Critical Dialogue

Contesting Immigration Policy in Court: Legal Activism and Its Radiating Effects in the United States and France. By Leila Kawar. New York: Cambridge University Press, 2015. 232p. $110.
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— Stuart Chinn, *University of Oregon School of Law*

Leila Kawar has written a fascinating account of legal activism in the context of immigration law debates in the United States and France. *Contesting Immigration Policy in Court* is admirable in scope in illuminating developments in each nation, and in offering a more general perspective on immigration law and policy because of the author's comparative approach. The work also offers a valuable contribution to literatures in law and public policy, law and social movements, and law and American political development.

Stated broadly, Kawar's thesis is that legal activists in the United States and France have influenced the substance of immigration law and policy in their respective nations by helping to introduce new conceptual frames, including new conceptions of identity, social relations, and narratives of legal processes (pp. 2–3, 5–6, 8–9, 60–64, 158–61). Some of these ideas were subsequently endorsed by judges and found themselves embedded within the legal doctrine itself (e.g., pp. 54–55), but Kawar highlights a more expansive role for legal arguments in her narrative: "By shifting the focus away from the official rules laid out in immigration cases and toward the *process* by which immigration policy has been contested in court, we can explore how legal engagements generate identities and meanings whose repercussions extend far beyond any single case's judicially enforced remedy or doctrinal contribution" (pp. 2–3).

Kawar's thesis is convincing in part because of the judiciousness of her claims. She acknowledges that in crucial respects, the efforts of legal activists in the United States and France failed to achieve more transformative legal and policy changes. Thus, her story is not a simpler narrative of legal activists attempting to transform the law, and succeeding in all of their ambitions (pp. 157–58). Rather, her claim is more subtle: New legal concepts and new social narratives offered in legal arguments by activists and judges have changed immigration law and policy in the United States and France by virtue of their "radiating effects" (pp. 2–3), These new concepts and narratives have prompted change by more modestly shifting baseline presumptions, encouraging changes in terminology, and subtly redefining the terms of legal and political conflict—even while these new legal concepts, terms, and narratives may not have fundamentally transformed the policy settlements in either national context. As she eloquently states in her concluding paragraph: "Law matters less than the content of rights-expansive decisions would indicate, but law matters more than an examination of compliance with official case dispositions would suggest" (p. 164).

The author illuminates these points with carefully researched and illuminating chapters on the rise of legal activist networks focusing on immigration law in the United States and France; the introduction of new legal concepts and narratives by members of these networks; the subsequent entrenchment and professionalization of legal activist organizations in both nations; and an exploration of crucial procedural avenues utilized by legal activists in both nations (the class action lawsuit in the United States, and petitioning the Conseil d'Etat to exercise its power of abstract review in France). She concludes with a helpful concluding chapter summarizing her claims and offering hope that the radiating effects of these new legal concepts and narratives initially proposed by legal activists may yet achieve more transformative changes in the future (p. 163).

In all, *Contesting Immigration Policy in Court* is well written and well researched. The author has done extensive work with interviews and archives and in engaging with a multitude of theoretical and historical literatures—and such efforts are reflected in the end product. As someone possessing little familiarity with American immigration law, and no familiarity with the French legal system, I learned much from Kawar's substantive chapters. Relatedly, her comparative approach proved to be quite valuable both in showing the points of cross-national commonality and in highlighting points of divergence and distinction between the United States and France. Finally, while I have much greater familiarity with the literature on law and politics/law and public policy in the American context, I likewise found Kawar's exploration of these themes in the immigration context to be thought provoking and a valuable contribution to those literatures.

It is, however, on this last point—particularly with respect to the United States—where I would offer a few questions in reaction to the book. Kawar's core argument

is framed as a reaction to "the conventional wisdom that law has little impact on immigration policy matters" (p. 153). As noted, she departs from this view in illuminating the radiating effects of innovative arguments by legal activists and judges on immigration law and policy, while also partially confirming this view in acknowledging the resistance of immigration law and policy to many of these innovative arguments (pp. 157–61). Still, most of the book is framed toward illuminating her disagreement with the conventional wisdom, and this seems to leave half of this story untold or underexplored. Indeed, an alternative way to read the author's historical narrative would be to conclude that on net, the radiating effects of these innovative arguments were/are far less significant than the stubborn resilience of certain core legal concepts and broader political forces in the context of immigration law and policy.

