripe for reassessment" as it did not "reflect Canadian standards of procedural fairness as they are manifest in our general understanding of a 'fair hearing'" (x). Among numerous shortcomings, the lack of an oral hearing was highlighted. Axworthy responded with important reforms to the RSAC in 1982[4] before establishing oral hearing pilot projects in 1983, a move that he hoped would "substantially increase both the fairness and ... the speed" of the process (Canada, 1983: 25048). Soon thereafter, the need for a major overhaul of the system was reiterated in two additional reports.

The first, written by lawyer Ed Ratushny, argued that the system was "riddled with anomalies, inconsistencies and other shortcomings which have demonstrated that it is both cumbersome and susceptible to abuse" (1984: 59). This was evident in the backlogs that had formed (see below), as well as the frequency of both appeals and critical judicial rulings. Moreover, the SRC led people who did not meet the *Convention* definition to apply, which slowed down decision making further and encouraged abuse. For these and other reasons, Ratushny wrote, genuine refugees often found justice delayed or denied. Moreover, the system exhibited one "central, glaring weakness [in] the absence of a satisfactory oral hearing" (vii). These findings were confirmed by W. Gunther Plaut, who wrote in his report that efficiency "must be balanced by scrupulous concern to ensure that refugees are treated fairly and humanely, and that there are adequate procedural safeguards to ensure that cases are thoroughly understood prior to a determination of the question of refugee status" (1985: 11). This necessitated an oral hearing, he suggested, since "declaring a claimant to be a refugee is ... not [now] a privilege we grant, but a right we acknowledge" (17).

A few months later, the Supreme Court delivered its judgment on this issue in April 1985. The *Singh* decision revolved around seven failed refugee claimants who argued that they had a right to an oral hearing under section 7 of the 1982 *Charter of Rights and Freedoms*: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of funda-

mental justice." In a 6-0 decision split between two sets of reasons,[5] the court ruled in favour of the appellants. Justice Bertha Wilson wrote that "these are matters of such fundamental importance that procedural fairness would invariably require an oral hearing... [that] fundamental justice requires that credibility be determined on the basis of an oral hearing" (1985: 213–14). Henceforth, the government was obliged to "provide the refugee claimant with an adequate opportunity to state his case and to know the case he has to meet" (179). It would be almost four years before the system would meet this requirement.

Even before *Singh*, however, serious administrative difficulties had arisen. These stemmed, to a considerable degree, from the government's original decision to establish a complex multi-staged administrative process rather than (as critics had proposed) a simpler quasi-judicial process. In choosing the former, the government had opted to privilege administrative oversight over efficiency. Thus, as the number of people claiming asylum in Canada grew throughout the 1980s, the process became increasingly unable to process new arrivals, even as the government dedicated additional resources to do so. For example, the backlog rose from around 2,500 in 1981 to 10,500 by late 1983, with some cases taking more than three years.[6] The main problem was not with the RSAC or IAB (both of which said that they could process a higher caseload) but at the initial stage with immigration officials, where 3,646 cases were stalled in 1982–1983 and 6,958 in 1984–1985. By early 1985, some 13,500 were in the backlog, which then rose to about 20,000 after *Singh*.

This has not, however, prevented numerous commentators from targeting *Singh* as the major cause of Canada's control problems with respect to asylum seekers. For example, Knowles states that it constitutes a "major deterrent to the smooth, efficient operation of Canada's refugee determination system" (1997: 182), while former IAB member Charles Campbell has written of the "crisis brought about by the *Singh* decision" (1985: 75). Similar themes are presented in the Charter politics literature (Knopff and Morton, 1992; Manfredi, 2001). Such views are consistent with the comparative literature in focusing on rights-based politics. This, however, downplays or overlooks the actions of the government both before and after *Singh* in creating and exacerbating the situation. While *Singh* and—more generally—the courts are essential features of any serious analysis of Canadian control policies towards asylum seekers, a focus on such rights-based politics should not deflect attention from other pathways along which control problems can arise. Indeed, even the precise role played by *Singh* in the subsequent growth of the backlog to around 85,000 by the end of 1988 is, as will be seen, not easy to gauge.

In broad agreement with the criticisms raised in the mid-1970s and in the Task Force, Ratushny and Plaut reports, a parliamentary committee identified additional sources of control failure in late 1985 as it crafted

a fourth report on this issue. For example, it noted how recent restrictive immigration policies towards refugee-producing countries had led to an increase in claims.[7] It also heard that interdiction policies such as visa restrictions introduced to inhibit arrivals from refugee-producing countries like Afghanistan, El Salvador, Iraq, and Sri Lanka encouraged illegal migration (Canada, 1985b, 40: 36). These and other examples reviewed below suggest that the connection between rights-restrictive policies and circumvention should not be ignored. Indeed, without taking these other pathways into account, a much less nuanced understanding of the sources of the control problems that Canada faced will be produced.

