University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2003

The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism

Howard F. Chang

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the [Ethics and Political Philosophy Commons](#), [Immigration Law Commons](#), [Law and Politics Commons](#), [Political Economy Commons](#), and the [Social Welfare Law Commons](#)

Repository Citation

Chang, Howard F., "The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism" (2003). *Faculty Scholarship at Penn Law*. 22.

https://scholarship.law.upenn.edu/faculty_scholarship/22

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

THE IMMIGRATION PARADOX: POVERTY, DISTRIBUTIVE JUSTICE, AND LIBERAL EGALITARIANISM

*Howard F. Chang**

INTRODUCTION

According to the 2000 Census, the foreign-born population in the United States reached 31.1 million, representing 11.1% of the total U.S. population.¹ This percentage is the highest that the United States has experienced since 1930, when 11.6% of the total U.S. population was foreign born.² In 1970, the foreign-born population was only 9.6 million, or only 4.7% of the total population.³ The rapid expansion of the foreign-born population in the intervening three decades reflects high levels of immigration into the United States,⁴ which in turn reflects the liberalization of U.S. immigration laws since 1965.⁵ Some observers have reacted to these data with alarm, noting that the sheer number of immigrants now residing in the United States is “by far the most ever recorded.”⁶ The restrictionist Center for Immigration Studies (CIS), for example, notes that the foreign-born population grew by 11.3 million between 1990 and 2000, and that “[t]he foreign-born population’s growth rate in every decade since 1970 has been higher than at any other time in history.”⁷

The absolute number of immigrants, however, is far less important than their share of the total U.S. population. Our ability to absorb immigrants into our society and our labor market depends on the rela-

* Professor of Law, University of Pennsylvania Law School. Copyright © 2003, Howard F. Chang. I would like to thank symposium participants at the DePaul University College of Law and session participants at the annual meeting of the Association of American Law Schools for helpful comments.

1. See U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, CENSUS 2000 PROFILE: U.S. SUMMARY 3 tbl.2 (2002).

2. See U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, PROFILE OF THE FOREIGN-BORN POPULATION OF THE UNITED STATES: 2000, at 9 fig.1.1 (2001) [hereinafter U.S. CENSUS BUREAU].

3. See *id.*

4. See *id.* at 2.

5. See *id.* at 8-9.

6. STEVEN A. CAMAROTA, CENTER FOR IMMIGRATION STUDIES, IMMIGRANTS IN THE UNITED STATES - 2002, at 4 (2002).

7. *Id.*

tive sizes of the native and immigrant populations. Viewed from this perspective, the number of immigrants in the United States today is fairly moderate compared to levels experienced during much of our past. In fact, from 1860 to 1920, the foreign-born population fluctuated between 13.2% and 14.8% of the total U.S. population.⁸ This percentage fell steadily from 1920 to 1970 as a result of restrictive immigration legislation enacted in 1921 and 1924, which established the national origin quota system that remained in place until 1965.⁹ From a historical perspective, it is this period of low immigration and a shrinking foreign-born share of the U.S. population that represents an aberration and a departure from our tradition of liberal immigration laws. The recovery of the foreign-born population from the low point of 1970 merely reflects a return toward the levels that prevailed over much of our nation's history.¹⁰

Restrictionists, however, are disturbed by not only the quantity of immigrants in the United States but also their quality. The Census Bureau reports that according to data from the March 2000 Current Population Survey, the proportion of the population age twenty-five and older who had failed to complete high school was higher among the foreign born (33.0%) than among natives (13.4%).¹¹ The foreign born from Latin America were especially likely to have less than a high-school education (50.4%), and 66.2% of those from Mexico had less than a high-school education.¹² "There is no single better predictor of economic success than education," notes the CIS, "and the fact that so many adult immigrants lack a high school degree means their income, poverty rates, . . . and other measures of economic attainment are likely to lag far behind natives."¹³

Not surprisingly, the Census Bureau also found that the foreign born in the United States have lower earnings as full-time workers and lower median household incomes than natives.¹⁴ The Census Bureau reports that the poverty rate for the foreign born was 16.8%, while the poverty rate for natives was 11.2%.¹⁵ Poverty rates were

8. See U.S. CENSUS BUREAU, *supra* note 2, at 9 fig.1-1.

9. See *id.* at 8-9.

10. The foreign-born share of the U.S. population is also moderate compared to the corresponding share in other countries of immigration. In 1990, the foreign born represented 17% of the total population of Canada and 23% of the total population of Australia. See NATIONAL RESEARCH COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* 63 tbl.2.11 (James P. Smith & Barry Edmonston eds., 1997) [hereinafter NRC].

11. See U.S. CENSUS BUREAU, *supra* note 2, at 36.

12. See *id.* at 37.

13. CAMAROTA, *supra* note 6, at 11.

14. See U.S. CENSUS BUREAU, *supra* note 2, at 5-6, 42-45.

15. See *id.* at 46-47.

higher still for the foreign born from Latin America (21.9%) and highest for those from Mexico (25.8%).¹⁶ In light of such data, restrictionists are especially concerned about immigration from Mexico.¹⁷

Furthermore, census data indicate that despite a \$3000 increase in national median household income over the past decade¹⁸ and a decrease in poverty nationwide,¹⁹ median household income fell and poverty increased in areas in Southern California and in the New York metropolitan area, with high rates of immigration of the foreign born.²⁰ Some observers conclude that "something is going wrong."²¹ Economists and demographers suggest that immigration helps to explain the patterns observed in these data.²² This suggestion raises the questions: Should we find these trends troubling? Does it suggest that immigration is causing poverty? Should we therefore restrict the immigration of the poor? Should we reject proposals to make more visas available for unskilled alien workers?