To be sure, Kawar is surely correct to emphasize the influence of legal arguments beyond their ability to compel behavior. New conceptual frames may undoubtedly influence legal and political culture in more subtle ways. But the coercive power of the law is still a crucial effect to consider, of course, and she is candid on the disappointments felt by legal activists in both nations (pp. 157–58). If our focus were on policy and legal *outcomes*, it appears that her narrative could plausibly be the basis for a different set of arguments on the peculiar institutional and social dynamics in immigration law and policy that have locked in certain results (whether due to settled institutional arrangements or pervasive cultural norms) that are incredibly resistant to the creativity and efforts of these legal activists. That is, Kawar's historical narrative could seemingly support a set of conceptual claims concerning the relatively *unchanging* nature of immigration law and policy in the United States and France. In the spirit of authorial exchange, it is a major theme of my book, *Recalibrating Reform*, that even major policy changes—enacted in constitutional amendments and major statutes—are regularly contained by the American political system and the judiciary specifically. I wonder if she may see similarities between our historical narratives, even if we focus on different historical and policy contexts. I will be curious to hear her thoughts on this point since this seemed to me the strongest point of similarity between our respective works. Either way, I found her historical narrative to be thought provoking.

Relatedly, a second question concerns Kawar's discussion of how legal activist ideas ultimately found their way into the law and the legal culture. I found her Chapter 3 to be the most interesting substantive chapter in its exploration of the ways in which legal activists creatively synthesized ideas in immigration law and policy with established doctrinal and legal concepts to create new ideas, conceptual frames, and narratives. This chapter provided, at least for me, the clearest illustration of how legal activists could directly influence immigration law and policy by refashioning concepts and doctrinal rules.

Ideological and conceptual innovation is clearly a key point of interest for Kawar. Yet what seemed missing in this discussion was a theory as to why certain conceptual innovations seem to become more entrenched in the legal and political culture than others. She notes, for example, that in *Plyer v. Doe*, the arguments of immigration legal activists enjoyed a relatively more sympathetic reaction in the lower federal courts than the Supreme Court (even though activists still ultimately achieved some of their main goals in the Court's ruling) (pp. 54–55). Why?

Surely the "success" of certain ideological innovations has to do with the power of the ideas themselves—which seems to be Kawar's view as well. But one would suspect that since federal judges are tied to broader political influences both during and after their appointments, there is likely a political element that influences which conceptual innovations enjoy more positive reactions among federal judicial decision makers. If, for example, the "undocumented schoolchildren" in *Plyler* could plausibly be analogized to African Americans as another "discrete and insular" minority (p. 54) for some federal judges, the success of such an analogy would seem to require both conceptual attractiveness and enough background sociopolitical support for it to be politically plausible. Kawar nods more generally to such a political influence on successful conceptual innovations in her references to work in the law and American political development literature (p. 49). Still, a theory or a more detailed account of how legal activists succeeded in influencing judicial decision makers to accept their conceptual innovations—to greater or lesser degrees—would have been useful in further clarifying how immigration law and policy was influenced by the efforts of these activists.

In sum, *Contesting Immigration Policy in Court* is a fascinating exploration of these issues and an excellent illustration of an interdisciplinary work that is enhanced by its engagement with multiple literatures and multiple scholarly audiences. Scholars interested in immigration law, the study of ideas and ideology, and the intersection between law and politics/policy will likely find this a valuable book.

Response to Stuart Chinn's review of *Contesting Immigration Policy in Court: Legal Activism and Its Radiating Effects in the United States and France*

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— Leila Kawar

This exchange has been for me both productive and thought provoking. In reviewing my book, *Contesting Immigration Policy in Court*, Stuart Chinn asks me to explore the implications of my research for scholarship in law-and-public-policy. As Chinn notes, immigration law

doctrine has proved strikingly resistant to major innovation, even as advocates for immigrant rights have persisted for more than four decades in calling upon judges to adopt more rights-expansive legal frameworks. Moreover, Chinn correctly observes that my study offers no new explanation for the resilience of doctrines that encourage judicial deference on immigration matters. Leaving this task to others (see pp. 3–5, 10), my project instead investigates legal activism's impact *outside* of the realm of judicial doctrine. Responding to Chinn's thoughtful review prompts me to clarify that unlike some other studies of law-and-public-policy, my approach allows for the possibility that political dynamics may shift even as doctrine remains relatively fixed.