In answer to such concerns, immigration officials focused fairly exclusively on the willingness of non-citizens to abuse the system. Thus, J.C. Best suggested that those rejected—some 70 per cent of claimants—were not genuine refugees but rather had "frivolous and unfounded" claims (Malarek, 1985: M6). "The problem," he said, "is that under the legislation each claim must be given the full treatment provided by law, including access to the courts in some cases" (Canada, 1984: 10). Such an interpretation led officials to propose more rights-restrictive measures than recommended in the four government-sponsored reports. In contrast, RSAC Chair Joe Stern maintained that there were "very few cases where we reject a claim because the person is an out and out liar... The vast majority ... are rejected because we have found all of the allegations credible but the allegations do not substantiate that they have a well-founded fear of persecution" under the *Convention* (Canada, 1985a, 11: 27). The problem was not one of abuse, he said, but of the law and its administration. After extensive hearings, the committee recommended an independent board that would allow claimants to "be heard orally, in a non-adversarial setting, by panels composed of two members ... [and that] every person in Canada who wishes to claim that he or she is a Convention refugee should have an unqualified right of access to a formal process that will adjudicate the claim" (Canada, 1985b, 46: 15, 5).

In response, the government hesitated, even as the system continued to unravel. Previously, Ratushny and Plaut had stated that changes could be implemented readily, but Ratushny had cautioned that "one big difficulty has been an inertia on the part of immigration officials," whom he suspected of preferring that the system remain more under their control (quoted in "Immigration changes," 1984). Alternatively, it was suggested that the delay stemmed from cabinet resistance to a more restrictive approach. Such inaction encouraged both organized and unorganized efforts to use the asylum process as a means to remain within Canada. The most prominent case involved Portuguese citizens claiming to be persecuted Jehovah's Witnesses (Malarek, 1987). Although clearly a

scheme to get around Canadian immigration policies, the government only imposed a visa restriction to stem the movement after some 4,000 claims had been made. Thus, the administrative inefficiencies that defined the system and the government's inaction in the face of the *Singh* decision served to attract false refugee claimants, which further undermined the system. Alongside inaction, government action also could produce problems, as when a backlog clearance program was announced in 1986 without adequate preparation for its administration. This encouraged more people to make claims in the hopes of another backlog clearance, as did the decision to land many of the Portuguese claimants. By year's end, some 10,000 new claims had been made.

This increase also stemmed from restrictive policies being pursued by other countries, which underlines the fact that a country's control policies can rarely be made in isolation (García 2006). For example, after a crackdown on Central American claimants in the United States in late 1986, arrivals in Canada grew to about 1,000 per week. In response, the government enacted restrictive measures of its own to limit access to the Canadian system. Such measures did little to reduce the pressure on the system, however, as the range and numbers of claimants continued to grow from both refugee-producing and non-refugee producing countries alike. Restrictive policies in Europe similarly led asylum seekers to Canada, most dramatically with the boat arrivals from Europe of 155 Tamils in 1986 and 174 Sikhs in 1987. In the latter case, the government instituted an emergency recall of Parliament to pass legislation to replace the RSAC system, as Immigration Minister Benoît Bouchard spoke against "the vast majority" of refugee claimants who "steal their way in to Canada, confident that although they have broken our laws, we, the people of Canada, will not break our own laws. Not only has the generosity of Canadians been abused, but the generosity of our entire system of justice has been abused" (Canada, 1987: 7911).

As its political response served to heighten public anger over Canadian refugee policy (Creese, 1992), the government worked to push through legislation that would see claimants appear before a two-person panel (with split decisions in the individual's favour) in a non-adversarial setting within an independent board, with negative decisions being subject to an appeal by leave on points of law to the Federal and Supreme Courts. There were, however, two major restrictive features that caused considerable controversy. The first was a proposed screening mechanism to be administered by officials to prevent access to the inland system if, for example, claimants made a "manifestly unfounded" claim or came from a "safe third country." Aside from such "objective tests," there would also be a credibility test "to see if there is a shred of a chance that this refugee is in fear of life, limb, liberty or security," said Minister of State (Immigration) Gary Weiner (Canada, 1987: 5996). The second stemmed

from the lack of an appeal on the merits of the case. Both of these issues remain controversial to this day.

In an echo of the debates of a decade earlier, critics argued that these proposals would not result in greater control because they involved unnecessary stages and denied fairness to claimants. While the inefficiencies built into the system would create new backlogs, its unfairness would produce successful court challenges. Indeed, they protested that such screening constituted an effort to subvert *Singh* by denying individuals an oral hearing. Critics argued that this—in combination with an inadequate appeal—would prevent genuine refugees from receiving protection and encourage abuse. "As I learned in the three and a half years during which I was responsible for that Department," Axworthy recalled, "the more one tried to restrict, the more there will be new channels found to get around those restrictions. Attempting to close the door simply means that cracks will be found in other places" (Canada, 1987: 6031). The suggested alternative was to institute a system more in line with the 1985 parliamentary committee report described above.