In this Article, I argue that the immigration of unskilled workers poses a fundamental problem for liberals. In Part I, I suggest that this immigration produces benefits for natives in the labor market with little evidence of adverse effects on native workers. In Part II, however, I turn to concerns about the fiscal burden that poor immigrants might impose on the public treasury, and I suggest that the optimal

16. See *id.* at 47 fig.19-2.

17. See STEVEN A. CAMAROTA, CENTER FOR IMMIGRATION STUDIES, *IMMIGRATION FROM MEXICO: ASSESSING THE IMPACT ON THE UNITED STATES* (2001).

18. See Janny Scott, *Census Finds Rising Tide, and Many Who Missed Boat*, N.Y. TIMES, June 17, 2002, at B1.

19. See Peter Y. Hong, *The U.S. Census: Data Reflects Southland's Highs, Lows*, L.A. TIMES, June 5, 2002, pt. 2, at 1 (reporting that 13.1% of individuals in the United States lived in poverty in 1989, whereas 12.4% lived in poverty in 1999); Peter T. Kilborn & Lynette Clemetson, *Gains of '90's Did Not Lift All, Census Shows*, N.Y. TIMES, June 5, 2002, at A1 (reporting that 10% of all U.S. families lived in poverty in 1989, whereas 9.2% lived in poverty in 2000).

20. See Sean Gill, *California Children Living in Poverty Rose by 430,000 in '90s, Survey Shows*, L.A. TIMES, Mar. 8, 2002, pt. A, pt. 1, at 18 (reporting increase in number of California children living in poverty); Hong, *supra* note 19, at 1 (reporting increased poverty in the Los Angeles area); Peter Y. Hong et al., *Southland's Average Family Income Dropped in the '90s*, L.A. TIMES, May 15, 2002, at pt. A, pt. 1 (reporting rising poverty and falling median income in Los Angeles County); Daryl Kelley, *Ventura County: High-Tech Boom Offset by Rise in Poverty*, L.A. TIMES, May 15, 2002, pt. 2, at 1 (reporting rising poverty in California's Ventura County); Scott Martelle & Erin Chan, *Income Drop in '90s Cut a Broad Swath, Data Show*, L.A. TIMES, Aug. 27, 2002, pt. 2, at 1 (reporting increased poverty and declining median household income in Los Angeles County); Scott, *supra* note 18, at B1 (reporting a fall in median household income in parts of the New York metropolitan area and in parts of Southern California); Janny Scott, *Manhattanites Fared Best in New York City in 1990's*, N.Y. TIMES, May 24, 2002, at B4 (reporting rising poverty and falling median family income in Queens, Brooklyn, and the Bronx).

21. Hong et al., *supra* note 20, at 1 (quoting economist Heather Boushey).

22. See, e.g., Hong, *supra* note 19, at 1; Martelle & Chan, *supra* note 20, at 1; Scott, *supra* note 18, at B1; Scott, *supra* note 20, at B4.

response from the perspective of the economic welfare of natives would be to admit these aliens as guest workers with limited access to public benefits. In Part III, I note how this response would violate liberal egalitarian ideals. These ideals would treat these resident workers as equals, entitled to access to citizenship and to the full set of public benefits provided to citizens. In Part IV, I outline how this liberal stance can produce an anomaly: If the welfare of all incumbent residents determines admission policies, and we anticipate the fiscal burden that the immigration of the poor would impose, then our welfare criterion would preclude the admission of unskilled workers in the first place. Thus, our commitment to treat these workers as equals once admitted would cut against their admission and make them worse off than they would be if we agreed never to treat them as equals. In Part V, I argue that a liberal should avoid this anomaly by adopting a cosmopolitan perspective that extends equal concern to all individuals, including aliens, which suggests liberal immigration policies for unskilled workers. Finally, in Part VI, I conclude that the problem with this escape from the "immigration paradox" is the failure of most citizens to adopt such a cosmopolitan perspective. As long as citizens are reluctant to bear the fiscal burdens that cosmopolitan liberalism would impose, constraints of political feasibility may imply that guest-worker programs are the best policies that cosmopolitan liberals can obtain with respect to many unskilled alien workers.

I. THE EFFECTS OF UNSKILLED IMMIGRATION IN THE LABOR MARKET

One common source of concern is the impact of the immigration of unskilled workers on the wages and employment opportunities of similarly unskilled natives. The CIS, for example, has expressed this concern regarding unskilled immigration from Mexico, claiming that this immigration has harmed the poorest and most vulnerable native workers.²³ If immigration reduces the wages of those natives who must compete with unskilled immigrants in the labor market, then this effect would produce a more unequal distribution of income among natives.

Studies of the effects of immigration in U.S. labor markets, however, have shown little evidence of effects on native wages or employment. Surveys of this empirical literature indicate that immigration

23. See CAMAROTA, *supra* note 17, at 21-23, 27-28.

has a weak effect on the employment of natives.²⁴ Furthermore, the evidence indicates a weak relationship between native wages and immigration across all types of native workers, white or black, skilled or unskilled.²⁵

Why do immigrants have so little adverse impact on the wages and employment of natives? One reason is that the demand for labor does not remain fixed when immigrants enter the economy. Immigrant workers not only supply labor, for example, they also demand goods and services, and this demand will translate into greater demand for locally supplied labor. This increase in demand can offset the effect of increased supply.