My findings suggest that a focus on rare precedent-setting judicial decisions, such as the U.S. Supreme Court's 1982 decision in *Plyler v. Doe*, has prevented scholars of law-and-public-policy from investigating the political impact of many other litigation campaigns that do not leave a substantial doctrinal imprint and that are relatively unknown outside the specialized field of immigration law. By tracing the chains of relationships linking legal activism to the legislative and administrative policy spheres, I show that the frames, narratives, and performances generated by activity in court have profoundly shaped how other policy actors understand immigration matters. For instance, independent of any doctrinal impact, the process of litigating immigration issues played a crucial role in catalyzing a rights-oriented immigration lobby, comprised of bar association leaders and other liberal elites, whose involvement in immigration policymaking is now taken for granted in both the United States and France.

In other words, rather than addressing what motivates judicial deference (or its occasional absence) in immigration matters, I take a different and—especially to lawyers—somewhat counterintuitive approach. My analysis brackets the rules and remedies produced in these cases so as to examine how the lived experience of law has contributed to immigration politics. The study's comparative scope proves to be particularly illuminating in this respect, as it sheds light on the multiple discursive and affective dimensions of French and American immigrant rights litigation. These cultural dimensions of law have no place in doctrinal analysis even though, as I show, they contribute in important ways to shaping social and political understandings.

It is true, as Chinn points out, that I do not place judges at the center of this analysis. My approach conceptualizes courts not as producers of rules but as a culturally productive setting. I argue that this constructivist socio-legal approach pushes us to look beyond doctrinally centered understandings of law reform. Because the doctrinal frameworks of immigration law have proved uniquely unchanging across national contexts, this domain demonstrates with particular clarity the extent to which the radiating effects of activity in court extend beyond—and are distinct from—the content of judicial decisions.

Recalibrating Reform: The Limits of Political Change.
By Stuart Chinn. New York: Cambridge University Press, 2014. 351p. $95.00.
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— Leila Kawar, *University of Massachusetts Amherst*

Amid the current political impasse in Washington, DC, it is helpful to remember that political gridlock does at times give way to bursts of dramatic policymaking. These moments, while far and few between, are at the center of legal scholar Bruce Ackerman's notion that politics as usual may give way to a "higher lawmaking" modality with the capacity to augur in constitutional transformation (*We the People,* vol. 1, 1991).

In *Recalibrating Reform*, Stuart Chinn gives an inventive new twist to Ackerman's concern with transformative reform by making the provocative argument that these "transformations" are much more contained than Ackerman's story of political-change-as-higher-lawmaking would suggest. Focusing on notable lawmaking initiatives that emerged during Reconstruction, the New Deal, and the Civil Rights era, Chinn, proposes that we conceptualize even the most radical legal reform initiatives as a form of "contained destruction" (p. 37). New legal considerations embedded in reform laws demolish existing legal structures, but only within a certain domain. Moreover, they must be reconciled with other, potentially conflicting, elements of the prereform politico-legal order that impinge on this domain of transformation. His analysis thus operates not at the level of policy visions or constitutional gestalt but, rather, at the level of what he terms "structures of governance" (p. 29). Inspired by the literature on American political development, he examines both jurisprudential frameworks and institutional arrangements and sees the two as largely interchangeable for purposes of charting the conceptual contours of a given political order.

Chinn's lucidly written intervention is a welcome one. Liberal legal scholars have all too often alternated between the extremes of celebrating transformative reform and bemoaning the "failure" of cherished reform initiatives. By examining the gritty and unglamorous work of governance reconstruction in the aftermath of reform, Chinn moves the discussion of politico-legal transformation onto a more nuanced analytical plane. Moreover, he convincingly demonstrates that the U.S. Supreme Court has played a prominent role throughout American history in setting in motion and supervising the reconstruction of stable conceptual boundaries calibrated to the context of postreform politics.