Although the government used its majority to speed the legislation through the House, it had no such power in the Senate, where both Liberals and Conservatives raised concerns. Thus, the law became enmeshed in an increasingly partisan debate and only received royal assent in July 1988. By that time, a claim could take up to eight years to process and the backlog had grown to 46,000. As for the RSAC, by March it had been allowed to lose about one-third of its staff and by June it was hearing just 150 cases a week, down from 600. In September, officials stopped processing claims as the backlog passed 60,000. With the IRB poised to get underway in January 1989, a new clearance program for the 85,000 cases in the RSAC system (consisting of some 100,000 individuals) was announced.

While the literature rightly calls attention to the role of rights-based politics (especially the *Singh* decision) and the increasing number of asylum seekers worldwide in undermining control in the 1980s, the analysis presented above suggests that this is not enough. These events are better viewed within the wider context of the rights-restrictive approach pursued, as proposed in section 2. While rights-based politics were important, control problems can also be tied to the administrative inefficiencies produced by the system's design and the extent to which this and other policy choices encouraged circumvention. Furthermore, government policy responses to emerging problems were generally rights-restrictive in nature and did little to diminish the dynamics noted above. Finally, although the number of claimants increased each year, which put increased pressure on the system, this does not account for how the system and decision makers responded to such pressure.

5. Conclusions

Canada's subsequent control experiences suggest that these findings continue to be relevant. In 1987, supporters asserted that the IRB system would provide the requisite tools to "attack the very roots of the problem and give us the control we need" (Canada, 1987: 7920). Officials anticipated a 62 per cent drop in claims to 17,400, with 66 per cent being rejected either during pre-screening or after they had been heard, with each hearing taking about 18 weeks. None of these objectives was met. Monthly claims climbed from 1,360 in January 1989 to 3,750 in March 1990, at which point cases took nine months to process and a new backlog of 23,499 had arisen. In response, the government pursued additional rights-restrictive legislative and policy measures (Dirks, 1995). Further restrictions accompanied the passage of the 2001 *Immigration and Refugee Protection Act* and the increased securitization of asylum policy after September 2001 (Macklin, 2005). While claims levels diminished from an IRB-era high of 42,746 in 2001 to 19,740 in 2005, this does not necessarily mean that control had increased. Indeed, the 2008 total of 36,895 suggests otherwise.

The research presented above can assist in understanding recent events by providing a better framework for analyzing the control–rights nexus. Aside from offering a more accurate description of control policies and outcomes, it has the potential to contribute to a much more structured analysis of the conditions under which control fails or succeeds, thereby assisting in the development of mid-range immigration theories "that can help explain specific empirical findings by linking them to appropriate bodies of historical and contemporary research" (Portes, 1997: 812). However, while the basic claims made in section 2 have been supported, considerable work remains to fulfil their analytical potential. For example, control policies need to be distinguished according to the different types of rights involved and the extent to which they challenge general or specific understandings of those rights. As well, studies of how frequently rights-based politics bolster rather than undermine state control are needed. Moreover, such analyses should be conducted with respect to other policy periods, types of international migration and liberal democracies.

Although the ways in which the institutions, practices and principles of rights are embedded vary within different political settings and traditions (Hollifield, 2000), the basic tension between the state and noncitizens—between sovereignty and rights—exists within each (Crépeau et al., 2007). With the advent of an increasingly rights-restrictive approach towards international migration since 2001, the study of the control–rights nexus has only gained in importance. Any liberal democracy that seeks to control its borders through the implementation of rights-restrictive

policies is susceptible to having its authority and capacity challenged, and not just—as the literature generally suggests—through rights-based politics. This is, then, an issue of considerable importance for both policy analysts and policy makers alike. It is only by integrating Canada within the comparative field more firmly, however, that the question of whether the Canadian experience constitutes an exception or exemplar can be addressed. This will require revisiting critical cases that have already received scholarly attention, as has been done here, and then studying more recent events within the deeper historical perspective that this can generate.

Notes

1 This entails both policies that restrict specific rights as well as those that serve to restrict the access to and fairness within the systems through which these rights are protected.
2 This idea has been mentioned only in passing in the literature. For example, Joppke and Marzal observe that "the constitutionalization of immigrant rights has to be put into the dynamic context of states' discriminatory practices triggering court intervention" (2004: 839) but they do not integrate this insight into their analysis.
3 The material on the IAB in this and the following paragraph is drawn from Anderson (2006).
4 For example, Axworthy provided the RSAC with guidelines to assist in interpreting the *Convention* definition, additional panels to consider claims and clearer institutional independence.
5 One was based on the *Charter* and the other on the 1960 *Bill of Rights*.
6 The figures provided in this article are drawn from dozens of sources, which are available from the author upon request.
7 In one case, a contrast was drawn between Guyanese applicants, whose numbers had soared in the 1980s after the government closed down an assisted relative program, and claimants from El Salvador, whose numbers decreased dramatically after a targeted resettlement program was created (Canada, 1985b, 44: 40–41).

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