Furthermore, the empirical evidence indicates that immigrants and natives are not perfect substitutes in the labor market.²⁶ Thus, immigrants often do not compete for the same jobs as natives. Indeed, immigrant labor can be a complement rather than a substitute for native labor, so that an increase in the supply of immigrant labor will increase the demand for native labor and thus have positive effects on native workers rather than negative effects. In fact, labor markets are highly segregated, with immigrant labor concentrated in some occupations while natives are concentrated in others.²⁷

If immigration has little impact on the wages and employment of native workers, then why do we observe rising poverty and declining incomes in areas where the foreign born immigrate? The high rates of poverty may simply reflect the influx of poor immigrants themselves and the impact that they have on the composition of the local population rather than any adverse impact on the incomes of those already here.²⁸ Indeed, the lower levels of skill and education among immigrant workers makes it all the less likely that they will serve as good

24. See, e.g., George J. Borjas, *The Economics of Immigration*, 32 J. ECON. LIT. 1667, 1698 (1994); Rachel M. Friedberg & Jennifer Hunt, *The Impact of Immigrants on Host Country Wages, Employment and Growth*, J. ECON. PERSP., Spring 1995, at 23, 42; NRC, *supra* note 10, at 223.

25. See, e.g., Borjas, *supra* note 24, at 1697; Friedberg & Hunt, *supra* note 24, at 42; NRC, *supra* note 10, at 223.

26. See Jean Baldwin Grossman, *The Substitutability of Natives and Immigrants in Production*, 64 REV. ECON. & STAT. 596 (1982).

27. See NRC, *supra* note 10, at 218.

28. See Martelle & Chan, *supra* note 20, at B1 (quoting demographer Dowell Myers, who notes that "immigrants came in at the bottom of the ladder" in California, which "worked to drop average income"); Scott, *supra* note 18, at B1 ("As low-wage workers poured in from places like Central America in pursuit of a better life, the midpoint on the income spectrum in some places with large foreign-born populations may have . . . inched down."); Scott, *supra* note 20, at B4 ("While immigrants may have been making more than they did before they came, many were also making less than many of the native-born New Yorkers who moved out of the city in the 1990's.").

substitutes for native workers and makes it correspondingly less likely that they will have an adverse impact on native workers.

On the contrary, immigrant workers are likely to benefit natives through their effects on our labor markets.²⁹ Even if wages may fall for some workers who compete with immigrant labor, this loss for those workers is a pure transfer: it is offset by an equal gain for those who employ labor, and ultimately for consumers, who obtain goods and services at lower cost.³⁰ Furthermore, we enjoy additional gains from employing immigrant workers: we gain surplus in excess of what we pay immigrants for their labor. If we did not gain any surplus from employing immigrants, we would not hire them. Thus, natives as a group enjoy a net gain.³¹

Furthermore, the immigrants themselves gain by immigrating and obtaining higher wages than they would have enjoyed in their home countries.³² Labor migration represents a form of international trade in which the source country exports labor to the host country.³³ Like international trade in goods, labor migration allows foreign suppliers to sell their services to domestic buyers, allowing both parties to enjoy gains from trade as a result of the transaction. Thus, the increase in poverty and the decrease in median incomes in areas where the foreign born immigrate are consistent with increasing incomes for both natives and immigrants.³⁴

29. See NRC, *supra* note 10, at 135-53.

30. See Scott, *supra* note 18, at B1 (quoting economist Edward N. Wolff, who observes that "[f]or every investment banker, you have one or two delivery men to feed them during their long working hours" so that "in a sense, the high-income group in the city also creates this low-income group" in a "symbiotic relationship").

31. George Borjas has attempted a rough calculation of the size of the surplus enjoyed by natives in the United States as a result of immigration, using a variety of assumptions. See George J. Borjas, *The Economic Benefits from Immigration*, J. ECON. PERSP., Spring 1995, at 3, 5. Assuming a homogeneous supply of labor, for example, Borjas estimates that immigration into the United States has produced a surplus of \$7,000,000 per year. See *id.* at 7.

32. Unauthorized immigrants from Mexico, for example, have reported receiving wages in the United States nearly nine times what they receive in Mexico. See *Mexican Deportees Report Good Treatment*, UNITED PRESS INT'L, Apr. 21, 1996, available at LEXIS, Nexis Library, UPI File (reporting that Mexican immigrants received an average of \$278 per week in the United States, compared with \$30.81 per week in Mexico).

33. See Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT'L L. & FOREIGN AFF. 371 (1998-99).

34. See Hong, *supra* note 19, at 1 (quoting demographer Dowell Myers, who states: "Because there's a high percentage of poor, does that mean you'll become poor if you move to L.A.? No. . . . Does it mean the economy is not performing well? No."); Kelley, *supra* note 20, at 1 (noting, despite increasing rates of poverty in Ventura County, quality of life may be improving for the poor immigrant workers who live there); Scott, *supra* note 18, at B1 (quoting economist Gary Burtless, who notes: "When you have a lot of people entering from the rest of the world, and many of them enter at the lower rungs of the wage distribution, then you can have a situation where everyone is prospering and the median income is declining.").