Beyond urging a move away from sweeping generalization, *Recalibrating Reform* has the ambitious goal of

formulating a general theory of political development. With this aim in mind, Chinn draws on case studies of postreform recalibration to develop a series of claims about what he identifies to be the recurring dynamics of this process. Most provocatively, he makes the claim that the judiciary's contribution to reconstructing governance in the wake of transformative reform will predictably tend towards retrenchment or delimitation. He explains this strong propensity toward delimitation in terms of the unique institutional prerogatives of the judiciary. When faced with the task of integrating "system-threatening reforms" within a preexisting institutional and legal context, the judiciary has an institutional predisposition to promote stability. According to the author, this institutional predisposition for stabilizing boundaries between competing sets of governing authorities and competing sets of rights is a by-product of the judiciary's "peculiar commitment to basic legality values of notice, settlement, and predictability in the law" (p. 41). In his assessment, judicial rulings "codify and crystallize emergent political developments" (p. 54).

As Chinn notes, this vision of the judiciary, and in particular of the U.S. Supreme Court, as institutionally predisposed toward retrenchment has echoes of Tocqueville, but it differs in an important respect. Whereas Tocqueville had viewed law and lawyers as having an inherently conservative nature, Chinn associates the Supreme Court's propensity for delimiting open-ended reform programs with the unique political environment accompanying transformative recalibration. As he points out, the justices do indeed at times go out of their way to assist, or even lead, in dismantling portions of the governance grid of authorities and rights. The Court's decision in *Brown v. Board of Education* (1954) is the prime case in point. Therefore, the impulse to stabilization, he argues, is not a general feature of the American judiciary but, rather, a distinct institutional response to the crises of governance that, throughout American history, have tended to follow the enactment of dramatic law reform.

Chinn sees the Court's assumption of a delimiting role as tied not only to its institutional predisposition for stability but also to intrainstitutional strategic calculations operating at a particular stage of political development. He writes: "In the immediate post-reform context, the weakness of external constraints on the Court may allow for greater judicial independence and, correspondingly, may also allow for the judicial interest in stability to be more efficacious in shaping legal development" (p. 47). In other words, judicial delimitation, in Chinn's view, takes place in the particular stage of political development that immediately follows the enactment of disruptive law reform initiatives. Once the judiciary has marked the boundaries of legal disruption through a cluster of high-profile decisions, political development then enters a new stage. Recalibration is completed as a range of political actors, working within the now-delimited domain of reform, contribute to the construction of a new grid of legal rights and authority relationships. At this stage, the role of the Court is primarily one of affirming these incremental acts of construction, thereby entrenching the new order.

Chinn presents three case studies of transformative reform and its aftermath to illustrate his claim that postreform political development proceeds through discernible stages of recalibration, each with a distinct set of institutional dynamics. These historical narratives about the legal trajectories of the Reconstruction Amendments, the Wagner Act, and the *Brown* decision rely on readings of judicial opinions and litigants' briefs and utilize secondary historical sources to set the judicial decisions in context. What one learns from these narratives is that in all three periods, law reform was situated amid heightened social instability. Whether legislative initiatives went too far too fast or whether insufficient resources were devoted to affecting structural social change have been matters of historical debate, and Chinn does not address either of these questions directly. Rather, he emphasizes the success of opponents of reform programs in convincing sizable subsets of the public that the new legal direction was creating social disorder. In each instance, legislative efforts to make rights a reality ground to a halt, but opponents were not strong enough to repeal signature legislative enactments so as to return to the prereform governance order. With the legislative and executive branches unable to craft a policy framework calibrated to the new political reality, it fell to the Supreme Court to "clarify and demarcate which aspects of the reform would remain standing in the face of resilient authorities and rights" (p. 164).

For this reader, the narrative of "governance crisis" inevitably emerging from ambitious law reform projects at times seemed a bit too close to a *deus ex machina* explanation for recalibration. It is not clear from Chinn's account whether he sees each instance of "crisis" as something that is real or as something that is constructed by political actors. Yet surely this would matter for purposes of the Court's assessment that reforms qualify as "system-threatening" and thereby necessitating delimitation.