II. FISCAL EFFECTS OF UNSKILLED IMMIGRATION

Is there any reason for natives to be worried about the influx of poor immigrants and the resulting increase in inequality in the United States? Are natives better off when unskilled workers immigrate? The answer depends on not only effects on the private sector through the labor market but also effects on the public sector through taxes and public entitlements. Much of the debate over the effects of immigration upon the welfare of natives has focused on the question of whether immigrants pay more in taxes than they consume in public benefits.³⁵

The Census Bureau reports that the foreign born not only have higher rates of poverty but also are more likely to participate in means-tested programs than natives. While 21.2% of households headed by foreign-born householders received food stamps, housing assistance, or Medicaid benefits, only 14.6% of households headed by natives participated in one of those programs.³⁶ Similarly, while 8.0% of households headed by foreign-born householders received Temporary Assistance for Needy Families, General Assistance, or Supplemental Security Income, only 5.6% of native-headed households participated in one of those programs.³⁷

Furthermore, the empirical evidence suggests that unskilled immigrants on average have a net negative impact on natives through their effects on the public treasury. The National Research Council (NRC), for example, found in 1996 that the average immigrant with less than a high-school education imposed a net fiscal cost of \$13,000, even after taking into account the fiscal benefits that the immigrant's descendants would confer in the future.³⁸ Does this negative fiscal impact suggest that we should exclude unskilled aliens through restrictive immigration laws?

A better alternative from the perspective of the economic welfare of natives would be to admit unskilled aliens to our labor market without granting full access to public benefits. That is, the optimal response to fiscal concerns would not be exclusion but less restrictive alternatives designed to eliminate the fiscal burden that these immigrants impose on natives. That is, if unskilled immigrants have a negative effect on the public sector, the optimal response is not restrictive immigration laws. Rather, the appropriate response is fiscal. Restrictive

35. See, e.g., CAMAROTA, *supra* note 17, at 35-41, 53-54; NRC, *supra* note 10, at 254-362.

36. See U.S. CENSUS BUREAU, *supra* note 2, at 48-49.

37. See *id.*

38. See NRC, *supra* note 10, at 334 tbl.7.5 (reporting net present value of average fiscal impacts in 1996 dollars).

tions on alien access to public benefits, for example, can improve the fiscal impact of immigration without excluding unskilled immigrants from the U.S. labor force. Exclusion is the more costly response for both natives and immigrants, because it excludes immigrants not only from our public benefits but also from our labor market and thereby sacrifices the gains from trade that we and they would otherwise enjoy.

The objective of reducing the burden that immigrants impose on natives through the public sector underlies restrictions on the access of aliens to various entitlement programs. Current U.S. laws, for example, generally exclude non-immigrants, including temporary workers, and unauthorized immigrants from a broad range of public benefits: with only narrow exceptions, these aliens are ineligible for "any Federal public benefit."³⁹ Current law also includes restrictions on the access of other aliens, including even legal permanent residents, to federal entitlement programs.⁴⁰ The NRC estimated that by excluding legal immigrants from various means-tested benefits for their first five years in the United States, welfare legislation enacted in 1996 would improve the total fiscal impact of the average immigrant by \$8000.⁴¹

While legal immigrants can gain full access to public benefits upon naturalization, only aliens "admitted for permanent residence" may naturalize as U.S. citizens.⁴² Aliens admitted on non-immigrant visas only, including temporary guest workers, are not admitted as permanent residents and are thus not eligible for most public entitlements and not eligible to naturalize. Therefore, even if fiscal concerns justify restrictions on access to permanent residence for unskilled workers, these concerns cannot justify restrictions on their access to non-immigrant visas. A truly temporary worker, for example, would remain in the United States only while employed and would then return home, imposing even less of a burden on the public treasury than a permanent resident.⁴³ The empirical evidence indicates that immigrants are likely to make a positive contribution to the public treasury through the taxes they pay during their working years and impose a burden only if they remain in the United States for their retirement years and

39. 8 U.S.C. § 1611(a) (2000).

40. *See id.* §§ 1612, 1613.

41. *See* NRC, *supra* note 10, at 339 (reporting net present value of fiscal impact in 1996 dollars).

42. 8 U.S.C. § 1427(a) (2000).

43. *See* Alan O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of U.S. Policy*, in *JUSTICE IN IMMIGRATION* 158, 189 (Warren F. Schwartz ed., 1995).

gain access to public benefits.⁴⁴ Thus, guest workers admitted on non-immigrant visas, even if unskilled, are likely to have a net positive economic impact on natives, and there is little reason to restrict their entry. This observation suggests that the optimal policy from the perspective of native economic welfare is to admit unskilled workers as guest workers rather than exclude them. Through guest-worker programs, natives enjoy the benefits of unskilled alien workers in the labor market but do not bear the fiscal burden of providing the full set of public benefits that these workers would enjoy if they were to gain access to permanent residence and ultimately citizenship.

III. GUEST WORKERS AND LIBERAL EGALITARIAN IDEALS

In fact, the expansion of our guest-worker programs appeared to be a priority on the political agenda while President George W. Bush weighed proposals to expand access to such visas,⁴⁵ until terrorist attacks placed these plans on hold.⁴⁶ The question is hardly moot, however, and we may see some liberalizing reforms proposed in the near future, now that the Bush administration has resumed negotiations with Mexico on immigration policy with the support of Democrats in Congress.⁴⁷ Should we expand our guest-worker programs?

The alternative to a guest-worker program for many migrant workers is probably entry as an unauthorized immigrant. In fact, employment-based immigration of unskilled workers into the United States has largely taken the form of illegal rather than legal immigration. Legalization of unauthorized immigrants through an expanded guest-worker program would serve the interests of these immigrants. These workers would gain from having a legal alternative to illegal entry and life as an unauthorized immigrant, which leaves them vulnerable to deportation by the government and to abuse by employers.

Critics of guest-worker programs commonly complain that guest workers often prefer to stay permanently and that it can be difficult to ensure that these workers leave.⁴⁸ We could accommodate the desire

44. See NRC, *supra* note 10, at 315 fig.7.9.

45. See Dan Eggen & Helen Dewar, *Bush Weighing Plan for Mexican Guest Workers*, WASH. POST, July 25, 2001, at A3.

46. See Alfredo Corchado, *Immigration Talks Between U.S., Mexico on Hold*, DALLAS MORNING NEWS, Sept. 19, 2001, at 5A; Mike Dorning, *Mexico Border Issue on Hold*, CHI. TRIB., Sept. 21, 2001, at 16.

47. See Mary Jordan & Kevin Sullivan, *U.S. and Mexico to Resume Talks on Immigration Policy*, WASH. POST, Nov. 15, 2001, at A40; Ginger Thompson, *Top Democrats Politick Through Rural Mexico*, N.Y. TIMES, Nov. 19, 2001, at A12.

48. See Philip L. Martin & Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, FOREIGN AFF., Nov./Dec. 2001, at 117, 119-20, 124-25.

of guest workers to remain here by lifting restrictions on the duration of a guest worker's residence and employment in the United States. As long as we restrict their access to public benefits for a sufficient period of time, they seem unlikely to impose a net fiscal burden on natives.⁴⁹

Such a program, however, raises the prospect of *de facto* permanent residents with only restricted access to citizenship and to public benefits.⁵⁰ Liberal objections to this prospect account for some of the political resistance to expansion of these guest-worker programs. James Woodward objects that "[t]he creation of a class of permanent residents who are restricted from becoming citizens (if they should wish to do so) or any similar system of differential status among a state's permanent inhabitants is fundamentally incompatible with liberal egalitarian ideals."⁵¹

For example, consider the liberal theory of justice developed by John Rawls, who asks what principles people would choose behind a "veil of ignorance."⁵² In this "original position," people know nothing about their own personal circumstances or traits and thus "they do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations."⁵³ This condition ensures that the parties are "fairly situated and treated equally as moral persons."⁵⁴ Rawls includes all persons within a single society, which he defines as "a cooperative venture for mutual advantage," as participants in the original position.⁵⁵ Rawls concludes that principles of distributive justice

49. Recall that the NRC found that an immigrant with less than a high-school education imposes a net fiscal cost of only \$13,000, and that if the 1996 welfare legislation excludes immigrants from seven specified means-tested benefits for only their first five years in the United States, then the total fiscal impact of the average immigrant would improve by \$8000. See NRC, *supra* note 10, at 334, 339.

50. See Sergio Munoz, *Jorge Castaneda: Mexico's Man Abroad*, L.A. TIMES, Aug. 12, 2001, at M3.

51. James Woodward, *Commentary: Liberalism and Migration*, in *FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY* 59, 82 (Brian Barry & Robert E. Goodin eds., 1992). The communitarian Michael Walzer adopts a similar position. See MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 56-61 (1983) (arguing that guest-worker programs are inconsistent with political justice in a democratic state).

52. See JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971).

53. *Id.* at 136-37; see also *id.* at 141 ("If a knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies.").

54. *Id.* at 141.

55. *Id.* at 4.

would require members of this society to maximize the welfare of those who are least advantaged.⁵⁶

Thus, liberal ideals suggest that our obligations of distributive justice extend to workers who participate in a scheme of social cooperation with us. From this perspective, we cannot limit these obligations to natives alone. This perspective suggests that if we admit workers to our labor market, we must extend the benefits of full membership to them as well. From this perspective, by admitting unskilled workers, we make them objects of our concern and thus worthy recipients of the full set of public benefits that we provide to natives. We would then take a broader view of national economic welfare: our welfare objectives would include the welfare of not only natives but also immigrants.⁵⁷

IV. THE IMMIGRATION PARADOX

By the same token, however, by excluding aliens from our labor market and our society, we can avoid the obligations that we would incur by admitting them. Rawls assumes that the “boundaries” of his principles “are given by the notion of a self-contained national community.”⁵⁸ Similarly, Woodward argues in favor of applying Rawls’s framework to “inhabitants of a particular country” and rejects the suggestion that Rawls’s principles of justice apply “globally.”⁵⁹

This moral stance, however, produces an anomaly. If our admission policies are based only on the interests of natives and immigrants already here, then we would refuse to admit poor immigrants because we would anticipate the public benefits that they would consume and the fiscal burden that they would impose on incumbent residents. Thus, our commitment to treat them as equals once admitted would cut against their admission and make them worse off than they would be if we rejected such a commitment. That is, by agreeing to obligations of distributive justice toward them if admitted, we harm them. These aliens would be better off if we agreed never to care about their welfare and never to treat them as equals. If concern for the welfare of poor immigrants motivates generous fiscal policies toward them, then it seems perverse to cite these policies as a reason to exclude the

56. See *id.* at 75-83.

57. See Jagdish N. Bhagwati & T.N. Srinivasan, *On the Choice Between Capital and Labor Mobility*, 14 J. INT’L ECON. 209, 212 (1983) (“[O]nce labour crosses national borders, we have to worry about which country’s welfare it ought to be included in [W]e need to consider the possibility that it may be regarded, after immigration, to be part of one’s own welfare.”).