Moreover, the author's analysis is premised on a particular understanding of governance, one that mirrors the jurist's affinity for creating order. In this conceptual world, political regimes take the form of a grid of coherent conceptual boundaries. The affective dimension of governance is absent from this model, as is any notion of law's own internal contradictions. Admittedly, these considerations are largely outside the parameters of Chinn's focus on transformative reform and its aftermath, but one wonders whether "normal politics" might not be a good deal more unstable than the model of recalibrating reform suggests.

Closer to the concerns of the book, one wonders whether the delimiting actions of the Court might not be

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driven by other factors besides an institutional predisposition towards stability. In Chapter 6, Chinn marshals evidence to substantiate his institutionally based explanation of the U.S. judiciary's pattern of delimiting reform against approaches that explain judicial behavior in terms of the politics of the appointing president or in terms of public opinion at the moment a case is decided. Yet even if the justices are institutionally predisposed to delimit the open-ended rights extended to subordinated groups, it is not clear why their institutional preference for stability should lead them to draw the line in such a conservative manner. A purely institutional story appears particularly unsatisfying in the area of labor rights. The United States was not the only industrialized democracy to enunciate a right to freedom of association during the twentieth century, and in comparative perspective, the Wagner Act does not look particularly radical. And yet in no other developed democracy has judicial curtailment of this right to freedom of association been so pronounced. Other countries drew a different line between conflicting legal considerations, even as their jurists faced the same challenge of reconstructing political order in the aftermath of transformative legal reform.

The comparative dimension suggests that any claim to developing a general theory of political development might need to be qualified by national context. Nevertheless, for scholars focused specifically on *American* political development, *Recalibrating Reform* is uniquely helpful in opening new frontiers for thinking about how sweeping statements of rights are incorporated into the existing political terrain.

Response to Leila Kawar's review of *Recalibrating Reform: The Limits of Political Change*

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— Stuart Chinn

My thanks to Leila Kawar for her review of my book. She very ably summarizes and engages with my core arguments, and the sophisticated and nuanced analysis characteristic of her own book was likewise reflected in her review.

In this brief response, I offer two short addendums to the arguments in my book, which I hope will be responsive to some of the queries Kawar raises. First, while Kawar is correct to note my ambition in offering some general claims regarding the nature of major political changes in American history, there are some respects in which my aims are more modest. In particular, my theory is quite explicitly limited to the American context (as she notes); I aim to describe political dynamics in only a subset of major reforms in American history; and I aim to explain a relatively limited—though highly significant—subset of actions by the Supreme Court. As such, there is much in the complexities of normal politics and transformative politics that lies outside my argument. Thus, I take no issue with Kawar's cautionary point that instability may still characterize eras of more normal politics. I think that is indeed correct, even if my argument does imply that such uncertainties may be of a somewhat lesser magnitude relative to the contexts I examine.

A second point concerns Kawar's query regarding delimiting rulings. Given how conservative these delimiting rulings were, she questions whether they can be explained only with reference to a judicial-institutional interest in stability. She may be hinting that perhaps some other political-cultural values may help explain the conservative nature of American legal outcomes on some matters, relative to legal developments in other nations. In one respect, I am sympathetic to Kawar's suggestion. My current research interests are focused on matters of American political culture and ideologies, and it seems quite plausible to me that such factors must intersect with the processes of transformative recalibration in some ways: for example, in defining the range of imaginable alternatives for reformers and their opponents; in helping to delineate the scope of plausible recalibrations or reconciliations between old and new governing orders; and in helping judges process and react to the social and political conditions that confront them.

Yet once we arrive past these decision points, and once the scope of plausible judicial options was clarified to judges in periods of delimitation—which is where my attention was focused in the book—I maintain that a judicial-institutional interest in stability is the simplest and most consistent explanation for these particular delimiting outcomes chosen by Supreme Court majorities. Among the plausible alternatives in these important legal controversies, it is noteworthy that the Court's choices always offered relatively greater clarity on demarcating the scope of recent reforms.

In sum, I believe that my argument is consistent with a view of American politics and judicial behavior where uncertainties are persistent, and where a number of important factors—such as political culture—are crucial in explaining processes and outcomes. Hopefully, my argument clarifies some of the processes and judicial actions that occur within a small but significant subset of American political developments.