58. RAWLS, *supra* note 52, at 457.

59. Woodward, *supra* note 51, at 75; see also *id.* at 75-81.

very immigrants whose welfare we would seek to improve through these policies. This moral stance is unsatisfactory from the standpoint of human welfare. The liberal who prevents a poor alien from escaping extreme poverty while citing principles of justice and equality for that alien seems vulnerable to the charge of "superstitious 'rule worship,'" that is, "the charge of heartlessness, in his apparently preferring abstract conformity to a rule to the prevention of avoidable human suffering."⁶⁰

It seems incoherent public policy to turn away the poor immigrant, citing a negative effect on the welfare of current residents, given that we always have the option of admitting the poor immigrant subject to restrictions on access to public benefits. This option would improve the welfare of both the poor immigrant and the welfare of current residents. This admission would also transform the poor immigrant into a resident, however, and if our social welfare criterion includes the welfare of all residents, then the same distributive concerns that justified generous policies for other poor residents would apply to the poor immigrant as well. In short, no measure of social welfare that counts an individual's welfare if and only if the individual is a resident can provide a coherent criterion for immigration policies, because these policies determine the identity of the population of residents.

This moral stance harms the very individuals whose welfare we would invoke as the basis for their access to citizenship and public benefits. This paradox lies at the heart of immigration policy. A commitment to treat the immigrant as an equal can backfire against the alien seeking to immigrate, because the immigrant's access to this equal status does not arise unless we admit the immigrant. If the act of admission triggers obligations of justice, then we can avoid these obligations by choosing to exclude. Indeed, if admission policies are determined by the interests of only incumbent residents, we would be obliged to exclude unskilled alien workers. This stance begs the question of whether we can legitimately base admission policies on the interests of incumbent residents alone.

Unless the admission decision itself also respects the alien as an equal, the result is perverse. Thus, the source of the immigration paradox is the contingent nature of the obligation to treat the alien as an equal. That is, this problem is inherent in making obligations of justice contingent on voluntary acts of cooperation. This approach allows us to avoid obligations of justice by refusing to employ poor

60. J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 3, 6 (1973).

aliens. If we refuse to admit aliens, then we owe them no explanation within the framework that Rawls proposes for deriving principles of justice. This approach reconciles the exclusion of aliens with egalitarian principles of social justice only by fiat: it assumes the result rather than deriving it.⁶¹

We cannot begin our normative analysis by *assuming* that we do not admit the aliens in question. As the example of immigration policy demonstrates, the question of which individuals we choose as partners in cooperation is itself an open question of public policy that we may want to answer using our principles of justice. If we make obligations of justice contingent on whether we admit them in the first place, then this normative framework becomes a function of our policies and cannot work as an independent standard that we can use to evaluate these policies.

That is, if admission to our labor market implies status as a constituent and as a member of our society, then the set of individuals whose welfare we seek to promote becomes an endogenous function of our admission policies. By choosing our members, we also choose our moral obligations and our welfare objectives. If our obligations depend on our admission policies, however, then they can no longer provide independent criteria for a normative analysis of those admission policies. Our analysis becomes circular: we are justified in discriminating against aliens in employment precisely because our refusal to hire them relieves us of the obligations of justice that we would owe equals. Such a theory begs the question of whether our choice of partners is itself justifiable.⁶²

V. COSMOPOLITAN LIBERALISM

We can avoid the immigration paradox if we instead adopt a welfare objective that is independent of our policy choices. Two options present themselves. First, we can choose a welfare objective that favors the interests of natives and discounts the interests of immigrants. As we saw, this nativist perspective suggests guest-worker programs as

61. Thus, critics of this approach complain that it is "an arbitrary move which cannot be defended within the theory." BRIAN BARRY, *THE LIBERAL THEORY OF JUSTICE* 129 (1973).

62. Thus, the fact that cooperation is feasible should be sufficient to require the inclusion of a prospective party to the original position. See Charles R. Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591, 595 (1983) (arguing that otherwise, "limiting the scope of the principles to national societies on the grounds that international cooperation does not exist today . . . would arbitrarily favor the status quo").

the optimal immigration policies for unskilled aliens.⁶³ Second, we can adopt a cosmopolitan perspective that extends equal concern to all individuals, including aliens. Either alternative provides a criterion that is independent of our admission policies and thus avoids the circularity that underlies the immigration paradox. The welfare objective that is consistent with liberal egalitarian ideals, however, is cosmopolitan rather than nativist.

Only the cosmopolitan interpretation of the original position offers a satisfactory framework for the evaluation of our immigration policies under a liberal egalitarian theory of justice. This cosmopolitan perspective is the only interpretation of the original position that is faithful to "the underlying spirit of Rawls' theory," which "is animated by the underlying idea of eliminating or compensating for 'morally arbitrary' differences between people."⁶⁴ Cosmopolitan liberals note that "the fact that one is an inhabitant of one particular country rather than another . . . is a paradigmatic example of the sort of 'morally arbitrary' fact that the method of the original position is designed to abstract from."⁶⁵ To restrict the scope of our theory of justice based on such morally arbitrary facts undermines our claim to a liberal egalitarian theory of justice.

The cosmopolitan perspective would imply not only more generous transfer policies but also more liberal admission policies for unskilled immigrants than the nativist perspective would imply.⁶⁶ Joseph Carens addresses the issue of immigration restrictions as a question of social justice using a cosmopolitan interpretation of Rawls's original position.⁶⁷ In seeking a justification for the exclusion of aliens, he suggests, "we don't want to be biased by self-interested or partisan considerations" and instead "can take it as a basic presupposition that we should treat all human beings, not just members of our own society, as free and equal moral persons."⁶⁸ Carens identifies this premise as a

63. I use the term "nativist" here to refer to "the practice or policy of favoring native-born citizens as against immigrants." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 947 (David B. Guralnik ed., 1976).

64. Woodward, *supra* note 51, at 80-81. In this sense, Rawls's failure to extend his principles globally is "an *ad hoc* move" that is "inconsistent with the underlying egalitarian spirit of his theory." *Id.* at 76.

65. *Id.* at 76.

66. See Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1229-38 (1997).

67. See Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 255 (1987).

68. *Id.* at 256.

basic feature of all liberal political theories,⁶⁹ concluding that we should “take a global, not a national, view of the original position.”⁷⁰

If we begin with equal concern for all persons, then immigration barriers are morally suspect and demand justification. All immigration restrictions discriminate against individuals based on their alienage. Most aliens are born aliens because our nationality laws deem them to be aliens based on immutable characteristics, including the geographic location of their birth (that is, national origin) and the citizenship of their parents at the time of their birth.⁷¹ For a liberal society that declares that “all men are created equal,”⁷² this discrimination based explicitly on circumstances of birth is at odds with ideal principles of social justice.⁷³ National origin would appear to be a trait that Rawls should deem “arbitrary from a moral point of view.”⁷⁴ Carens concludes that we cannot justify restrictions “on the grounds that those born in a given territory or born of parents who were citizens were more entitled to the benefits of citizenship than those born elsewhere or of alien parents.”⁷⁵ Nor can we justify restrictions “on the grounds that immigration would reduce the economic well-being of current citizens.”⁷⁶ Similarly, in a utilitarian calculation of global welfare, “current citizens would enjoy no privileged position.”⁷⁷ Carens and others conclude from these liberal premises that “we have an obligation to open our borders much more fully than we do now.”⁷⁸

69. See *id.* at 265 (claiming that “our social institutions and public policies must respect all human beings as moral persons,” which “entails recognition . . . of the freedom and equality of every human being”); see also *id.* at 269 (“No moral argument will seem acceptable . . . if it directly challenges the assumption of the equal moral worth of all individuals.”).

70. *Id.* at 256.

71. See U.S. CONST. amend. XIV, § 1 (“All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .”); 8 U.S.C. § 1401 (2000) (setting forth categories of “citizens of the United States at birth”).

72. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

73. See Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105, 2112-15 (1997); Roger Nett, *The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth*, 81 ETHICS 212, 224 (1971) (“May we expect the lesson which the Negro has taught his fellow Americans about denial of fair opportunities to be repeated on a broader scale, with the underprivileged of the earth demanding ‘desegregation’ of nation states?”).

74. RAWLS, *supra* note 52, at 72.

75. Carens, *supra* note 67, at 261.

76. *Id.* at 262.

77. *Id.* at 263 (“[T]he utilitarian commitment to moral equality is reflected in the assumption that everyone is to count for one and no one for more than one when utility is calculated.”).

78. *Id.* at 270. Carens condemns immigration restrictions: “Like feudal barriers to mobility, they protect unjust privilege.” *Id.* Similarly, Bruce Ackerman concludes that immigration barriers are inconsistent with liberal principles: “I cannot justify my power to exclude you without destroying my own claim to membership in an ideal liberal state.” BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 93 (1980).

VI. POLITICAL FEASIBILITY AND SECOND-BEST POLICIES

Given the failure of most citizens to adopt this cosmopolitan perspective, however, cosmopolitan liberals face a constraint of political feasibility that prevents realization of all their ideals. As a matter of political reality, the interests of citizens have in fact played a dominant role in the public debate over immigration policies. National governments, including that of the United States, will likely continue to deem the promotion of its own citizens as the paramount objective of immigration policies.⁷⁹ This feature of the real world may impose a constraint on the set of policy alternatives open to us as a practical matter.⁸⁰

The cosmopolitan liberal would prefer that aliens have access both to our labor market and to public benefits and citizenship. As a matter of political reality, however, incumbent citizens are unlikely to admit unskilled aliens under those generous conditions in the numbers that cosmopolitan ideals would require, given the fiscal burden that those liberal policies would entail. As long as citizens are limited in their willingness to bear this burden, they are likely to restrict alien access to immigrant visas.

The self-interest of citizens is bound to impose constraints of political feasibility on the availability of immigrant visas. These constraints are likely to exclude many unskilled aliens from the U.S. labor market unless they either are willing to immigrate illegally or have access to guest-worker visas. Given these constraints, cosmopolitan liberals face a trade-off: significantly liberalized access to our labor markets for unskilled alien workers will likely require some restrictions on access to public benefits and citizenship to have a realistic chance of enactment.⁸¹ Under these circumstances, guest-worker programs may represent the only alternative to exclusion for many aliens.

79. See, e.g., S. REP. NO. 98-62, at 3-4 (1983) ("[T]he paramount obligation of any nation's government, indeed the very reason for its existence and the justification for its power, is to promote the national interest—the long-term welfare of the majority of its citizens and their descendants.").

80. See Louis Michael Seidman, *Fear and Loathing at the Border*, in JUSTICE IN IMMIGRATION, *supra* note 43, at 136, 140 (noting that the limitations imposed by "bounded caring" are, "like it or not, . . . facts that exist in the world" and "unlikely to change more than marginally in the near future," so that any "real-world immigration policy must . . . take account of these facts and work around them").

81. Recognizing the political controversy generated by proposals to grant access to citizenship, Mexico has also emphasized an expanded guest-worker program in its negotiations with the Bush administration and has been careful not to press the issue of citizenship. By maintaining flexibility on this issue, Mexico seeks, as the Mexican foreign minister Jorge Castaneda put it, "as many rights as possible, for as many Mexicans (in the United States) as possible, as soon as possible" within the constraints of political feasibility. Robert Collier, *Momentum Grows to Le-*

If so, cosmopolitan liberals must settle for second-best policies that fall short of their ideals. For many unskilled alien workers, legalization as guest workers may be the best one can achieve under current circumstances. Guest-worker programs may be incompatible with liberal egalitarian ideals, as Woodward notes, but as Carens and others have argued, the exclusion of aliens is also incompatible with these ideals. If political realities require us to choose between these two departures from our liberal egalitarian ideals, then how can Woodward justify the choice that inflicts the greater harm on the alien as well as on natives?⁸²

Ironically, Woodward himself notes that if we act against a “background of non-ideal institutions and behaviour” in a world “in which large numbers of people and institutions fail to do what justice requires,” we may “acquire obligations which are different from those [we] would acquire under more perfectly just institutional arrangements.”⁸³ As Woodward states the theory of the second-best:

It is not in general a defensible moral principle that if it is obligatory (or even a good thing) to do P under ideal, utopian circumstances, then it is also obligatory (or even a good thing) to do P under the actual circumstances, no matter how far they may differ from the ideal.⁸⁴

Woodward advances this claim in defense of immigration restrictions, but as we have seen, they could more plausibly justify restrictions on alien access to public benefits and to citizenship. Indeed, Woodward himself notes that “it is far from obvious that it would be wrong . . . to limit eligibility for social welfare programmes to citizens or long-term residents, if failure to do so would jeopardize the continued existence of such programmes.”⁸⁵ We might say the same about restrictions on alien access to public benefits and citizenship if these restrictions are necessary to make politically feasible the alien’s access to our labor market and the alien’s admission in the first place.

galize Migrants, S.F. CHRON., July 16, 2001, at A1. As one Mexican negotiator explained, “we . . . have to be very realistic.” Alfredo Corchado, *Fox Pushes for a More Open Border*, DALLAS MORNING NEWS, July 16, 2001, at 1A. Castaneda has explained that access to citizenship “is not something of huge significance to us.” Munoz, *supra* note 50, at M3.

82. See JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 302-03, 310 (1989) (arguing that a guest-worker program is better than a policy of exclusion); see also Seidman, *supra* note 80, at 143 (“Why should anyone believe that a guest worker is ‘exploited’ when he receives higher wages and more protection in the program than he would receive if he remained in his home country?”).

83. Woodward, *supra* note 51, at 78.

84. *Id.* at 77.

85. *Id.* at 79.

These second-best arguments require us to rank two non-ideal alternatives, both of which fall short of our moral ideals. In this regard, teleological moral theories have an advantage over deontological theories. Under a teleological theory, "those institutions and acts are right which of the available alternatives produce the most good."⁸⁶ Once we specify the good, then a teleological theory can provide a complete ranking of all alternatives, including non-ideal alternatives.⁸⁷ Deontological theories, which do not maximize a good specified in advance,⁸⁸ may not readily provide a ranking of non-ideal alternatives.⁸⁹

We might, for example, specify the good as an appropriate measure of social welfare, one based on the satisfaction of preferences but excluding those preferences that violate our liberal principles of equality. Ronald Dworkin, for example, has proposed such a teleological theory.⁹⁰ If we apply this type of consequentialism and adopt a cosmopolitan perspective, then a guest-worker program represents the lesser of two evils when compared with the alternative of exclusion. Exclusion not only decreases global wealth but also worsens its distribution, whereas a guest-worker program would improve social welfare on both counts by increasing labor mobility.⁹¹

Thus, from a consequentialist perspective that extends equal concern to aliens and natives, expanded guest-worker programs represent an improvement over the status quo alternative of exclusion. Therefore, cosmopolitan liberals should support liberalizing reforms that include guest-worker programs, even while seeking the broadest rights possible for aliens within the constraints of political feasibility. While it would be a mistake to pretend that this compromise is ideal from a liberal egalitarian perspective, it would also be a mistake to sacrifice worthwhile reforms because they fall short of the ideal.

86. RAWLS, *supra* note 52, at 24.

87. See ROBIN BOADWAY & NEIL BRUCE, *WELFARE ECONOMICS* 34 (1984) (defining a "complete" ordering); JOHN VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* 26 (3d ed. 1953) (same).

88. See RAWLS, *supra* note 52, at 30.

89. See *id.* at 303 (suggesting that "we may be able to find no satisfactory answer at all" in "instances of nonideal theory").

90. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 234-38 (1977). I have outlined a similar theory, which I call "liberal consequentialism." See Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 *YALE L.J.* 173, 195-96 (2000).

91. See Bob Hamilton & John Whalley, *Efficiency and Distributional Implications of Global Restrictions on Labour Mobility*, 14 *J. DEV. ECON.* 61, 70-74 (1984).